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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1901

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

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

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CITED IN OPINIONS.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1901.

THE STYRIA, SCOPINICH, CLAIMANT, *v.* MORGAN.

SAME *v.* PARSONS.

SAME *v.* MALCOLMSON.

SAME *v.* MUNROE.

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

Nos. 72, 73, 74, 75. Argued November 22, 25, 1901.—Decided May 19, 1902.

The Styria, an Austrian steamship sailing from Trieste *via* Sicilian ports to New York, took on board at Port Empedocle, Sicily, a quantity of sulphur for New York. Before sailing the master learned that war had broken out between Spain and the United States, and as sulphur was an article contraband of war, he had the sulphur all unloaded and warehoused at Port Empedocle before sailing. This court holds that the master of the Styria was justified in relanding and warehousing the contraband portion of the cargo, and that in so doing he had reasonable regard for the interests of both ship and cargo.

This court does not think that, in the subsequent circumstances, it was the master's duty to reship that cargo, and resume his voyage with the sulphur on board.

FOUR libels in admiralty were filed in the District Court of the United States for the Southern District of New York against the steamship Styria, to recover damages for the failure duly

to deliver at New York different lots of sulphur, owned by the libellants, shipped on board the Styria at Port Empedocle, the port of the town of Girgenti, in Sicily, April 21–24, 1898, and shortly afterwards relanded at the port of shipment because it had become contraband of war. The facts were substantially undisputed, and were as follows:

The Styria was an Austrian steamship, owned by the Austro-Americana Steamship Company, and Burrill & Sons of Glasgow were her managing agents. She sailed April 16, 1898, with some cargo, from Trieste *via* Sicilian ports for New York, and on April 21 reached Port Empedocle, Sicily, her second loading port. Her master began at once to load on board the sulphur in question, and by April 24 it was all on board, bills of lading therefor (containing the provisions copied in the margin [1]) had been signed, and the vessel cleared from the custom-house, and ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York.

In the mean time, unknown to the master, war had broken out between the United States and Spain. On April 20, Congress passed, and the President approved, the joint resolution recognizing the freedom and independence of Cuba, and demanding that the government of Spain relinquish its authority in the island and withdraw its land and naval forces. 30 Stat. 738. On the same day the Spanish minister in Washington demanded and received his passports. On April 21, the Amer-

[1] To be delivered at the port of New York, "restraints of princes and rulers or people" and other specified perils "excepted; with liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer."

"In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the post-office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

ican minister at Madrid was informed that the diplomatic relations between the two governments were broken off, and he left that same day. On April 22, the first overt act of war, the capture of the Spanish merchant steamship, the Buena Ventura, was committed. *The Buena Ventura*, 175 U. S. 384. On April 25, Congress passed an act declaring that war had existed since April 21. 30 Stat. 364, c. 189. On April 25, the Queen Regent of Spain issued a decree announcing the existence of war with the United States; authorizing the Royal Navy, "in order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag," to exercise the right of search on the high seas and in the territorial waters of the enemy; including, under the denomination of contraband, "powder, sulphur, saltpetre, dynamite, and every kind of explosive;" and charging the Minister of State and the Minister of Marine with the fulfilment of this decree.

On April 23, the master of the Styria received a telegram from Burrill & Sons, her managing agents, directing him not to sail until further orders; and on April 25 another telegram directing him "to discharge whole cargo as quickly as possible." The master had by this time learned that war existed, and that sulphur was contraband. He knew that his course would take him within a few miles of the Spanish coast, in order to sight the lighthouses; and he had seen in an Italian newspaper that Spanish men-of-war were looking for contraband goods, and that a sulphur ship had been taken. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that the sulphur was contraband of war and he considered it unsafe to carry it, the master began to reland the sulphur at Port Empedocle on April 27, and had it all unloaded and warehoused by May 7. At the beginning of the unloading on April 27, he gave notice in writing to the shippers, and to the consignees named in the bills of lading, that "on finding risky my passage to New York with the actual sulphur cargo, for facts of war," he was discharging the cargo for the account and risk of the shippers, "under care of the mercantile agent, Mr. William Peirce, depositing the same in the

warehouses of Mr. Zenobia Urso here, and, if these are not sufficient, in the warehouses of the British consulate, faculty which I have in force in the bills of lading." On the same day, he gave notice in writing to the Austrian consul at Girgenti "that, by order of the representative of my owners, for facts of war," he was discharging and warehousing the sulphur from the Styria, for whom it might concern; and also gave notice in writing, through the Austrian consul, to the director general of the customs at Girgenti, that, having loaded the sulphur on the Styria, "and sulphur being declared contraband of war, war actually existing between Spain and the United States of America, in behalf of the present laws, I deem it in the interest of all whom it might concern to discharge the whole sulphur here on receiving the necessary permit from the customs;" and asking that duties might be remitted on reshipment. On April 30 and May 2, the shippers of the sulphur protested against the unloading; and on May 3 and 5, respectively, the master replied that he, "in discharging the goods, acted as was his right, and in the best interest of the goods, which is confirmed by the fact, published in the papers, and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the belligerent powers." And at the conclusion of the unloading, on May 7, the master gave notice to the shippers that, as soon as they paid the expense incurred on their account, the sulphur would be delivered to them; and to the consignees that the sulphur was lying in the warehouses at Port Empedocle, at the risk and expense of whom it might concern.

The exportation of sulphur is one of the principal industries of the island of Sicily, and immediately after the declaration of war Sicilian merchants urged the Italian Government to request Spain to exempt it from the list of contraband. The Giornale di Sicilia, a newspaper of Palermo, each issue of which had a double date, and was read by the master of the Styria on the day of its publication, contained, according to the translations in the record, the following information on the subject: On April 24–25, 1898, it was stated that the merchants of Messina had requested their deputy in the Italian Parliament to

urge the Government to induce Spain to exclude sulphur from being considered contraband of war; and that the deputy had been assured that the Minister for Foreign Affairs would telegraph to the Italian Ambassador in Madrid to obtain what was required from the Spanish authorities. On April 26–27, it was stated that Spain included sulphur in the list of contraband of war, and that the Italian Council of Ministers had decided to induce Spain to revoke its decision. On April 27–28, it was stated that an Italian deputy had asked the Minister of Foreign Affairs in Parliament whether sulphur had been excluded from the list of contraband of war. On April 29–30, it was stated that the Spanish Government had not yet pronounced itself upon the Italian demand to exclude sulphur from the list of contraband of war; that the Italian Ambassador had been promised an immediate decision; that the Spanish Minister of Marine seemed decidedly adverse to the demand; but that it was hoped it would be conceded. The paper of May 1–2 contained, under date of May 1, from an anonymous correspondent at Rome, these statements: "Although the official advice has not yet arrived, I assure you absolutely that the Spanish government has determined to exclude sulphur from the list of contraband of war. The Popolo Romano, confirming my information, says that the relative decree is imminent which has been provoked by the insistence of our ambassador in Madrid, who obtained from Sagasta that he should unite the Council of Ministers, in which, notwithstanding the opposition of the Minister of Marine, the opinion prevailed to exclude sulphur from contraband." "The Official Gazette will publish the decision regarding sulphur. Meantime the Spanish Government has already ordered the commanders of its ships to allow sulphur to pass free." The paper of May 3–4 contained, under date of May 3, from its Roman correspondent, this statement: "The Department of Foreign Affairs decided not to publish in the Official Gazette the Spanish Government's decision regarding the exclusion of sulphur from contraband of war. But the Minister of the Interior sent a circular to all the prefects in Sicily, informing them of the orders relative to the free navigation of cargoes of sulphur."

The Giornale di Sicilia of May 5–6, 1898, contained, under

the heading "Sulphur is not War Contraband," the following: "From the Minister of Agriculture, Industry and Commerce, the following telegram has been sent: 'Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23d of the Spanish Government are considered, as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre, dynamite, explosives, uniforms, ornaments, saddles, engines for ships, derricks, screws, boilers, and all that is necessary for the construction, repair and armament of men of war. I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. The Minister, Coeco Ortu.'"

The master also testified that on the evening of May 7 he saw a notice from the Austrian consul, saying that there had been a communication from the prefect that it was agreed between Spain and Italy that the Spanish ships had instructions to let sulphur go free; but "it was not given officially, only a matter of verbal arrangement. Of course, the verbal arrangement you can't believe."

Early in the morning of May 8, the master sailed, without the sulphur, to Palermo, and thence to Messina, took on board at each place a cargo of fruit, and on June 3 arrived at New York. Soon after the arrival there, these libels were filed.

The Giornale di Sicilia of May 7–8, 1898, (which did not reach the master before he sailed from Port Empedocle,) contained, under the heading "The Exportation of Sulphur may be continued," the following: "The Prefettura also with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish Government has officially declared, in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely."

On May 10, 1898, the Foreign Office in London, answering a telegram from Burrill & Sons, wrote them: "Spanish Government state that decree already issued cannot be altered, but that

as temporary measure Naval Departments have been ordered not to treat sulphur as contraband of war. They lay stress on the fact that the measure is temporary only."

It appeared from inquiries made by the Foreign Office in London, and by the American Embassy in Italy, in June and July, 1898, that the actual state of facts was as follows: The Spanish Minister for Foreign Affairs verbally stated to the Italian Ambassador at Madrid, on April 29, 1898, and to the British Ambassador at Madrid, on May 6, 1898, that, while the decree of April 23 could not be altered, orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. On May 31, 1898, the Spanish Minister, in a note to the British Ambassador at Madrid, stated that the treatment of sulphur as contraband of war would be temporarily suspended; that the orders which had been given to that effect would not be revoked without due notice; and that the eventual revocation of the orders would not, in any case, apply to vessels at sea in ignorance of it, while the necessary time would be given for the execution of pending contracts. It did not appear that Spain ever made any public announcement of the modification of her intentions in regard to the treatment of sulphur, or ever agreed to let sulphur go free permanently.

A vessel which lay alongside the Styria at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19. Two other vessels laden with sulphur came safely from the Sicilian port of Licata to the United States about the same time. And no sulphur ships were taken by Spain during the war.

Presently after the signing of the peace protocol between the United States and Spain on August 12, 1898, the parties to these cases stipulated in writing that the steamship company should forward the sulphur from Port Empedocle by the first available vessel to New York, and deliver it to the consignees, upon the terms and for the freight specified in the original bills of lading; that the sulphur, upon arrival, should be sold at current market rates, and the proceeds, less charges incurred, be credited on account of the damages, if any, recovered by the libellants; that, if the Styria was justified in relanding and

Counsel for Parties.

storing the sulphur as was done, the company should have a lien upon the sulphur for the charges against it in Sicily; and that, if it was not so justified, the sulphur should be free from any charges except freight.

Under this stipulation, the steamship company paid the expenses of storage in Sicily, and reloaded the sulphur and brought it to New York in its steamship Abazzia, sailing September 4, and arriving September 30, and there delivered it to the consignees, who paid the freight as agreed, and sold the sulphur at the current market rates. And the company filed cross libels for the charges in Sicily.

The District Court found for the libellants, holding that the discharge of the cargo was too hasty and precipitate, and not justified by the facts of the case; and entered decrees for the libellants in small amounts, and dismissed the cross libels. 93 Fed. Rep. 474; 95 Fed. Rep. 698.

Both parties appealed to the Circuit Court of Appeals, which held that the sulphur was rightly discharged, but should have been reloaded before the Styria left Port Empedocle; and entered decrees for the libellants for increased damages, and upon the cross libels for the expenses of unloading, warehousing and reloading in Sicily. 101 Fed. Rep. 728.

The cases were then brought to this court by writs of certiorari, granted on petitions of both parties. 179 U. S. 683, 685.

Mr. J. Parker Kirlin for petitioner. *Mr. Charles R. Hickox* was on his brief.

Mr. E. C. Burlingham for respondent in No. 72.

Mr. Luther G. Reed for respondent in No. 73.

Mr. E. B. Hill for respondent in No. 74. *Mr. William J. Curtis* was on his brief.

Mr. M. H. Regenburger for respondent in No. 75, submitted on his brief.

Opinion of the Court.

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

The master of a ship is the person who is entrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. Abbott on Shipping, 7th Am. ed. 167.

It was well said by the District Judge in the present case, that "though exceptions noted in the bill of lading contemplate circumstances of war, and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo, and must endeavor to hold the balance evenly between ship and cargo when their interests conflict."

"All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned." *New England Insurance Company* v. *The Sarah Ann*, 13 Pet. 400; *The Amelia*, 6 Wall. 27.

The good faith of the master and his reasonable exercise of discretion must be considered and determined in the light of the facts in each particular case. The term *discretion* implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means a decision of what is just and proper in the circumstances." Bouvier's Law Dict. "Discretion means the liberty or power of acting without other control than one's own judgment." Webster's Dict.

Courts, in passing upon such questions, should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible but a deliber-

ate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not. *Holliday* v. *Kennard*, 12 Wall. 254.

Applying these principles to the facts of the present case, we have to inquire whether the conduct of the master of the Styria showed a reasonable exercise of judgment, having regard to the rights of the owners of the vessel and those of the several owners of cargo.

That the situation was a difficult one is obvious, and is shown by the fact that the learned judges of the courts below, though having the advantage of a full disclosure of the facts and of able discussion by counsel, disagreed on the critical question in the case, whether the master was right in deciding that it was his duty to reland and store the contraband goods.

As heretofore stated, the Styria was an Austrian steamship, owned by the Austro-Americana Steamship Company, and Burrill & Sons of Glasgow were her managing agents. She sailed April 16, 1898, with some cargo, from Trieste *via* Sicilian ports for New York, and on April 21 reached Port Empedocle, Sicily, her second loading port. Her master began at once to load on board different lots of sulphur owned by the libellants, and by April 24 it was all on board, bills of lading therefor had been signed, and the vessel cleared from the custom-house, and was ready to proceed on her voyage to Messina and Palermo for additional cargo of fruit, and thence to New York. On April 27, the master, having learned that war between Spain and the United States had broken out, and being aware that sulphur was a contraband article, began to reland the sulphur at Port Empedocle, and had it all unloaded and warehoused by May 7. He gave notice in writing to the shippers, and to the consignees named in the bills of lading, that, "on finding risky my passage to New York with the actual sulphur cargo for facts of war," he was discharging that portion of his cargo. On the same day he gave notice in writing to the Austrian consul at Girgenti "that, by order of the representative of my owners, for facts of war," he was discharging and warehousing the sulphur from the Styria, for whom it might concern; and

also gave notice in writing, through the Austrian consul, to the director general of the customs at Girgenti, that, having loaded the sulphur on the Styria, "and sulphur being declared contraband of war, war actually existing between Spain and the United States of America, in behalf of the present laws, I deem it in the interest of all whom it might concern to discharge the whole sulphur here on receiving the necessary permit from the customs;" and asking that duties might be remitted on reshipment. On April 30 and May 2 the shippers of the sulphur protested against the unloading; and on May 3 and 5, respectively, the master replied that he, "in discharging the goods, acted as was his right, and in the best interest of the goods—which is confirmed by the fact, published in the papers, and discussed in the Italian Parliament, that sulphur had been declared contraband of war by one of the belligerent powers." And at the conclusion of the unloading, on May 7, the master gave notice to the shippers that, as soon as they paid the expense incurred on their account, the sulphur would be delivered to them; and to the consignees that the sulphur was lying in the warehouses at Port Empedocle, at the risk and expense of whom it might concern.

As both the District Court and the Circuit Court of Appeals held that, within the provisions of the bills of lading, the master had the right to decide on the course to pursue, whether to discharge the sulphur, or to refuse to sail until there was some reasonable assurance of safety, or to immediately proceed on his voyage, it is unnecessary for us to discuss the meaning of the bills of lading in that regard, but only to determine whether the decision of the master, to discharge and warehouse the goods, was a reasonable exercise of the discretion vested in him.

The learned judge of the District Court held that, while the bills of lading contemplated circumstances of war and were therefore applicable, yet that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continuing the voyage with the sulphur might not be removed by negotiation between the Italian and Spanish governments. He thus expressed himself (93 Fed. Rep. 477):

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar, would presumably be peculiarly dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure, though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both the right and the duty of the master, for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24, until there was some reasonable assurance of safety. See *The San Roman*, L. R. 3 Adm. & Eccl. 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo the master, in my judgment, was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. . . . I must find, therefore, that the ship was not justified by clauses (a) and (b) of the bill of lading in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time." 93 Fed. Rep. 474; 95 Fed. Rep. 698.

The Circuit Court of Appeals took a different view of the duty of the master to suspend his voyage and await the uncertain results of the rumored negotiations, and held that he had a right to unload the cargo of sulphur when he did. The following quotations sufficiently show the reasoning of the court:

"It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents

might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a man 'of ordinary courage, judgment and experience' to hesitate to proceed, is of no weight. We may not attribute to the captain of the Styria knowledge gained after the event; and indeed this court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain, during the first few months of the war, to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast. . . . We do not find it necessary to discuss this branch of the case, because we find in clause (a) abundant authority for a refusal to carry forward the sulphur, while such a condition of affairs existed as that already described as being generally known to exist, when the discharge began on April 27. There is no logical difference between a restraint of princes and rulers exercised by a cruiser, with power to visit, search and seize, lying two leagues off Cape Empedocle, and that exercised by a half dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo, loaded as this was before war broke out, could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover, it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease, a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more, entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk. . . . Inasmuch as the master, where the contract was made in time of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safekeeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk or delay by reason of an actual arrest, which would be caused only by the presence

of such contraband cargo. The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered. We understand that the District Court reached this same conclusion, but found the ship in fault because she did not wait a reasonable period to see if there might not be some reasonable assurance of safety, and held that 'the commencement of the discharge on the 27th was too hasty and precipitate.' This brings us to the next branch of the case.

"When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it and make peace. A situation is quite conceivable, where delay might fairly be required. Thus the minister of one power or the other might demand his passports; or the day named in an ultimatum might pass without compliance with its requirements; or a squadron of the war vessels of one power might impress seamen from the deck of the war vessel of another power, as the Carnatic and her consorts did with the Baltimore in 1798; or the war vessel of one power encountering the war vessel of another upon the high seas might pour broadside after broadside into her, as the Leopard did with the Chesapeake in 1807—any one of which acts would seem to import the imminence if not the actual existence of war, and yet might fall short of being such authoritative evidence of a state of belligerency as would justify a master in treating any part of his cargo as being thereby made contraband. But the situation shown here was a very different one. Both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days or twenty-four weeks, to see if the two belligerents would not settle their differences.

"As soon as he learned that war was declared the master knew that the cargo he had taken on board at Port Empedocle was contrabrand. 'I knew,' says he, 'that sulphur is to make gun-

powder; everybody knows that. . . . I thought it must be contraband.' We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other. And, in the absence of special circumstances, there would seem to be no necessity to wait for further assurance in that regard. In the case at bar, however, there were special circumstances which will be next considered.

"The exportation of sulphur is one of the greatest industries of the island of Sicily, and the Italian government was naturally solicitous that the trade in sulphur with the United States should not be interfered with. It now appears in the record, by reports obtained from diplomatic sources, that shortly after the proclamation of the Queen Regent negotiations were opened by the Italian government to secure a modification of its provisions so that sulphur should not be considered contraband of war. The Spanish government declined to alter the decree, but on April 29, at Madrid, the Spanish Minister of Foreign Affairs 'Verbally' [*sic:* orally?] stated to the Italian Ambassador that orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war. The same statement was made by the Spanish Minister for Foreign Affairs to the British Ambassador on May 6. On May 31 the same Minister stated in an official note to both the Italian and the British Ambassadors that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice.

"Not being in telephonic communication with the chancellery of the embassy at Madrid, the master of the Styria was not advised of these transactions at the moment they occurred. And his conduct is to be judged not in the light of exact knowledge acquired after the event, but by such information as may have been available for him at the time and place. As we have seen, he knew certainly on April 27, and probably on April 26,

that war had been declared, and that his sulphur cargo was contraband; that he was, therefore, entitled to land and store it, thus leaving his ship free to carry out her obligations to the rest of the cargo. On April 25 the Giornale di Sicilia, a newspaper published at Palermo, and which the captain saw from day to day, stated that Messina merchants had asked their Parliamentary deputy to urge the government to coöperate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filed with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband; its exportation to the United States might well be considered an 'aid' to Spain's enemy; no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband, neither the Italian government nor people could justly take offence, if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded; but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken." 101 Fed. Rep. 728.

Opinion of the Court.

We concur in these views of the Circuit Court of Appeals and in the conclusion thereby reached, that the master of the Styria was justified in relanding and warehousing the contraband portion of his cargo, and that in so doing he had reasonable regard for the interests of both ship and cargo.

Several leading authorities are cited on this branch of the case in the brief for the Styria, and which we shall briefly notice.

Geipel v. *Smith*, L. R. 7 Q. B. 404, was a case where the defendants had agreed to load a cargo of coal in England and sail to Hamburg. After the charter party had been made war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. The defendants refused to carry out the charter party, relying on an exception of restraints of princes and rulers. It was held that they were justified in their refusal. And as to the contention that the defendants were bound to be in readiness to carry the cargo as soon as the blockade should be raised, Cockburn, C. J., observed:

"But it would be monstrous to say that in such case the parties must wait, for the obligation must be mutual, till the restraint be taken off—the shipper with cargo which might be perishable or its market value destroyed—the shipowner with his ship lying idle, possibly rotting;" and Lush, J., said: "A state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of commercial adventure like this."

In *Nobel's Explosives Co.* v. *Jenkins*, L. R. 1896, 2 Q. B. 326, the plaintiff's goods, which were dynamite and contraband of war, had been placed upon a general ship of the defendant for carriage from London to Yokohama, a bill of lading containing similar clauses with those in the case of the Styria. The ship also contained non-contraband goods belonging to other shippers. In the course of the voyage she arrived at Hong Kong, and while there war was declared between China and Japan. There were at the time Chinese war vessels in and around the port of Hong Kong, and it was found that if the master had attempted to sail thence with the plaintiff's goods on board there would have been danger of their being seized and confiscated. The master

cabled to his owners for advice, and they instructed him to land the cargo at Hong Kong. This was done. The plaintiffs forwarded the dynamite by another steamer several months later, and then brought an action to recover from the defendants the amount of freight which they had to pay for so forwarding, and also for the other expenses for relanding and reshipping the cargo at Hong Kong. The opinion of the court, delivered by Matthew, J., is so pertinent to our case that we extract a considerable portion of it:

"The main ground of defence was the exception in the bill of lading of 'restraint of princes, rulers or people.' A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she would, in all probability, be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith*, L. R. 7 Q. B. 404, and *Rodoconachi* v. *Elliott*, L. R. 9 C. P. 518. The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The warships of the Chinese government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception. . . .

Opinion of the Court.

"But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend on the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, J., in *Notara* v. *Henderson*, L. R. 7 Q. B. 225, at p. 234, 'a fair allowance ought to be made for the difficulty in which the master may be involved. . . . The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

A suggestion of the District Judge, and repeated in the argument for the libellants, to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from Burrill & Sons, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time; that if he had been left to exercise his own judgment, he would not have discharged the cargo, especially not at the time he did, does not appear to us to be supported by the testimony of the captain, which is the only evidence on the subject. It is true that he did state that he acted under instructions of the agents, but he also said, in reply to questions put on cross-examination, as follows:

"Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? Answer. Yes, and also because I knew that the war was there, and I acted on the

bill of lading clause. Question. You have testified, haven't you, that all this you did by orders? Answer. No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war."

Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with a contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. In the case of *Nobel's Explosives Co.* v. *Jenkins*, just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue.

But, while we concur with the conclusion of the Circuit Court of Appeals, that the master acted discreetly in landing and storing the contraband portion of the cargo when and as he did, we cannot accept the other conclusion of that court that, in the subsequent circumstances, it was the master's duty to reship the cargo and resume his voyage with the sulphur on board. Indeed, the facts and reasoning which brought the court to its first, seem to us to be quite inconsistent with its latter conclusion. In its opinion, heretofore quoted, the court said that it

was not the duty of the master "to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons on no better assurance that such action would be taken, than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that action be taken." Yet the court thought that, on May 6, the situation had changed, and that the publication in a newspaper, purporting to be from the Italian Minister of Agriculture, Industry and Commerce, that the Spanish Government had given notice to the commanders of its vessels to let sulphur pass free, was an official declaration, upon the strength of which the master ought to have reshipped the sulphur. That publication, under the date of May 5 and 6, was as follows: "Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23 of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur. . . . I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur go free."

The publication of May 7 and 8 was as follows: "The prefettura, also, with its communication confirms to us that the exportation of sulphur, notwithstanding the Spanish-American war, may continue. Indeed, the Spanish Government has officially declared in the circular to the commandants of their ships, that sulphur is not to be considered as contraband of war. An official and public declaration is lacking, but there is no doubt that sulphur will pass freely."

It must be observed that these assurances did not come from any Spanish, but from Italian sources. It was for the interest of the Italians to continue to export sulphur, and to give the impression that it could be done with security to the carrying vessels, and all statements from Italian sources must be weighed with reference to that fact. In the meantime, on May 7, the Styria had sailed, and the master testified that when he was clearing the ship to leave on the 7th of May he saw a notice from the consul to say that there was a communication from the prefect that it was agreed between Italy and Spain that

sulphur would not be taken, that Spanish vessels had instructions to let it go free, saying: "It was not given officially—only a matter of verbal arrangement. Of course, the verbal arrangement you cannot believe." "On the 7th, in the evening, about eight o'clock, and I already had my clearances." And he further testified, in reply to a question by libellant's counsel, as follows: "Question. But the day before you sailed, on the 7th, you did read in the papers that the Governments had come to an agreement—to an understanding? Answer. Yes—not to an understanding, not to a safe understanding, but a temporary understanding, you know. Question. To the effect that sulphur temporarily would not be treated as contraband of war? Answer. Yes. Question. In spite of the previous proclamation, was it not? Answer. Yes, but the papers said, not officially confirmed, you see. That meant, of course, they could withdraw it at any moment. Question. The newpapers in which you read about these things, were what papers? Answer. I could not tell you. I believe the Sicilian Courier; I don't know; something like that; the paper published in Palermo—the largest paper published in Palermo."

From this it appears that when the Styria sailed on the evening of May 7, the only information that the captain had was that the newspapers said that a temporary verbal arrangement had been made between Italy and Spain that sulphur might go free, but that the captain's opinion was that a mere verbal arrangement could not be relied on, and that the statements contained in the newspapers could be withdrawn at any moment.

Giving to the evidence every reasonable intendment, it falls far short, in our opinion, of making it the master's duty to change his arrangements to sail on the evening of the 7th of May. The Spanish proclamation of April 23, declaring sulphur to be contraband, had not been withdrawn, and it is evident that the master had no right, in justice to the other cargo owners, to make a longer delay. A perishable cargo of fruit was awaiting the vessel at Palermo, and no one could foretell what the result of the negotiations would be. The master and the ship cannot reasonably be charged with knowledge of subsequent events. And when they are examined they do not show

that, within a reasonable period, any change in affairs was disclosed that would have made it safe beyond question to have sailed with the contraband cargo on board. It was not until May 10 that the British Government, replying to Burrill & Sons' previous application for information, telegraphed that orders had been given not to treat sulphur for the present as contraband of war. And by telegram of that date it was further stated that the Spanish Government states that "decree already issued cannot be altered," but that, as "temporary measure," naval departments have been ordered not to treat sulphur as contraband of war, "but they lay stress on the fact that the measure is temporary only."

Moreover, it does not appear when such orders were actually given, nor that they had been transmitted to war vessels which had sailed, under the directions of the proclamation of April 23, before such alleged orders were given. It was not until May 31 that the Spanish Minister stated, in a note to the English Ambassador at Madrid, that the treatment by Spain of sulphur as contraband of war would be temporarily suspended, and that the order which had been given to that effect would not be revoked without due notice. It does not appear that any formal agreement was ever made between Spain and Italy, or any other Government, that the proclamation of April 23, declaring sulphur contraband of war, was withdrawn. And it is mere matter of conjecture whether, if the Styria had sailed, even as late as May 10, with sulphur on board, and had been arrested by a Spanish war vessel which had not received orders countermanding the proclamation, that the sulphur would not have been confiscated by a Spanish prize court. In any event, there was the liability of such an arrest and of the incident delay to both vessel and cargo.

Without protracting the discussion, we are of the opinion that the master was justified in landing and storing the cargo that had become contraband by reason of the outbreak of the war between Spain and the United States, and by the Spanish proclamation of April 23; that, having acted reasonably with due regard to the interest of all concerned in so doing, it was not made his duty, by the facts brought to his notice, to reship the sulphur on the Styria and further delay his voyage.

The sulphur was subsequently, in pursuance of an agreement in writing, after the signing of the peace protocol between the United States and Spain, forwarded on the steamship Abazzia, belonging to the owners of the Styria, to the port of New York. Several questions arose in the courts below, under the terms of that agreement, and chiefly having reference to the measure of damages in case that the vessel was held liable. But as, for the reasons given, we hold that the vessel was not liable, those questions do not call for our consideration.

The decrees of the District Court and of the Circuit Court of Appeals, sustaining the libels of the respective libellants, are hereby reversed; the decrees of the Circuit Court of Appeals reversing the decrees of the District Court, dismissing the respective cross libels, are hereby affirmed, and the causes are remanded to the District Court with directions to take further proceedings in conformity with the opinion of this court.

MONTANA MINING COMPANY *v.* ST. LOUIS MINING AND MILLING COMPANY.

MONTANA MINING COMPANY *v.* ST. LOUIS MINING AND MILLING COMPANY.

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

Nos. 213, 214. Argued April 9, 1902.—Decided May 19, 1902.

When by the judgment of the Circuit Court each party to a cause is defeated in some part of his contention, and both take the case to the Circuit Court of Appeals, which affirms the judgment in favor of one party, and reverses it and remands the cause at the suit of the same party, the judgments of that court taken together cannot be regarded as final so far as the jurisdiction of this court is concerned, and writs of error from this court to review each judgment must be dismissed.

THIS was an action brought by the St. Louis Mining and Milling Company of Montana against the Montana Mining

Company in the Circuit Court of the United States for the District of Montana, to recover damages for trespass on a vein of rock, having its apex entirely within the described premises of plaintiff, and extracting therefrom and converting large quantities of valuable ore.

The cause was tried on a second amended and supplemental complaint, which was filed June 26, 1899, and is set forth in the record, but the original complaint and the amended complaint are not. The record contains the original summons dated September 18, 1893, which ran against the Montana company; and sundry individuals, whose citizenship was not stated, though it appeared that they were served in Lewis and Clarke County, Montana, but who seem to have disappeared as parties in the progress of the cause, and who are not parties to the complaint contained in the record.

The first paragraph of the second amended and supplemental complaint alleged—

"That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining and Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State."

The second paragraph alleged plaintiff "to be the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz lode mining claim, and all the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis lode mining claim, although

such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz lode mining claim," situated in the county of Lewis and Clarke, Montana, and more particularly described as follows: [Here followed a full description, concluding] "Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim, which said fractional portion of said St. Louis lode mining claim is described as follows, to wit: [Here followed description].

The third and fourth paragraphs were as follows:

"III. That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz lode mining claim, situate and being east of the said St. Louis lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St. Louis lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour lode mining claim.

"IV. That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis mining claim is to the east and dips under and beneath the said Nine Hour lode mining claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of

said St. Louis Quartz lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south, 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz lode mining claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south, 59 degrees 50 minutes west, 108 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

"That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis lode mining claim.

"A map or plat showing the point at which the said vein enters said St. Louis lode mining claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit 'A,' and made a part of this complaint, and to which reference is made."

The Montana Mining Company answered June 30, 1899, in three paragraphs, the first admitting the allegations of paragraphs numbered one, two and three of the second amended and supplemental complaint; the second paragraph denying each and every other allegation thereof; and the third being as follows:

"And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P.

Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked Exhibit 'A,' and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis lode mining claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said plaintiff and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said plaintiff and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the district court of the first judicial district of the State of Montana, within and for the county of Lewis and Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said

premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit 'B,' and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein."

Replication was filed, the cause tried by the court and a jury, a verdict returned in favor of plaintiff for $23,209, and judgment rendered thereon. To review this judgment the Montana company prosecuted a writ of error from the Circuit Court of Appeals for the Ninth Circuit, which writ was dated October 7, 1899, and the judgment was affirmed May 14, 1900. 102 Fed. Rep. 430. The writ of error in No. 213 was then allowed.

On the trial the St. Louis company was restricted by the Circuit Court to damages for ore taken north of what was designated as the 108-foot plane of the Nine Hour claim, but the company insisted on the right to recover for ore taken up to what was designated as the Nine Hour 133-foot plane. Accordingly the St. Louis company took out a cross writ of error from the Circuit Court of Appeals dated January 30, 1900, and that court reversed the judgment, October 8, 1900, and remanded the cause for a new trial as to the recovery sought for the conversion and value of certain ores between the planes designated as the 108-foot and 133-foot planes. 104 Fed. Rep. 664. The writ of error in No. 214 was then brought.

Mr. W. E. Cullen and *Mr. Charles J. Hughes, Jr.*, for plaintiff in error. *Mr. Edward C. Day*, *Mr. Aldis B. Browne* and *Mr. Alexander Britton* were on their brief.

Mr. Thomas C. Bach and *Mr. Arthur Brown* for defendant in error. *Mr. H. P. Henderson* and *Mr. E. W. Toole* were on their brief.

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

The St. Louis company recovered judgment in the Circuit

Court for the sum of $23,209. This judgment was affirmed by the Court of Appeals, May 14, 1900, on the writ of error brought by the Montana company.

On the eighth of October, 1900, the Court of Appeals gave judgment on the cross writ of error of the St. Louis company in these words: "On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said Circuit Court for a new trial as to damages alleged and recovery sought for the conversion and value of certain ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes."

To review these judgments thus separately rendered, the Montana company sued out on the same day, October 24, 1900, two writs of error from this court, the records returned on which were filed December 18, 1900, and the cases docketed, and now numbered 213 and 214.

The St. Louis company moved to dismiss the writ of error in No. 213 on the ground that the jurisdiction of the Circuit Court was, according to plaintiff's statement of his own claim, "dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States," and the judgment of the Circuit Court of Appeals was, therefore, not reviewable on error under the sixth section of the judiciary act of March 3, 1891. And at the same time, the St. Louis company moved to dismiss the writ of error in No. 214 on the additional ground that the judgment was not a final judgment. This objection is, of course, well taken, and the writ of error must be dismissed. But when, thereupon, the mandate of the Court of Appeals goes down to the Circuit Court, if in the meantime we have retained jurisdiction in No. 213, the result would be that part of the case would be pending in the court of original jurisdiction, and part in the court of last resort. And should we differ with the Court of Appeals and reverse its judgment brought up in No. 213, our mandate would go to the Circuit Court, which would have been already directed to proceed as to part of the case on other prin-

ciples. We do not mean to intimate in the slightest degree any conclusion on the merits, but only wish to indicate embarrassments which might arise if one and the same case is treated as two separate and independent cases.

By Rule 22 of this court appeals and cross appeals are heard together, and the practice is the same as to writs and cross writs of error. Where there are cross appeals or cross writs of error in the Circuit Courts of Appeals in cases in which the decrees or judgments are made final in that court by statute, and the case is brought here on certiorari, we consider only the errors assigned by petitioner, unless a cross writ of certiorari is applied for and allowed. *Hubbard* v. *Tod*, 171 U. S. 474.

In this case two writs of error were sued out by the Montana company because there were two judgments rendered below, but the records on both constitute the record in one and the same case, as both writs of error in the Court of Appeals ran to the same judgment of the Circuit Court.

It is said that the complaint described two sections of the vein, one lying north of the 108-foot plane and one between the 108 and 133-foot planes, and that as they were described separately this was equivalent to two counts on distinct causes of action. But we do not understand that this is so, for the complaint is complete in itself, and a single trespass may be committed on several closes and alleged in a single count. Moreover, although set up in two counts, if there were no misjoinder, which is not pretended here, the recovery would be entire and would require an entire judgment. And as the trial court sustained a recovery as to one part of the vein and not as to the other, and both parties took bills of exceptions, and resorted to the appellate tribunal, we do not think that the judgment as rendered could be retained as a judgment and a retrial had as to so much of the claim as was disallowed. Our attention is not called to any act of Congress or to any rule of practice which authorizes this to be done, nor to any statute or decision of the courts of Montana to that effect, if, indeed, the Federal courts would be obliged to follow such practice if it existed. And the difficulty of the situation is illustrated by the suggestion of counsel that this one action should be regarded

as two actions, over one of which the ground of jurisdiction of the Circuit Court was dependent solely on diverse citizenship, and over the other, not.

But we are of opinion that the judgment of the Court of Appeals on the writ of error prosecuted by the St. Louis company operated to reverse the prior judgment of affirmance, inasmuch as the court in terms reversed the judgment of the Circuit Court, although imposing a limitation on the extent of the new trial awarded. Even if the Court of Appeals had power to impose that limitation, the issue so reserved deprived the first judgment of finality so far as our jurisdiction is concerned. *Covington* v. *First National Bank*, 185 U. S. 270.

The answer to the complaint consisted of a general denial and an affirmative defence that the plaintiff had granted by contract, and afterwards by deed enforced by a decree of court, a thirty-foot strip along a portion of its side line, and the trial court held that the plaintiff could not recover for the 25-foot section between the two planes, but that it could recover northerly from the 108-foot plane. Each party was defeated in some part of its contention, and each party took the case to the Court of Appeals, but the decision of that court left a part of the case undisposed of in the court below. The judgment of reversal being before us in No. 214, we are not compelled to ignore its effect on the judgment in No. 213, and to entertain one writ of error while dismissing the other. *Butler* v. *Eaton*, 141 U. S. 243; *Kimball* v. *Kimball*, 174 U. S. 158; *Mills* v. *Green*, 159 U. S. 654; *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 84.

When these writs of error were taken out the judgment first rendered had ceased to be final by the operation of the second judgment, which was itself not final, and the result is that both must be dismissed.

Writs of error dismissed.

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

EMSHEIMER *v.* NEW ORLEANS.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 347. Argued March 19, 20, 1902.—Decided May 19, 1902.

A certificate under section six of the act of 1891 should contain a proper statement of the facts on which the question or proposition of law arises.

The entire record should not be transmitted and a decision asked on the whole case.

The inquiry as to the jurisdiction of the Circuit Court of suits to recover the contents of choses in action relates, so far as the assignors are concerned, to the time when the suit is brought.

If at that time the assignors could have brought suit in the Circuit Court, it is immaterial whether they could have done so when the assignment was made.

THE certificate in this case is as follows:

"This suit was commenced by filing in the Circuit Court the following bill and exhibit, filed November 13, 1899:

"'To the honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, New Orleans division:

"'Alphonse Emsheimer, of New Orleans, an alien and a subject of the Empire of Germany, brings this his bill against the city of New Orleans, a municipal corporation created by the laws of Louisiana, and a citizen of said State. And thereupon your orator complains and says:

"'1st. That by an act of the legislature of Louisiana (No. 74), approved September 14th, 1868, the parishes of Orleans, Jefferson and St. Bernard were territorially united in one district for the purpose of police government therein, called the 'Metropolitan police district of New Orleans, State of Louisiana;' that the government of said district for police purposes was vested in a board of commissioners, styled 'the board of Metropolitan police.'

"'2d. That said board was required to appoint all the officers

and employés of the police force required in said district, and their salaries (which were prescribed by the act) were required to be paid monthly; that by said act and acts of said legislature, supplementary to and amendatory thereof, said board was required to make annually an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay, and to provide the means for promptly paying, the amounts thus apportioned to them.

"'3d. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said Metropolitan police and apportioned the same to said several cities and parishes as required by said acts.

"'4th. That the apportionments made by said board aforesaid to the city of New Orleans for all the years from 1869 to 1876, inclusively, amounted to the sum of $6,033,030.51, and when said apportionments were made and notified, as they were to said city, she became liable to said board of Metropolitan police for the amount thereof.

"'5th. That like apportionments of police expenses were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board, but afterwards by acts of said legislature, said cities were consolidated with said city of New Orleans, which by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

"'Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

"'6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and

St. Bernard and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments; but what the amounts of said apportionments were complainant is unable to state, but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

"'7th. That while said cities and parishes within the police district were required to promptly pay and to provide the means for promptly paying their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amount required for that purpose by levying taxes upon the persons and things subject to taxation within their respective jurisdictions, and for that purpose did severally make such levies, and your orator avers that said city of New Orleans annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority levied and collected taxes for the purpose of paying the same, and paid upon account thereof large sums of money, but not enough to discharge her liability in the premises, there still being due upon account thereof, including Carrollton, the sum of two hundred and forty-one thousand, one hundred and six and $\frac{54}{100}$ dollars ($241,106.54,) and the defendant, the present city of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

"'8th. And your orator avers that said city of New Orleans was and is a statutory trustee of the money derived from such taxation, and collected by her for the purpose of paying said apportionments of police expenses; that ever since said several levies of such taxes said city has been, and still is making collections thereof, and has collected large sums of money on account thereof, for which she has failed to account and still holds subject to said trust, the amount thereof being to your orator unknown; that for a portion of such collections a receiver was appointed by the civil district court for the parish of Orleans with the consent of said city, to whom said city on July 25th,

1888, paid the sum of thirty thousand nine hundred and forty-four $\frac{94}{100}$ dollars ($30,944.94) part and parcel of the moneys derived from the collection of such taxes as well as other small sums thereafter, the amount and date of payment of which is to your orator unknown.

"'And your orator avers that afterwards, to wit, on the 27th of December, 1890, said receiver died, and that said board has been since then, and is now without any successor or representative, and its affairs are under no administration whatsoever; that said city of New Orleans has since the death of said receiver continued to collect said police taxes, and is still collecting the same, the amount of such collections being to your orator unknown, but he avers that it is a large amount, no part of which she has applied to the payment of any of her indebtedness on account of said apportionments; and that she holds the same subject to said trust as above averred.

"'And your orator avers that large amounts of said police taxes levied, as aforesaid, became delinquent, and thereafter interest accrued thereon at the rate of ten per cent per annum; that said city of New Orleans collected large amounts of such interest, which as accessory to said taxes should have been paid to said police board, but which she neglected and refused in violation of her duty as trustee, to apply to the payment of said apportionments, and she should be required to account for the same with interest thereon; that the amount of police taxes as well as the interest thereon, so as aforesaid collected, is unknown to your orator, and he is entitled to an account thereof from said city before one of the masters of this honorable court, or otherwise, as your honors may direct.

"'9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and maintained the same until March 31st, 1877, when said act No. 74 of September 14th, 1868, establishing said Metropolitan police district, as well as all other acts amendatory thereof and upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished without any provision being made for the liquidation of its affairs, or the payment of its debts.

Statement of the Case.

"'10th. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said law, ceased to be and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complainant herein, and he is remediless, except in this honorable court, where matters of this nature are cognizable and relievable, wherefore he brings this his bill, in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expense of this suit.

"'11th. That one Lew Goldstein, as holder of a large amount of Metropolitan police warrants, issued to officers and members of the Metropolitan police, and assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against said city of New Orleans, said city of Kenner and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver and enforcement of the liabilities of said several defendants, for the purpose of paying and discharging the obligations of said board; that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this honorable court, where holders of warrants and claims against said board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, the claims now held by your orator being among those so presented and proved, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof; but as to all other defendants the same still remains pending and undisposed of.

"'That afterwards, to wit: February 9th, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this honorable court against said city of New Orleans and others for an account of the sums due by said defendants, applicable to the

payment of the certificates and claims against said police board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin had acquired; that various persons having like claims against said police board intervened in said suit and proved the same before the master therein; that among said claims sued upon by said Benjamin and said intervenors, were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described; that process of subpœna in said case was duly served upon said city of New Orleans February 9th, 1891, that she afterwards appeared and answered and a final decree was made against her in favor of said complainant, and the intervenors therein establishing their claims and decreeing the said city to pay the same, which suit was afterwards dismissed for want of jurisdiction in this honorable court, but without prejudice to a new bill, which decree became final January 31st, 1898.

"'12th. That your orator is the holder and owner of certificates issued by said board of Metropolitan police in acknowledgment of its indebtedness for services rendered to it by the persons therein named and of transfers of debts due by said police board, amounting to three thousand, thirty and forty-eight / 100 dollars ($3030.48), a list whereof is hereto annexed as Exhibit 'A,' and made a part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration, and he is now the holder and owner thereof.

"'And your orator avers that each of said persons in whose favor said claims accrued, and to whom said certificates were issued, or their heirs or legal representatives, are citizens respectively of States other than Louisiana, and competent as such citizens to maintain suit in this honorable court against said defendant for the enforcement of said indebtedness, represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows, viz.:

"'Said D. M. Moore is a citizen of the State of New York.

" Eli Jones is a citizen of the State of Texas.

"'Said Peter Joseph is a citizen of the State of Colorado.

" Robert Crofton is a citizen of the State of Mississippi.

" W. C. Bodechtel is a citizen of the State of California.

" J. H. Moore is a citizen of the State of Colorado.

" Edward Masterson is a citizen of the State of Ohio.

" John Dinan is a citizen of the State of Ohio.

" F. Coleman is a citizen of the State of Ohio.

" R. H. Taylor is a citizen of the State of Illinois.

" W. H. Murphy is a citizen of the State of Michigan.

"'Said G. H. Hamersley resided in and was a citizen of the State of California, until he died recently, leaving two sons, G. H. Hamersley and —— Hamersley, as his sole heirs, who are also citizens of the State of California.

"'Said Dr. J. B. Cooper resided in and was also a citizen of the State of California, where he died leaving Mrs. Catherine E. Cooper, his widow in community, as sole heir under the laws of said State of which she is a citizen.

"'15th. And your orator further shows and avers that there are now outstanding, due and unpaid, other warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it, for services rendered and supplies furnished thereto, amounting to a large sum, the exact amount thereof being unknown to your orator, but he avers upon information and belief, that including interest thereof, the amount exceeds two hundred thousand dollars ($200,000); that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by the said city of New Orleans, and by other municipal corporations within said police district; that the amount due by said city as aforesaid, is applicable to the payment of the claims held and owned by your orator as aforesaid, the same being for services rendered within said city, and that he is entitled to an accounting by said city, in order that the amount due by her may be ascertained and fixed and decreed to be paid, and applied to the payment of your orator's claims, and of such others as shall join herein and contribute to the expense of this suit.

"'In consideration whereof and inasmuch as your orator has not a complete and adequate remedy at law to the end there-

fore that the said defendant may, if she can, show why your orator should not have the relief hereby prayed, and that she may full, true and perfect answer make to all and singular the premises, (but not under oath, the oath thereto being expressly waived); that an account be taken before a master to be appointed by the court, of the amount of taxes collected by the defendant on account of the assessments and levies of taxes for police purposes, as set forth in the bill, and of the amounts due by the defendant on account of the apportionments aforesaid due by her, and that the defendant may be decreed to pay into the hands of a receiver, the amount of said taxes collected, with interest thereon, since the same have come into the hands of the defendant, and a sufficient amount of the said apportionments as trust funds, to meet the demands of the complainant and other creditors similarly situated who may come into this cause and take the benefit of these proceedings, and all expenses and costs; and that the same be applied to their payment.'"

[Then followed prayer for process and for general relief and signatures of counsel; also Exhibit "A," "List of certificates of indebtedness of Board of Metropolitan Police and claims against it held and owned by said complainant." These were in small amounts, some of them dated in October, November and December, 1874, some in December, 1875, and some in November and December, 1876. The original payees were D. M. Moore, Eli Jones, Peter Joseph, Robert Crofton, W. C. Bodechtel, Edward Masterson, R. H. Taylor, John Dinan, G. H. Hamersley, W. H. Murphy, F. Coleman and Dr. J. B. Cooper.

The city demurred to the bill on the ground that the Circuit Court had no jurisdiction as such for want of proper averments of diverse citizenship; that necessary parties were lacking; that plaintiff had not stated a case entitling him to the relief prayed; and that the remedy was at law and not in equity. On hearing the Circuit Court entered the following decree:]

"'This cause came on to be heard at a former day upon the demurrer to the bill, filed by defendant, and after arguments from counsel, was submitted.

Statement of the Case.

"'On consideration thereof for the reasons on file:

"'It is ordered that the defendant's first ground of demurrer be and the same is hereby overruled, the court finding and decreeing that the allegations of the citizenship of the complainant, of the original payees and of the city of New Orleans, are fully sufficient.

"'It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein and said bill is therefore dismissed for want of equity with full reservation of complainant's right to sue and proceed at law.'

"The complainant below prosecuted an appeal to this court and assigns herein errors as follows:

"'1st. Said Circuit Court erred in sustaining the demurrer to the complainant's bill, and in dismissing the same.

"'2d. Said court erred in holding that complainant's bill does not state a case within the jurisdiction of a court of equity.

"'Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed and said cause reinstated to be proceeded with according to law.'

"And now at this term this cause came on to be heard on the transcript and was argued,—

"Whereupon, for the proper decision of the case, this court, desiring the instruction of the honorable, the Supreme Court of the United States, certifies to that court the following questions and propositions of law arising on the record, to wit: 1. This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship? 2. Under the facts stated in the bill and under the proper construction of Act No. 35 of the Laws of Louisiana, approved March 31, 1877, can the city of New Orleans, as a legal successor of the defunct Metropolitan Police Board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late board of

Metropolitan police for the amounts due on said certificates? 3. Under the facts stated in the bill, can the complainant maintain a suit in equity in the Circuit Court of the United States for the Eastern District of Louisiana against the city of New Orleans for the establishment of a fund out of which he in common with other creditors of the late Metropolitan Police Board may be paid *pro rata* upon their claims?"

Mr. J. D. Rouse for appellant. *Mr. William Grant* was on his brief.

Mr. Frank B. Thomas for appellee. *Mr. Samuel L. Gilmore* was on his brief.

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

This is a certificate under section six of the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, and it is settled as to such certification that each question propounded must be a definite point or proposition of law clearly stated, so that it can be definitely answered without regard to other issues of law in the case; that each question must be a question of law only and not of fact, or of mixed law and fact; and that the certificate cannot embrace the whole case, even where its decision turns on matter of law only and even though it be split up in the form of questions. *Graver* v. *Faurot*, 162 U. S. 435; *McKeen* v. *Railroad Company*, 149 U. S. 249.

Rule 37 provides: "Where, under section six of the said act, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises." In this case there is no such statement, but the entire record is certified, and the questions contemplate an examination of the whole case and in large part its decision on the merits.

We cannot regard this certificate as in compliance with the rule, and are constrained to decline to answer the second and

third questions, but we think we may properly answer the first question in view of the narrow limits by which it was apparently intended to be circumscribed.

The judicial power extends to controversies between citizens of different States; and between citizens of a State and citizens or subjects of foreign States; but the Judiciary Act of September 24, 1789, provided that the District and Circuit Courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange," 1 Stat. 78, c. 20, § 11; and the same provision of the act of March 3, 1887, as corrected by that of August 13, 1888, is in these words: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. 433–4, c. 866, § 1.

To prevent abuse of the constitutional right to resort to the Federal courts, jurisdiction in respect of assignees or transferees was thereby denied except as to suits upon foreign bills of exchange; suits upon choses in action payable to bearer and made by a corporation; and suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made. *New Orleans* v. *Quinlan*, 173 U. S. 191.

The bill shows that at the time this suit was brought the Circuit Court had jurisdiction as between plaintiff and defendant, and also that the payees of these warrants might themselves then have instituted it, if there had been no assignment or transfer. We lay out of view as inapplicable the limitation on amount prescribed as to parties plaintiff by another clause with a different purpose.

But it is objected that the restriction relates to the time when

the paper was assigned, and not to the time of the commencement of the suit; and that if there were intermediate assignees jurisdiction in respect of them must appear, and does not appear on the face of this bill.

We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and cannot be divested by subsequent change of residence; but jurisdiction cannot be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the acts from 1789.

In *Chamberlain* v. *Eckert*, 2 Biss. 126, Judge Drummond held that the time of the commencement of the suit determined the question; and, among other things, said: "But if the rule contended for by the defendant is the true rule, then no change in the status of the payee, after the assignment, could ever enable a party to bring a suit, and it might happen, where the note was executed by the maker to the payee of another State, and at the time of the commencement of the suit in the Federal court, he was of the same State with the maker, the suit could be maintained by the assignee, a citizen of another State, because you have to look according to the view of the defence, to the status of the parties at the time that the assignor held the note. And if he ever could have prosecuted the suit, the assignee could prosecute it, although at the time when the suit is brought the payee and maker are citizens of the same State. That would be the necessary consequence, and the question recurs, what does the language of the statute mean, 'unless the suit might have been prosecuted in said court, if no assignment had been made?' I think it means at the time the suit was prosecuted, so that if it appears then that the assignor could have maintained the suit if no assignment had been made, the assignee being a citizen of another State, can maintain the suit." And see *Thaxter* v. *Hatch*, 6 McLean, 68.

In *White* v. *Leahy*, 3 Dillon, 378, the same conclusion was announced by Judge Dillon. The suit was a bill to foreclose brought in the Circuit Court for the District of Kansas by plaintiff, a citizen of Missouri, as the assignee of a note and mortgage. The maker and payee of the note were citizens of Kansas,

and were such at the time the note and mortgage were made and the payee endorsed the note and assigned the mortgage, and delivered the same to plaintiff in Missouri. But at the time the suit was brought the payee was a citizen of Texas. Judge Dillon said: "If no assignment of this note had been made, the assignor might, being at the time when suit was brought a citizen of Texas, have then commenced it; and under the statute his assignee has the same right. If the restriction on the assignee does not exist at the time suit is commenced, the court has jurisdiction if the case involves the requisite amount and is between a citizen of the State where the suit is brought and a citizen of another State."

The same ruling was made by the Circuit Court of Appeals for the Fifth Circuit in *Jones* v. *Shapera*, 57 Fed. Rep. 457, and the foregoing and other cases were cited. See also *Portage Water Company* v. *Portage*, 102 Fed. Rep. 769.

In *Milledollar* v. *Bell*, 2 Wall. Jr. 334, which was a bill to foreclose, complainant, the mortgagee, was a citizen of New York, and defendant was a citizen of New Jersey, but there had been intermediate assignments. Mr. Justice Grier said: "The complainant's case is therefore within the strict letter of the law—nor can we discover anything in the spirit, equity or policy of the act, or in adjudged cases, which would compel us to give it a construction such as the defendant asks. The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, *unless his immediate assignor* could have sustained such action; but only in case the court could have had no jurisdiction as between the original parties to the instrument, *if no assignment had been made.* The situation or rights of temporary intermediate assignees, holders, or endorsers enters not into the conditions of the case."

Wilson v. *Fisher*, Bald. 133, was approved. There a citizen of New York had obtained a judgment against a citizen of Pennsylvania in the Supreme Court of that State. The judgment was assigned to citizens of Pennsylvania, and subsequently to complainant, who was an alien, and jurisdiction was sustained; Hopkinson, J., saying: "The suit cannot be main-

tained here unless it might have been prosecuted here, if no assignment had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless a recovery of the right claimed might have been had in this court if no assignment of it had been made; and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here."

In *Kirkman* v. *Hamilton*, 6 Pet. 20, where the payees of a note and the makers thereof were citizens of Tennessee, and before the note became due the payees became citizens of Alabama and endorsed it to a citizen of Alabama, the jurisdiction of the Circuit Court for the Western District of Tennessee of a suit brought by the holder of the note was upheld because the payees could have prosecuted a suit to recover the contents of the note in that court if no assignment had been made. But it is to be observed that the payees were not only citizens of Alabama when the suit was commenced, but when the note was assigned.

In *Mollan et al.* v. *Torrance*, 9 Wheat. 537, the declaration contained two counts. The first was against the defendant, Torrance, as endorser of a promissory note made by Spencer and Dunn, payable to Sylvester Dunn, and endorsed by him to Torrance, by whom it was endorsed to Lowrie, and by him to plaintiffs. The other count was for money had and received by Torrance to plaintiffs' use. The declaration stated plaintiffs to be citizens of New York, and defendant to be a citizen of Mississippi, but was silent "respecting the citizenship or residence of Lowrie, the immediate endorsee of Torrance, through whom the plaintiffs trace their title to the money for which the suit is instituted."

The ruling in *Young* v. *Bryan*, 6 Wheat. 146, "that an endorsee who resides in a different State, may sue his immediate endorser, residing in the State in which the suit is brought, although that endorser be a resident of the same State with the

maker of the note," was affirmed, but it was pointed out that: "In this case the suit is brought against a remote endorser, and the plaintiffs, in their declaration, trace their title through an intermediate endorser, without showing that this intermediate endorser could have sustained his action against the defendant in the courts of the United States. The case of *Turner* v. *Bank of North America*, 4 Dallas, 8, has decided that this count does not give the court jurisdiction. But the count for money had and received to the use of the plaintiffs being free from objection, it becomes necessary to look farther into the case." The record showed that defendant Torrance had filed a plea to the jurisdiction, in which he stated that the promises laid in the declaration were made to Lowrie, and not to plaintiffs, and that Lowrie and defendant were both citizens of the State of Mississippi. Plaintiffs demurred to this plea, the demurrer was sustained, and judgment rendered for defendant. The court overruled the plea because it averred that Lowrie and defendant were citizens of Mississippi at the time of the plea pleaded, not that they were citizens of the said State at the time the action was brought; and Chief Justice Marshall said: "It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny that jurisdiction, we think that the judgment ought not to have been rendered on the demurrer in favor of the defendant." The judgment was reversed and the cause remanded.

That was a suit on the distinct contract between endorsee and endorser, but as plaintiff was not the immediate endorsee, and made title through Lowrie, who was, the court held that the first count should have shown the competency of the latter to invoke the jurisdiction at the time the suit was brought.

The general rule is that when a note or bill is endorsed in blank the *bona fide* holder of it may write an endorsement to himself or to another over the endorser's name, and where there are several endorsements in blank he may fill up the first one to himself or may deduce his title through all of them.

Evans v. *Gee*, 11 Pet. 80; 1 Daniel Neg. Inst. (4th ed.) §§ 693, 694, 694*a*.

However, this bill does not trace title through any intermediate assignee, and on the contrary does so directly from the original payees. It is true that there are averments that in a proceeding by one Goldstein, still pending and undisposed of in the Circuit Court, against other parties than the city of New Orleans, these claims, "now held" by complainant, were presented and proved, the master's report thereon being referred to but not set out; and also that in a suit by one Benjamin and certain intervenors brought against the city of New Orleans in the Circuit Court, and subsequently dismissed without prejudice, these claims, "since acquired and now held and owned by" complainant, were included; and while this shows that these warrants must have passed through the hands of others than complainant, it does not appear that there was any endorsement of them other than in blank, and on the bill as framed complainant distinctly appears to be assignee of the payees. What complications may emerge hereafter in respect of the prior cases, or either of them, need not be considered.

We answer the first question by saying that on the face of the bill the Circuit Court had jurisdiction on the ground of diverse citizenship.

It will be so certified.

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

McCLAUGHRY *v.* DEMING.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

No. 610. Argued April 28, 29, 1902.—Decided May 19, 1902.

The trial of an officer of volunteers by a court-martial, all the members of which were officers of the Regular Army, is illegal, and the objection to it could be taken on *habeas corpus*.

A PETITION for a writ of *habeas corpus* was presented to the Circuit Court of the United States for the District of Kansas, First Division, asking that Peter C. Deming, once a captain in the subsistence department of the Volunteer Army of the United States, might be produced by Robert W. McClaughry, the appellant herein, in whose custody Deming was placed, McClaughry being the warden of the United States prison at Fort Leavenworth, Kansas.

On the part of Deming it was shown in the petition that he was imprisoned and restrained by virtue of a sentence imposed upon him by a general court-martial of the United States, convened at the Presidio of San Francisco, California, by William R. Shafter, Major General, United States Volunteers, and Brigadier General of the United States Army, retired, being of the age of 64 years. The sentence imposed upon Deming by the court-martial was that he should be dismissed from the service of the United States, and be confined in such penitentiary as the reviewing authority might direct for the period of three years, and that the crime, punishment, name and place of abode of the accused should be published in the newspapers in and about the city of San Francisco, and in the State where the accused usually resided. The sentence was approved by the Secretary of War and affirmed by the President of the United States on June 8, 1900.

The petition further showed that the court-martial which imposed the sentence was convened by virtue of the following order:

"Special Orders, No. 65. } Headquarters Department of California, San Francisco, Cal., March 29, 1900.

"7. A general court-martial is appointed to meet at the Presidio of San Francisco, California, at 11 o'clock A. M., on Tuesday, the 3d proximo, or as soon thereafter as practicable, for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers.

"Detail for the court:

"Colonel Jacob B. Rawles, 3d Artillery.

"Lieutenant Colonel Richard I. Eskridge, 23d Infantry.

"Major Louis H. Rucker, 6th Cavalry.

"Major Benjamin C. Lockwood, 21st Infantry.

"Captain Frank West, 6th Cavalry.

"Captain Carber Howland, 4th Infantry.

"Captain Sedgwick Pratt, 3d Artillery.

"Captain Henry C. Danes, 3d Artillery.

"Captain Charles A. Bennett, 3d Artillery.

"Major Stephen W. Groesbeck, judge advocate, U. S. Army, judge advocate.

[SEAL.]

"The court is empowered to proceed with the business before it with any number of members present not less than the minimum prescribed by law, the above being the greatest number that can be convened without manifest injury to the service.

"Such journeys as Colonel Rawles, Major Groesbeck, and Captain Pratt may be required to make between their respective stations and the Presidio of San Francisco, in attending the meetings of the court, are necessary for the public service.

"By command of Major General Shafter:

"J. B. BABCOCK,

"*Assistant Adjutant General.*"

It was further shown in the petition that Deming was an officer in the Volunteer Army and forces of the United States, and that the members of the court-martial above named, and who tried him, were all officers in the Regular Army, and it was averred that he could not legally or lawfully be tried by a court-

martial composed of such officers, because it would be in direct violation of the seventy-seventh article of war, section 1342, Revised Statutes of the United States, which reads as follows:

"Article 77. Officers of the Regular Army shall not be competent to sit on courts-martial, to try the officers or soldiers of other forces, except as provided in article 78.

"Article 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of an offender belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

It was further averred in the petition that Deming was tried and convicted without due process of law and in violation of the Fifth Amendment of the Constitution of the United States; that the court-martial was an illegal one and without warrant of law, and the sentence imposed upon Deming was without warrant or authority of law, illegal and void. A writ of *habeas corpus* was prayed for, to be directed to the warden, commanding him to have the body of Deming before the court. This petition was sworn to in behalf of Deming by the petitioner J. H. Atwood.

Upon that petition the writ issued, and the warden, in compliance therewith produced Deming and made return to the writ in substance, as follows: That William R. Shafter was a major general of volunteers, exercising command of the Department of California, by virtue of an assignment of the President of the United States, as Commander-in-Chief of the Army; that on March 29, 1900, pursuant to authority and in conformity with the provisions of article 72 of the articles of war, General Shafter appointed a general court-martial, by special orders, to meet at the Presidio of San Francisco on April 3, 1900, or as soon thereafter as practicable, for the trial of Peter C. Deming, assistant commissary of subsistence, United States Volunteers, the detail of which court-martial was then stated, and which was the same as that already mentioned in the order convening the court. It was admitted that all the members of the court-

martial so detailed were members of the Regular Army; that on April 5, 1900, the court proceeded to the trial of Deming, who, being present in court, the order convening the court was read to him, and he was asked if he objected to being tried by any member present named in the order convening the court, to which he replied in the negative. The members of the court and the judge advocate were then duly sworn, the court adjourning to meet again on April 23, 1900, at which time all the members of the court were present, and the judge advocate and Deming, the accused, with counsel. The accused was then arraigned upon charges of embezzling public money of the United States in violation of the sixtieth article of war, and conduct unbecoming an officer and a gentleman in violation of the sixty-first article of war; that thereupon Deming pleaded guilty, and the court-martial then passed sentence upon him, which was set forth in the return, and has been already stated.

The return further stated that on May 2, 1900, the proceedings, findings and sentence of the court-martial were approved by Major General Shafter, and submitted for the action of the President pursuant to the provisions of article 106 of the articles of war, and that thereafter on June 8, 1900, the sentence was confirmed by the President of the United States, and on that day, by direction of the Secretary of War, Deming ceased to be an officer of the Army of the United States, and the penitentiary at Fort Leavenworth, Kansas, was designated as the place for his confinement.

A certified copy of the record and proceedings of the court-martial, duly authenticated under the laws of the United States, together with a copy of the order for the court-martial, the proceedings, finding and sentence in the case, were attached to the return of the warden, and made a part of it.

The facts above detailed also appear in the record of the court-martial.

The petitioner demurred to the return as not stating facts sufficient to warrant the detention of the petitioner in custody, nor to warrant the refusal of the writ of *habeas corpus*, prayed for in the petition, and because such facts did not give the warden any legal right to deprive Deming of his liberty.

Opinion of the Court.

Although it does not appear distinctly in the record, yet it is conceded that upon the argument before the District Judge the writ was discharged and the prisoner remanded to the custody of the warden, and that upon appeal to the Circuit Court of Appeals that court reversed the order of the Circuit Court, and directed that the writ issue and that Deming be discharged from custody. Thereafter, in accordance with the judgment of the Circuit Court of Appeals, Deming was discharged by the Circuit Court, and from the order of the court so discharging him the Government has appealed to this court.

Mr. E. P. Crowder for appellant.

Mr. James H. Hayden for appellee.

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

The grave question in this case relates to the power of an officer convening a court-martial for the trial of an officer of volunteers, to compose that court entirely of officers of the Regular Army. It is claimed on the part of the respondent herein that a volunteer officer could not be legally tried by such a court, and that to convene and constitute a court-martial so composed, for the trial of a volunteer officer, was a violation of the seventy-seventh article of war, above set forth.

The Circuit Court of Appeals for the Eighth Circuit held, in a very clear and satisfactory opinion, 113 Fed. Rep. 639, that the trial of Deming by a court-martial, all the members of which were officers of the Regular Army, was illegal, and that the objection could be taken on *habeas corpus*. The reasoning of the opinion leaves little to add further than to state our concurrence therein. As the case is one of considerable importance in its results, it is, however, proper that we should ourselves state the reasons which lead us to the conclusion that the order appealed from was right, and should be affirmed.

The Government seeks a review of the decision of the court below, upon the strength of three propositions, argued by its

counsel, upon one or all of which a reversal of the decision of that court is sought. These propositions are as follows:

(1) That the Volunteer Army of 1899, of which Deming was an officer at the time of his trial, conviction and sentence, was not "other forces" within the meaning of article 77 of the articles of war.

(2) That even if Deming were to be treated as an officer of "other forces" within the meaning of that article, the fact would not deprive the court-martial of regular officers who tried him, of jurisdiction; this article relating entirely to the competency of members of a court-martial, not at all to its jurisdiction.

(3) The court-martial having jurisdiction and acting within its powers, its proceedings cannot be assailed by *habeas corpus*.

Taking these propositions in the order named, we are brought to the consideration of the meaning and application of the seventy-seventh article of section 1342 of the Revised Statutes of the United States, (page 237,) commonly called the articles of war. Article 78 has no application to this case, which rests upon the proper construction of article 77. The reading of the latter article shows that the existence of other forces than those of the Regular Army is contemplated. When a volunteer force is spoken of as well as a regular army force, in the statutes of the United States, such force would seem to come within the description of some other force than that of the Regular Army.

But the claim is made on the part of the Government that by virtue of the act of Congress of April 22, 1898, 30 Stat. 361, and particularly that of March 2, 1899, 30 Stat. 977, the officers of the Volunteer Army of the United States are not properly described by the words "other forces," within the meaning of the seventy-seventh article of war.

It is said that while the course of legislation prior to the passage of the acts above mentioned showed a clear distinction between the militia or volunteer forces and the Regular Army of the United States, the acts referred to, and especially that of 1899, changed the status of the volunteer forces enlisted under them, and, so far as the seventy-seventh article of war is concerned, rendered such force, in reality, the same in substance

as the forces of the Regular Army, and not "other forces" of the country. We think this claim is unfounded, and that the distinction still exists within the meaning of the article.

The seventy-seventh article of war as enacted in 1874 was but a substantial continuation of provisions, found in various acts of Congress from the foundation of the Government. In September of the year 1776 the Continental Congress enacted what is termed the military code of that year. In that code is to be found section 17, article 1, which reads as follows:

"SEC. 17, ART. 1. The officers and soldiers of any troops, whether minute men, militia, or others, being mustered and in continental pay, shall, at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.

"That such militia and minute men as are now in service, and have, by particular contract with the respective States, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war." Winthrop's Military Law and Precedents, vol. 2, p. 1501.

From the text of this section it is argued on the part of the Government that the purpose of its passage was not to guard against the feeling of jealousy and distrust with which the professional soldier was regarded, as was stated by the court below, because, as the Government claims, the regular forces of the Revolutionary War period were not made up of professional soldiers, and also because the article provided not only that the trials of militiamen should be before courts-martial composed entirely of militia officers, but that such officers should be of the same provincial corps with the offender. All this language, it is claimed, was but an expression in military legislation of the political doctrine, generally urged at that time in extreme form, that each State should be to the greatest extent practicable self-governing.

We think, however, there was, in addition to the idea of state control over the troops from a State, a recognition of the fact that there was a substantial difference between the regular forces and the militia. There was a recognition of the undoubted fact that at all times there has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can be readily seen that there might naturally be apt to exist a feeling among the militia that they would not be as likely to receive what they would think to be as fair treatment from regulars, as from members of their own force. The reasons for the feeling are set forth fully in the opinion below, and we think quite correctly. It is most probable that Congress recognized all these reasons in its earliest legislation upon the subject as considerations upon which that legislation was founded.

This military code with the above-mentioned section remained in force during the War of the Revolution and until 1806. Various acts were passed in the meantime providing for calling the militia into active service, and the acceptance of volunteers was also authorized by the acts of March 3, 1791, section 8, 1 Stat. 222, 223, and by that of May 28, 1798, 1 Stat. 558, but as stated by counsel for the Government, none of the organizations of volunteers authorized by the legislation was actually received into the service of the General Government and organized as United States troops.

By the act of April 10, 1806, 2 Stat. 359, Congress established rules and articles for the government of the Army of the United States. Among them is the following:

"Art. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by the court-martial in like manner with the officers

and soldiers in the regular forces, save only that such court-martial shall be composed entirely of militia officers."

This section, it will be observed, leaves out the words "of the same provincial corps with the offender," which are contained in section 17 of the Military Code of 1776, above set forth, thus leaving the militia to be tried by courts-martial the members of which shall be composed entirely of militia officers. While the provision that the courts-martial should be composed of militia officers of the same provincial corps with the offender was left out, the other provision that the courts should be composed entirely of militia officers was retained. This legislation still recognized the difference between the militia and the regular forces, and provided for the trial of militia offenders by militia officers, while at the same time the restriction that such officer should be of the same provincial corps with the offender was stricken out, thus showing that of the two ideas, the one which recognized the general ground of distinction between the regular and the militia forces was stronger than that which restricted the trial of a member of the militia to courts-martial composed of the same provincial corps.

While it may be that there was then no particular distrust or jealousy of the Regular Army, the provision in question recognized, as we have said, the difference there was between the two bodies, the regulars and the militia or volunteers, and Congress still thought it proper to provide that those composing the latter force should not be tried by officers of the former. It was not jealousy or distrust of the Regular Army which led to the enactment; it was the radical difference existing between the two forces which made it proper to provide that regular officers should not sit in courts-martial to try offenders in the volunteer forces.

History shows that no militia, when first called into active service, has ever been equal to a like number of regular troops. It is not that the men composing the militia force are less brave or less intelligent, but they lack actual experience which the regulars have, and it is that fact which gives the regulars the feeling of superiority, and it is that feeling which is recognized by Congress and which has resulted in legislation of this character.

Further distinctions between the two forces are very well stated in the opinion of the Circuit Court of Appeals in this case.

This section 97 of the act of 1806 continued in force until the revision of the law in 1874. During this time the war of 1812, the Seminole war, the Mexican war and the Civil war were all carried on. During the Civil war the volunteer troops, called for under the first proclamation of the President, came primarily as state troops, and the general orders of the War Department provided for the appointment of all field and company officers by the governors of the States who were to commission them. The same provisions in substance were contained in the subsequent acts of 1861. See acts of July 22, 1861, 12 Stat. 268; and August 6, 1861, chapter 75, sec. 3, 12 Stat. 317.

The statute of July 22, 1861, which provided that when vacancies occurred in any of the volunteer organizations received into the service under that act, they should be filled by election, and that the officers so elected should be commissioned by the respective governors of the States, or by the President of the United States, was amended by the act of August 6, 1861, which provided for the appointment and commissioning of officers of volunteers exclusively by the governors of the States furnishing the same.

The question of the meaning of the ninety-seventh article of war, with reference to the volunteer forces of the Civil war, was presented to Judge Advocate General Holt, who, on November 19, 1863, in an opinion, expressed himself as follows: "The words 'militia officers,' as employed in the ninety-seventh article of war, have been interpreted since the commencement of the rebellion as synonymous, as far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished," the object of the rule being that members of the volunteer forces of the Army at that time should be tried only by courts-martial composed of volunteer officers.

The intent of the legislation of 1874 was simply to preserve the rule which had existed from the formation of the Govern-

ment, and to keep up the distinction between the Regular Army and the volunteer forces, so far as to maintain the practice of trying volunteers by volunteer officers. The question was not so much how the volunteer or "other forces" came into the service of the Government, whether under officers appointed and commissioned by governors of their States, or by direct enlistment as volunteers, to aid the Government, but whether they were in fact volunteers and not members of the Regular Army. If they were volunteers, the same reasons for not being tried by regular army officers were present, whether they first volunteered through the State, and were then mustered into the service of the Government, or entered directly into that service, for in both cases they were volunteers and were not members of the Regular Army.

The acts of Congress of 1898, 30 Stat. 361, and of 1899, 30 Stat. 977, show conclusively, as we think, that the distinction was kept up and in the mind of Congress between the Regular Army and the Volunteer Army of the United States, and the declaration of section 2 of the act of 1898, which provides that in time of war the Army shall consist of two branches, which shall be designated respectively as the Regular Army and the Volunteer Army of the United States, is a plain recognition by Congress of the difference between the two forces. We cannot read the various provisions of these two acts of Congress without being brought to the conclusion that they contemplated and particularly provided for the existence of other forces than that of the Regular Army. The Volunteer Army was one of such other forces, and also the militia when in active service of the United States, and the Marine Corps when detached and placed upon duty with the Army by order of the President. The volunteer force is certainly not the regular force or army, and if not, it must be some other force, and if so, its members cannot be tried by officers of the regular force or army. The act of 1899 does not assume to repeal that of 1898, excepting some specific provisions thereof, such as are mentioned in section eleven of the act of 1899. The balance of the earlier act remains in force, except as to any provision which may be in conflict with the act of 1899. Upon this

particular matter of a distinction between the Regular Army and the Volunteer Army, there is no inconsistency between the two acts, and therefore the act of 1898 on that subject remains in connection with that of 1899.

It would unduly lengthen this opinion to cite the various sections of the two acts which provide for and prove this difference. It was done with much detail by the Judge who wrote the opinion in the Circuit Court of Appeals when this case was before that court, and we refer to that opinion for those details which in our judgment are controlling proof that the volunteer officers and men constitute other forces than the Regular Army within the meaning of the seventy-seventh article of war.

Section 14 of the act of 1898 seems to us particularly significant of the desire of Congress to recognize and keep up the distinction between these various forces of the Army of the United States. It proves its purpose to keep the interests of the volunteer troops particularly in mind, and that they should be looked after by members of their own body. It is therein provided that a general commanding a separate department or a detached army shall have authority to appoint military boards of not less than three nor more than five of the volunteer officers of the Volunteer Army to examine into the capacity, conduct and efficiency of any commissioned officer of that army within his command. They were to be not only officers of the Volunteer Army, but were themselves to be volunteer officers. This section of the act of 1898 has never been repealed and is not in conflict with any part of the act of 1899. Although the volunteer troops organized under the last act of Congress were mustered directly into the service of the United States without regard to state or territory lines, yet the very provisions of both these acts with regard to volunteers show that they were organized as volunteers for a temporary purpose only and did not form any part of the force of the Regular Army. The same reasons which have existed since the formation of the Government for prohibiting trials of such men by courts-martial composed of regular army officers exist under these acts. The seventy-seventh article of war by its terms covers such a case. It has not been repealed or amended. The reasons

for its enactment still remain as strong as when it was first adopted, and we think it covers the case of this officer who belongs to the Volunteer Army, raised under the act of 1899 and who was tried by a court-martial composed of regular army officers in violation of the act of Congress in that behalf. Congress could, of course, legislate for and temporarily enlarge the Regular Army, and the troops so enlisted for such Regular Army would be regular troops, notwithstanding they might be enlisted only for the term of the duration of a war then imminent or actually existing. Such was the act of February 11, 1847, 9 Stat. 123, in regard to the war with Mexico. But that has no material bearing upon the proposition that troops not so enlisted but on the contrary enlisted simply and in terms as volunteers, would not be troops of the Regular Army, but would be what they purport to be, volunteers, a separate branch from the regulars, and constituting by the terms of the statute other forces than such regulars.

The mere fact of a direct enlistment of the volunteers into the service of the United States under the act of 1899 cannot, as we have said, change the essential character of the Volunteer Army as a different and separate force from that of the Regular Army.

By the act of February 24, 1864, 13 Stat. 6, sec. 24, it was provided (section 24):

"That all able-bodied male colored persons, between the ages of twenty and forty-five years, resident in the United States, shall be enrolled according to the provisions of this act, and of the act to which this is an amendment, and form part of the national forces.

* * * * * * * *

"But men of color, drafted or enlisted, or who may volunteer into the military service, while they shall be credited on the quotas of the several States, or subdivisions of States, wherein they are respectively drafted, enlisted or shall volunteer, shall not be assigned as state troops, but shall be mustered into regiments or companies as United States colored troops."

Here was a case where the colored troops were mustered directly into regiments or companies as United States (colored)

troops, although credited on the quotas of the several States. They became United States troops, yet were not part of the Regular Army of the United States.

The Judge Advocate of the Army on December 16, 1864, rendered an opinion as to the composition of courts-martial for the trial of officers and soldiers in the Veteran Reserve Corps and United States colored troops, in which he used this language:

"In the absence of any statute law which either designates officers of the Veteran Reserve Corps or of the United States colored troops as regulars in express terms, or by a necessary implication from its provisions, fixes upon them this status, the Secretary of War has not proceeded to so characterize them, and until he shall do so these officers should, so far as the composition of courts-martial is concerned, be regarded as a part of the volunteer force."

Without some statute, otherwise providing therefor, the Judge Advocate General was of opinion that those forces should be regarded as a part of the volunteer forces unless the Secretary of War otherwise characterized them. Whether that official had power to do so need not now be inquired into, but unless he did so the Judge Advocate General thought that the United States colored troops were to be regarded as a part of the volunteer forces.

We conclude that the acts of 1898 and 1899 still left the Volunteer Army as a separate or other force from the Regular Army of the United States.

The second proposition argued by counsel for the Government we cannot agree to. If the defendant were a member of one of the "other forces," named in the seventy-seventh article of war, a court-martial, solely convened for the purpose of trying him, composed entirely of regular officers, would not have jurisdiction. Such a body would have jurisdiction over neither the subject-matter nor the person. A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. It was said by Mr. Chief Justice Waite in *Runkle* v. *United States*, 122 U. S. 543, 555:

Opinion of the Court.

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. sec. 470; *Brooks* v. *Adams*, 11 Pick. 441, 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 S. & R. 590, 599. Such, also, is the effect of the decision of this court, in *Wise* v. *Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80; *Mills* v. *Martin*, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The fact necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

What jurisdiction can a court-martial have which is composed of officers incompetent to sit on such court, of officers who are placed there in direct and plain violation of the act of Congress? This particular court was convened for the sole purpose of trying an officer of the Volunteer Army, and it was composed under the orders of the officer convening it of members each

and all of whom where prohibited by law from sitting on such court. As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but on the contrary all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over the person of any individual? The particular tribunal is a mere creature of the statute, as we have said, and must be created under its provisions. It is a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved. The officers composing the alleged court were not *de facto* officers thereof, for there was no court, and therefore it could not have *de facto* officers. *Norton* v. *Shelby County*, 118 U. S. 425, 441. The attempt at the creation of a court failed because such attempt was a plain violation of the statute. A court-martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in this case the very power which appointed the members of and convened the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. Is such a court a valid court and the members thus detailed *de facto* officers of such valid court? Clearly not.

It is urged, however, that the seventy-seventh article of war contains no reference to the jurisdiction of courts-martial; that it merely provides that certain officers shall not be competent to sit on such courts to try certain offenders, and that the jurisdiction of the court to hear and decide is regulated by other articles. But the court-martial that has jurisdiction over any

offence must, in the first place, be legally created and convened. Such a court is not a continuous one, created by the statute itself and filled from time to time by appointments of certain members under the power given by statute. The court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members, and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial and has no jurisdiction over either the subject-matter of the charges against a volunteer officer or over the person of such officer. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant or the subject-matter of the charges against him. It is said, in *Keyes* v. *United States*, 109 U. S. 336, that where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

Within the *Runkle case*, *supra*, this particular court was not legally constituted to perform the function for which alone it was convened. It was therefore in law no court. The men were disqualified to act as members thereof, and no challenge was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal. But this is not the case of a personal challenge of some member of the court where an objection to his sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute.

But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial.

Kohl v. *Lehlback*, 160 U. S. 293, was a criminal case, and it was held that in New Jersey the alienage of a juror participating in a trial was a subject of challenge when he was called; that it was for the state court to decide whether the verdict of conviction should be set aside on his motion when the accused did not interpose such challenge when the juror was drawn. The principle of that case does not apply here. It was an objection to a single juror, and was ground for a personal challenge. The presence of an alien on the jury did not render the court an illegal one, had no effect upon its jurisdiction over the person of the defendant or the subject-matter of the indictment, and therefore did not render the trial a nullity. The case at bar differs in all these facts, and the court, having been illegally constituted, had no jurisdiction to try the offender for any offence whatever, even with his consent.

It may also be said that the disqualification of a particular juror is brought before the court by a challenge in regard to the decision of which the juror takes no part. In this case no

provision having been made for a challenge to the whole court, the challenge must have been to each member thereof, separately, and the officers to try the challenge would have to decide a question existing in the case of each of such officers precisely to the same extent that was presented in the case of the officer challenged, so that in effect each would be passing upon a challenge in his own case. We do not say that this fact alone creates the difference between the two cases. The material and all pervading fact constituting that difference is that the whole court is in the one case constituted in utter violation of the command of the statute, while in the case cited the court was legal, had jurisdiction over the subject-matter and over the person, and the sitting of one disqualified juror being a cause of personal challenge is waived by the failure to interpose it.

There are some cases cited by counsel for the Government where disqualified judges sat in violation of the statute, such as *Pettigrew* v. *Washington County*, 43 Ark. 33; *Fowler* v. *Brooks*, 64 N. H. 423; *Crozier* v. *Goodwin*, 1 Lea (Tenn.), 368; *Holmes* v. *Eason*, 8 Lea (Tenn.), 754; *Wilson* v. *Smith*, 38 S. W. Rep. (Ky.) 870.

On the other hand, there is the case of *Oakley* v. *Aspinwall*, 3 N. Y. 547, where it was held that a judge who was disqualified to sit in a cause by reason of consanguinity to one of the parties could not sit even by consent of both parties, and if he did the judgment in regard to which he took part would be vacated. In that case it was said (page 552):

"It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion. But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibition of a law—which was not designed merely for the protection of the party to a suit, but for the general interests of justice. *Low* v. *Rice*, 8 Johns. 409; *Clayton* v. *Per Dun*, 13 Id. 218; *Edwards* v. *Russell*, 21 Wend. 63; 21 Pick. 101. It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the

respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect; that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his peculiar suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

A judge, who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of above case. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850. *People* v. *Connor*, 142 N. Y. 130, is among the latest of the cases on that subject. See, also, *Sigourney* v. *Sibley*, 21 Pick. 101, 106; *Gay* v. *Minot*, 3 Cush. 352; *Hall* v. *Thayer*, 105 Mass. 219, 224; *Chicago & Atlantic Railway Co.* v. *Summers*, 113 Ind. 10, 17.

It is difficult for us to understand how an ephemeral court, composed of men detailed as members, each one of whom is so detailed in direct violation of the statute on that subject which prohibits their sitting, can obtain any jurisdiction over the subject-matter or person even by the consent of the defendant. In those cases where the judgment rendered by a disqualified judge was held free from attack because of a waiver, it can at least be said there was a valid court for other purposes than the trial or hearing of the particular case, and that the objection was simply a personal one, and should be made before the trial or it must be deemed waived. We are not inclined to that view, but the principle is not applicable to this case where the court is created and all the members of it are convened in total disregard and violation of the statutes upon the subject of its membership.

(3) We are also of opinion that the invalidity of the court-martial can be raised upon a hearing on *habeas corpus*. The judgment, even after the approval of the officers, provided for by statute, is that of a court of limited jurisdiction only, whose

judgments may be attacked collaterally. In explaining the decision of *Wise* v. *Withers*, 3 Cranch, 331, where he had himself written the opinion, Chief Justice Marshall said in *Ex parte Watkins*, 3 Pet. 193, 209, that it had been considered in the former case that a court-martial was one of those inferior courts of limited jurisdiction, whose jurisdiction might be questioned collaterally. In order to give effect to the judgment of a court of that nature it must appear affirmatively that the court was legally constituted; that it had jurisdiction, and that all of the statutory requirements governing its proceedings had been complied with. *Runkle case, supra.* Jurisdiction of inferior courts not of record must be affirmatively shown and no presumption thereof exists. Freeman on Judgments, 3d ed. sec. 517. They can, therefore, be attacked collaterally.

While the writ of *habeas corpus* cannot be converted into a writ of error, yet unless the court which tried the prisoner has jurisdiction to try and punish him for the offence the prisoner may be discharged on such writ. *In re Coy*, 127 U. S. 731, 757.

The question we are now discussing resolves itself into one of jurisdiction simply. If the court-martial had jurisdiction over the subject-matter of the charge against the defendant and of the person, or if the consent of the defendant gave such jurisdiction, the writ of *habeas corpus* will afford no relief, for generally, in such case any error committed by a court-martial regularly organized and with full jurisdiction is not assailable before the civil courts. *Swaim* v. *United States*, 165 U. S. 553; *Carter* v. *McClaughry*, 183 U. S. 365.

For the reasons already given, we think the court was illegally constituted, in violation of law, and that it had no jurisdiction over the person of the defendant or the subject-matter of the charges against him, and that consent could confer none in opposition to the statutory requirements for members of a court-martial convened to try him.

The question of who shall act on courts-martial for the trial of offenders belonging to the various branches of the Army of the United States is one entirely for Congress to determine. If it should think the time has come to do away with the distinc-

tion between the volunteer or militia force and the Regular Army, it rests in its discretion to so provide.

We are of opinion, after a careful examination of this record, that the decision of the court below was right, and the order discharging the defendant from custody should be

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE MCKENNA dissented.

MR. JUSTICE GRAY and MR. JUSTICE BREWER did not hear the argument and took no part in the decision.

BEMENT *v.* NATIONAL HARROW COMPANY.

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

No. 215. Argued April 9, 10, 1902. — Decided May 19, 1902.

Any one sued upon a contract may set up, as a defence, that it is a violation of an act of Congress.

The object of the patent laws is monopoly, and the rule is with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee, and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts; and the fact that the conditions in the contracts keep up the monopoly, does not render them illegal. The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision, as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others.

Upon the facts found, there was no error in the judgment of the Court of Appeals, and it is affirmed.

THIS was a writ of error to the Supreme Court of the State of New York, to which court the record had been remitted after a decision of the case by the Court of Appeals. The action was brought by the plaintiff below, the defendant in error here,

a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties, in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over twenty thousand dollars, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the Supreme Court and an order made granting a new trial, but on appeal from such order the Court of Appeals reversed it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows: It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames and attachments applicable thereto, eighty-five of which patents were enumerated, and that the defendant desired to acquire the right to use in its business of manufacturing at Lansing, (in the State of Michigan,) and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction employed by the defendant, during the term of such patents or either or any

thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

(1) The defendant was to pay a royalty of one dollar for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica in the State of New York.

(2) The defendant was to make verified reports of its business each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows to any person, firm or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.

(3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in schedule B, which was made a part of the license, except as thereinafter provided.

(4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.

(5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of ten cents paid for each of such labels was to be credited and allowed on the royalty paid by the defendant at the time of such payment.

Statement of the Case.

(6) The defendant agreed that it would not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of five dollars, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture, for another licensee, which such other licensee was itself licensed to manufacture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

(9) The plaintiff agreed that after the license was delivered it would not grant licenses or let to any other person the right to manufacture the articles named of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such sam-

ples as had been deposited by it with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee and not assignable, except to the successors of the defendant in the same place and business, without the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license during the continuance thereof.

(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, and the agreement was to be construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was one dollar, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs and assigns.

Schedule A which followed contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was

therein stated that "A maximum discount of forty-two per cent may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States, also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south, and west of Virginia, West Virginia and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an injunction restraining future violations and for a specific performance of the contracts.

The plaintiff also alleged that the plaintiff's assignor, the New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at the time of the commencement of the action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and

the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the Supreme Court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It also alleged that all of the various contracts were in violation of the act of Congress, approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress, (26 Stat. 209,) entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The case was referred to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following-named parties: D. C. & H. C. Reed & Company, of Kalamazoo, Mich.; G. B. Olin & Company, Perry and Canandaigua, N. Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company, of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y., who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vigorously prosecuted and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named, and the other parties

than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms and corporations began the spring tooth harrow business and other patent lawsuits followed: Suits were begun against the defendants herein, and against their customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in another suit. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows;' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above thirty inches. The two classes of harrows were differentiated, one being called a 'float' and the other a 'wheel' spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms, above named, in the harrow business in September, 1890, organized under the laws of the State of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts and privileges under patents. The defendant's president, Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

"This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the Supreme Court of the State of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. *Strait et al.* v. *National Harrow Company et al.*

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately cancelled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business; but this contract was abandoned, the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment thereof the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of $29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of $16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted

and agreed to take the stock of the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of $45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of $45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

"The transaction between the National Harrow Company of New York and this defendant had, in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was founded on a good, valuable and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above, and the defendant and its customers, was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B, the National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent, which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent, and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did, settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

"I decide that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the State of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally organized in conformity with the laws of that State, and was by those laws and its charter authorized to purchase United States letters patent and to grant licenses under United States letters patent and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable and adequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and

directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges and benefits accruing to the New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of $13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B, and the plaintiff is now ready, willing and able to perform all of the stipulations and agreements to be performed on its part, as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected and refused, and still fails, neglects and refuses to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various viola-

tions of the license agreements by the defendant, and finds the defendant indebted to the plaintiff in the sum of over twenty thousand dollars. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction, and that all of the contracts in evidence were and are legal, valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the Supreme Court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel: "That the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890, chapter 647 of the first

session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment, and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The plaintiff then appealed to the Court of Appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the Supreme Court was wrong in reversing the judgment. The court therefore reversed the judgment of the Supreme Court, and affirmed the judgment entered upon the report of the referee.

Mr. Clark C. Wood, *Mr. Edward Cahill* and *Mr. Henry J. Cookingham* for plaintiff in error.

Mr. Edwin H. Risley for defendant in error.

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

In this court we are concluded by the findings of fact made in a state court in a suit in equity, as well as in an action at law. *Dower* v. *Richards*, 151 U. S. 658, 666; *Israel* v. *Arthur*, 152 U. S. 355; *Egan* v. *Hart*, 165 U. S. 188; *Hedrick* v. *Atchison, Topeka & Santa Fé Railroad Company*, 167 U. S. 673, 677.

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. Act of July 2, 1890, c. 647, 26 Stat. 209. That is a question of law, plainly raised in the record, and we are not precluded from its consideration by any action of the state courts. If, however, facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The contention of the defendant is that

the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that taken together they prove a purpose and combination on the part of all the dealers in patented harrows to control their manufacture, sale and price in all portions of the United States, and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former alleged contracts are not mentioned in the report of the referee excepting, as he stated, they had been declared void as against public policy, and as being in restraint of trade because they extended beyond the life of the patents therein mentioned, and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately cancelled by the parties thereto.

The referee made no finding of any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the plaintiff and the National Harrow Company of New York, and among other contracts the plaintiff executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses under such patents relating to the float spring tooth harrow business conducted by the defendant, and that it was founded upon a good, valuable and adequate consideration between the parties; that as a part of such consider-

ation the assignor of the plaintiff granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided "that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction, and that all the contracts in evidence were and are legal, valid and binding contracts, and such as might reasonably be made under the circumstances, and were founded upon a good, valuable and adequate consideration, and were reasonable in their provisions, and that they embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust or illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are, and were, intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

When he speaks of all the contracts in evidence, the referee

plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence, and previously referred to by the referee. He, therefore, must have included what is termed the escrow agreement in his finding, that all the agreements made by defendant with the plaintiffs were valid. That agreement is set forth in the margin.[1]

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[1] "*Escrow Agreement.*

"This memoranda of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the State of New York, and Edward Norris of the same place; and E. Bement & Sons of Lansing, in the State of Michigan.

"Whereas, the said National Harrow Company is the owner of a large number of latters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeen Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everst & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

"And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms and corporations, to be signed and executed by said respective persons, firms and corporations—

"Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

"But in case any of the above-named persons, firms and corporations

There is no finding by the referee that this agreement was ever signed by any one other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is, that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and uncancelled. In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought back to the question whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States, in the district in

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shall neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

"Witness the signatures of the parties.

"THE NATIONAL HARROW CO.,
By CHAS. H. CHILDS, *Pres't.*
"EDWARD NORRIS.
"E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

"Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

"Dated this 1st day of April, 1891. EDWARD NORRIS."

which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action.

The first section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defence of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence, and we think when proved it is a valid defence to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the Government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize

others to sell it. As stated by Mr. Justice Nelson, in *Wilson* v. *Rousseau*, 4 How. 646, 674, in speaking of a patent:

"The law has thus impressed upon it all the qualities and characteristics of property for the specified period; and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him, and on his death it passes, with his personal estate, to his legal representatives, and becomes part of the assets."

Again, as stated by Mr. Chief Justice Marshall, in *Grant* v. *Raymond*, 6 Pet. 218, 241:

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our Government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right to their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received:

if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Company* v. *Eureka Specialty Company*, 47 U. S. App. 146, 160, it is stated regarding a patentee:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe* v. *Knap*, 17 Fed. Rep. 204, is not supported by reason or authority."

It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the state inspector of Kentucky as unsafe for illuminating purposes under the statute requiring an inspection and imposing a penalty for

the violation of the statute, and it was held that the enforcement of the statute was within the proper police powers of the State, and that it interfered with no right conferred by the letters patent. *Patterson* v. *Kentucky*, 97 U. S. 501.

There are decisions also in regard to telephone companies operating under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company and could not exercise the franchise of a common carrier of messages with such exceptions to the grant. See *Missouri ex rel. &c.* v. *Bell Telephone Company*, 23 Fed. Rep. 539; *State ex rel. &c.* v. *Delaware &c. Company*, 47 Fed. Rep. 683; and *Delaware & Atlantic &c. Company* v. *Delaware ex rel. &c.*, 3 U. S. App. 30.

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Company* v. *Eureka Specialty Company*, *supra*. Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

The contention that they do not affect interstate commerce, is not correct. We think the licenses do by their terms and by their plain meaning refer to, include and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the State of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addystone Pipe &c. Company* v. *United States*, 175 U. S. 211. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers.

United States v. *E. C. Knight Company*, 156 U. S. 1, does not bear upon the facts herein. That case related to a purchase of stock in manufacturing companies, by reason of which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the States or with foreign nations. It was said by Mr. Chief Justice Fuller, for the court, while

speaking of such manufacture: "Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In these contracts provision is expressly made, not alone for manufacture, but for the sale of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addystone Pipe & Steel Company* v. *United States*, 175 U. S. 211, 238. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. This execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

It is also objected that the agreement of the defendant not

to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others therein contained, which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively, owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they con-

stituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found. Upon the facts found there is no error in the judgment of the Court of Appeals, and it must, therefore, be

Affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE GRAY and MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

MURPHY *v.* UTTER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 388. Argued March 7, 10 1902.—Decided May 19, 1902.

By an act passed in 1887 the territorial legislature of Arizona constituted a Board of Loan Commissioners for the purpose of refunding the territorial indebtedness. In 1890, Congress passed an act approving and confirming the territorial act of 1887, "subject to future territorial legislation." This act was a repetition of the territorial act with a few immaterial changes and an additional section. *Held:* that the territorial act of 1887 was repealed by the act of 1890, and that the Board of Loan Commissioners still continued in existence, notwithstanding that the territorial legislature in 1899 repealed that portion of the act of 1887 constituting such board.

Held, also, that the act of 1890 which declared the territorial act of 1887 to be "subject to future territorial legislation," was intended to authorize such new regulations concerning the funding act as future exigencies

might seem to require; but that it did not authorize the legislature to repeal the Congressional act of 1890.

Held, however, that it recognized the right of the territorial legislature to enact such legislation as should be in furtherance and extension of the main object of the act of 1890, whereby the power of refunding territorial indebtedness might be extended to the indebtedness of counties, municipalities and school districts.

Held, also, that even if the act of 1890 did not operate as a repeal of the territorial act of 1887, it was still a separate and independent act which it was beyond the power of the territorial legislature to repeal, and that the office of Loan Commissioners continued by that act, was not terminated by the repealing act of 1899.

Held, also, that a petition for a mandamus was a "proceeding taken" within the meaning of section 2934 of the Revised Statutes of Arizona, providing that the repeal of a statute does not affect any action or proceeding theretofore taken.

The fact that the members of the Board of Loan Commissioners were changed between the time the petition for a mandamus was filed and the time when a peremptory writ was granted, did not abate the proceeding. The board must be treated as a continuing body without regard to its individual membership, and the individuals constituting the board at the time the peremptory writ is issued may be compelled to obey it.

As it was decided in *Utter* v. *Franklin*, 172 U. S. 416, that it was made the duty of the Loan Commissioners to fund the bonds in question, it was *held* that, if the defendant could be permitted to set up any new defences at all without the leave of this court, it could not set up objections to the validity of bonds, which existed and were known to the Loan Commissioners at the time the original answer was filed, and before the case of *Utter* v. *Franklin* was heard or decided by this court.

This was an appeal by the Loan Commissioners of Arizona from a judgment of the Supreme Court of that Territory rendered March 22, 1901, granting a peremptory writ of mandamus and commanding such Loan Commissioners, upon the tender by plaintiffs of $150,000 bonds of the county of Pima with coupons attached, described in the petition, to issue and deliver to the petitioners refunding bonds of the Territory pursuant to certain acts of Congress.

The facts of the case are substantially as follows: By an act of the legislature of Arizona of February 21, 1883, the county of Pima in that Territory was authorized to issue $200,000 of bonds in aid of the construction of the Arizona Narrow Gauge Railroad Company, to which company the bonds were made payable. The entire issue was declared to be void by this court

in *Lewis* v. *Pima County*, 155 U. S. 54. This decision was pronounced in October, 1894.

Prior to this decision, however, owing to doubts that were entertained as to the validity of bonds issued in aid of railroads, the legislature of Arizona in 1887 and Congress in 1890 passed certain acts authorizing the refunding of territorial bonds, which had been authorized by law, and in compliance with a memorial submitted by the legislature of Arizona, Congress passed a further act in 1896 authorizing the refunding of all outstanding bonds of the Territory, and its municipalities, which had been authorized by legislative enactments, and also confirming and validating the original bonds, which by the first section were authorized to be refunded.

Thereupon, and on December 31, 1896, James L. Utter and Elizabeth B. Voorhies filed the petition involved in this case for a writ of mandamus to compel the Loan Commissioners to issue refunding bonds in exchange for those originally issued by the county of Pima in aid of the Narrow Gauge Railroad Company. Defendants demurred to the petition, and for answer thereto averred that the bonds of Pima County, held by the petitioners, had been declared both by the Supreme Court of the Territory and by this court to be void, and therefore that the petition should be dismissed. They also interposed a plea of *res adjudicata*. The petition being denied by the Supreme Court of Arizona, the relators appealed to this court, which reversed the order of the Supreme Court of the Territory, and remanded the case to that court for further proceedings. *Utter* v. *Franklin*, 172 U. S. 416. This decision was made in January, 1899.

Thereupon, and on June 1, 1899, after the case was remanded to the Supreme Court of Arizona, respondents, by leave of the court, filed an amended return to the effect that the bonds and coupons sought to be refunded were not delivered by any one authorized by Pima County to do so; that the county never acknowledged the validity of the bonds or paid interest thereon; that the railroad, the construction of which the legislature intended to promote, by the issue of the bonds, was never constructed, equipped or operated; that Pima County never re-

ceived any consideration whatever for the bonds; that they had been declared void by this court; that petitioners were not innocent holders of them; that the bonds and coupons were not sold or exchanged in good faith, and in compliance with the act of the legislature by which they were authorized, and that they were not intended to be included, and were not included, in the act of Congress of 1896, or any act or memorial of the legislative assembly of the Territory. The return also set up the statute of limitations; that the personnel of the Loan Commission had been wholly changed; that the act authorizing the employment of Loan Commissioners had been repealed and no longer existed, and numerous defences which had not been made or set up in the original answer or return.

Petitioners thereupon moved to strike the amended return from the files on the ground that the same had been filed without leave of the court, and that under the decision of this court in *Utter* v. *Franklin* no new defences could be considered. The Supreme Court of the Territory, however, overruled the motion and permitted the amended return to be filed, to which ruling petitioners excepted. But instead of applying to this court for a writ of mandamus to carry its mandate into effect, they proceeded with the case in the Supreme Court of the Territory, and filed a reply to the amended return. A referee was appointed, testimony taken and the Supreme Court of the Territory made a finding of facts set out in the record, and awarded a peremptory writ of mandamus directing the refunding of the bonds. From this judgment defendants appealed to this court.

Meantime, however, Elizabeth B. Voorhies, one of the petitioners, had died, and her executors were ordered by this court to be substituted.

Mr. Rochester Ford and *Mr. John G. Carlisle* for appellants.

Mr. John F. Dillon for appellees.

Mr. Justice Brown delivered the opinion of the court.

While upon the former hearing of this case, under the name of *Utter* v. *Franklin*, 172 U. S. 416, the order of the Supreme

Court of Arizona denying a writ of mandamus was reversed and the case remanded for further proceedings, we expressed the opinion "that it was made the duty of the Loan Commissioners by these acts to fund the bonds in question." The logical inference from this was that a writ of mandamus should issue at once. True, the case was argued upon demurrer, but as the demurrer was accompanied by a plea of *res adjudicata*, which was expressly held to be untenable, (page 424,) it is a serious question whether the defendant should have been permitted to set up new defences without the leave of this court. *In re Potts*, 166 U. S. 263, 267; *Ex parte Union Steamboat Co.*, 178 U. S. 317; *Supervisors* v. *Kennicott*, 94 U. S. 498; *New Orleans* v. *Warner*, 180 U. S. 199, 203; *Stewart* v. *Salamon*, 94 U. S. 434; *Gaines* v. *Rugg*, 148 U. S. 228. The reason for such a course applies with special cogency to this case in view of the statute of Arizona, (Rev. Stat. 1887, sec. 734,) declaring that the "defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defence, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time: 1. Matters denying the jurisdiction of the court. 2. Matters in the abatement of a suit. 3. Matters denying the sufficiency of the complaint, or of any cause of action therein, by demurrer, general or special. 4. Matters of counterclaim and set-off."

Of the numerous defences upon the merits set up in the amended return, but two are pressed upon our attention, namely, whether the petition abated by a change of the personnel of the Loan Commission, or by a repeal of the act abolishing the commission altogether.

1. The court was correct in holding that the change in the personnel of the commission did not abate the proceeding, which was not taken against the individuals as such, but in their official capacity as Loan Commissioners. The original petition was entitled and brought by Utter and Voorhies, plaintiffs, against "Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, Loan Commissioners of the Territory of Arizona," and the prayer was for a writ of mandamus requiring the defend-

ants, "acting as the Loan Commissioners of the Territory," to issue the refunding bonds.

The question when a suit against an individual in his official capacity abates by his retirement from office has been discussed in a number of cases in this court, and a distinction taken between applications for a mandamus against the head of a department or bureau for a personal delinquency, and those against a continuing municipal board with a continuing duty, and where the delinquency is that of the board in its corporate capacity. The earliest case is that of *The Secretary* v. *McGarrahan*, 9 Wall. 298, which was a writ of mandamus against Mr. Browning, then Secretary of the Interior, in which it appeared that Mr. Browning had resigned some months before the decision of the court was announced. It was held that the suit abated by his resignation, because he no longer possessed the power to execute the commands of the writ, and that his successor could not be adjudged in default, as the judgment was rendered against him without notice or opportunity to be heard. The same question was more fully considered in *United States* v. *Boutwell*, 17 Wall. 604, in which it was held that a mandamus against the Secretary of the Treasury abated on his death or retirement from office, and that his successor could not be brought in by way of amendment or order of substitution. Said Mr. Justice Strong: "But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant had neglected or refused to perform a personal duty, to the performance of which, by him, the relator has a clear right. . . . It necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long

as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office be substituted, he may be mulcted in costs for the default of his predecessor, without any delinquency of his own." This language has evidently but an imperfect application to a case where the delinquency is not personal but official, and the action is not that of an individual but of a body of men in their collective capacity.

These were followed by *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, wherein a bill in equity against the Secretary of the Interior and the Commissioner of the General Land Office, by their personal names, to restrain them from exercising jurisdiction with respect to the disposition of certain public lands, and to compel the Secretary to issue patents therefor to the plaintiff was held to abate, as to the Secretary, upon his resignation from office, and could not afterwards be maintained against the Commissioner alone.

In *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, it was held that a suit to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner, and cannot be revived so as to bring in his successor, although the latter gives his consent. See also *United States* v. *Chandler*, 122 U. S. 643; *United States* v. *Lamont*, 155 U. S. 303; *United States* v. *Lochren*, 164 U. S. 701.

It was doubtless to meet the difficulties occasioned by these decisions that Congress on February 8, 1899, passed an act, 30 Stat. 822, to prevent the abatement of such actions.

We have held, however, in a number of cases, that if the action be brought against a continuing municipal board it does not abate by a change of personnel. Thus, in *Commisssoners* v. *Sellew*, 99 U. S. 624, which was an application for a mandamus against a board of county commissioners and its individual members to compel them to levy a tax to pay a judgment, it was held that the action would lie, though the terms of the members had expired, and the case of *Boutwell* was distinguished upon the ground that the county commissioners were "a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks

to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone." Said the Chief Justice: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifests itself in *Boutwell's* case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents to perform such duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failing to do what the law requires of them as the representatives of the corporation."

This was followed by *Thompson* v. *United States*, 103 U. S. 480, which was a petition for a mandamus to compel the clerk of a township to certify a judgment obtained by the relator against the township, to the supervisor, in order that the amount thereof might be placed upon the tax roll. It was held that the proceeding did not abate by the resignation of the clerk upon the appointment of his successor; citing *People* v. *Champion*, 16 John. 60, and *People* v. *Collins*, 19 Wend. 56. See also *In re Hollon Parker*, 131 U. S. 221.

We think these cases control the one under consideration and that they are clearly distinguishable from the others. The Loan Commission of Arizona was originally created by an act of the territorial legislature of 1887, Laws of 1887, chap. 31, the first section of which reads as follows:

"2039 (Sec. 1). For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the territorial auditor and territorial secretary, and their successors in office, shall constitute a board of commissioners, to be styled the Loan Commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided."

Congress, by an act approved June 25, 1890, reënacted this statute substantially *verbatim*. 26 Stat. 175. As the members of this commission and their successors in office were constituted a Loan Commission for the express purpose of liquidating and providing for the payment of the outstanding indebtedness of the Territory, and subsequently by the act of Congress of 1896, 29 Stat. 262, of its counties, municipalities and school districts, we think it must be treated as a continuing body, without regard to its individual membership, and that the individuals constituting the board at the time the peremptory writ was issued may be compelled to obey it. As we said in *Thompson's* case, 103 U. S. 480, "the proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment."

It is true the Loan Commissioners were not made a corporation by the act constituting the board, but they were vested with power, and were required to perform a public duty; and, in case of refusal, the performance of such duty may be enforced by mandamus, under section 2335 of the Revised Statutes of Arizona of 1887, which provides that "the writ of mandamus may be issued by the Supreme or District Court to any inferior tribunal, corporation, *board* or person, to compel the performance of an act which the law especially enjoins." As, under the act of Congress, as well as the territorial act, the board was made a continuing body with corporate succession, the fact that it is not made a corporation by name is immaterial.

2. Respondents, however, relied largely upon the fact that as the Loan Commission of Arizona was abolished prior to the judgment of the Supreme Court in this case, there are now no persons upon whom the duty rests to fund the bonds in question, or against whom the writ of mandamus can go. There is no doubt that the legislature of Arizona did on March 13, 1899, pass an act "to abolish the Loan Commission," hereinafter set forth in full. But, in order to determine the effect of such act, it will be necessary to give a synopsis of the prior acts, both territorial and Congressional, upon the same subject.

To meet certain objections that had been raised to the valid-

ity of bonds issued in aid of railroads, (which objections were subsequently sustained by this court in *Lewis* v. *Pima County* 155 U. S. 54,) the legislature of Arizona on March 18, 1887, passed an act consisting of fourteen sections, the first section of which (above cited) constituted the governor, auditor and secretary of the Territory Loan Commissioners of the Territory, for the purpose of providing for the payment of the existing territorial indebtedness of the Territory due, and to become due, and for the purpose of paying and refunding the existing or subsisting *territorial legal* indebtedness, with power to issue negotiable bonds therefor. This power was limited to the *legal* indebtedness of the *Territory* and apparently had no bearing upon the indebtednes of its municipalities—certainly not upon indebtedness which had been illegally contracted.

On June 25, 1890, Congress passed an act, 26 Stat. 175, providing that the above-mentioned funding act of the Territory of Arizona "be, and is hereby, amended so as to read as follows, and that as amended the same is hereby approved and confirmed, *subject to future territorial legislation.*" The first section of this act is an exact copy of the first section of the territorial act of 1887, with an immaterial addition here printed in italics, and reads as follows: "Par. 2039 (Sec. 1). For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona *and such future indebtedness as may be or is now authorized by law*, the governor of the said Territory, together with the territorial auditor and territorial secretary, and their successors in office, shall constitute a board of commissioners, to be styled the Loan Commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided." Then follow thirteen other sections, which are also copies of the corresponding sections of the territorial act, with a few immaterial changes as to the rate of interest, the form of the refunding orders, and the maturity of the bonds, etc., and followed by an additional section, (15,) providing against any further increase of indebtedness with certain exceptions, beyond that limited by a former act.

The first question to be considered is as to the relation of

these two acts. Is the act of Congress to be considered as an amendment or a repeal of the territorial act? It is true the preamble speaks of the territorial act as being amended, and, as amended, approved and confirmed. But the language is not that of an amending act, but that of a repeated and substituted act. No attention is called to the amendments, which are not even introduced in brackets, and a careful reading and comparison of the two acts are required to discover where and how the territorial act is amended. It stands as an original piece of legislation, although its different sections contain the numbers taken from the Revised Statutes of Arizona, as well as from the original act of 1887. Both acts are complete in themselves, and each is, upon its face, independent of the other. It is impossible to say that, if the territorial act were repealed, the act of Congress passed three years later would also fail in consequence thereof, because the latter is not only the later, but the paramount act. They must either stand together as two independent pieces of legislation or the general, and perhaps the sounder, rule stated in *United States* v. *Tynen*, 11 Wall. 88, be applied, that where there are two acts on the same subject, and the later act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first. In that case, the defendant was indicted under an act passed in 1813 for uttering and counterfeiting a certificate of citizenship, purporting to have been issued by a California court. Upon a demurrer being filed to the indictment, the judges differed in opinion, and the case was sent to this court upon a certificate of division. While pending here, in 1870, Congress passed another act, embracing the whole subject of fraud against the naturalization laws, including all the acts mentioned in the law of 1813, and many others. It was held that the act of 1870 operated as a repeal of the act of 1813, and that all criminal proceedings taken under the former act failed; and that even where two acts are not, in express terms, repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended to be a substitute for the first act, it will operate as a repeal of that act—citing a number of prior cases.

We think that case is controlling of the one under consideration, notwithstanding the cases of *Miners' Bank* v. *Iowa*, 12 How. 107, and *Lyons* v. *Woods*, 153 U. S. 661, relied upon by the respondents, which are readily distinguishable. In the first case, the territorial legislature of Wisconsin chartered the Miners' Bank. Afterwards, an act of Congress annulled the charter in certain particulars, but left other provisions in force. Thereafter, the Territory was divided by an act of Congress, and the Territory of Iowa erected over that former part of the Territory of Wisconsin in which the bank was located. Later, the territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. It was held that the annulment of several of the provisions of the bank's charter did not make the charter of the bank a Congressional charter, but that it still remained a creation of the legislature of Wisconsin, and that no Federal question arose from the repeal of that charter by the legislature of Iowa. The case is totally different from the one under consideration, and that of *Lyons* v. *Woods* is equally so. There is a plain distinction between an act of Congress amending a territorial act by adding or striking out particular provisions, and one reënacting it substantially in all its provisions.

We, therefore, are constrained to hold, as did the Supreme Court of the Territory, that the territorial act of 1887 was repealed by the act of Congress of 1890, and that the latter act is still in force.

Returning now to the subsequent legislation, it appears that on March 19, 1891, the Territory passed an act "supplemental to the act of Congress" approved June 25, 1890, and in compliance with the permit given by Congress for future territorial legislation, the first section of which declared that the act of Congress "be, and the same is hereby, now reënacted as of the date of its approval," and enacted that the Loan Commissioners "shall provide" for the funding of the outstanding indebtedness "of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory as authorized by said act;" and also provided

(sec. 7) that "any person holding bonds, warrants, or any other evidence of indebtedness of the Territory, or any county, municipality or school district within the Territory, . . . may exchange the same for the bonds issued under the provisions of this act."

In the following year, and on July 13, 1892, Congress passed another act amending the act of June 25, 1890, in several immaterial particulars, not necessary to be further noticed, and on August 3, 1894, it passed another act amending the act of 1890, also in immaterial particulars.

It seems, however, as stated in *Utter* v. *Franklin*, 172 U. S. 416, 420, that the existing legislation upon the subject was not deemed adequate by the territorial legislature, since in 1895 it adopted a memorial, urging Congress to pass such curative legislation as would protect the holders of all bonds issued under authority of its acts, the validity of which had been acknowledged, and relieve the people from the disastrous effects of repudiation.

In compliance with this memorial, Congress on June 6, 1896, 29 Stat. 262, passed an act extending the provisions of the act of June 25, 1890, and the amendatory act of 1894, the first section of which provided that the above acts "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25, 1890," etc.; provided that such evidences of indebtedness "have been sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized," and also providing that they "*shall be funded* with the interest thereon," etc. The second section provided that all bonds and other evidences of indebtedness heretofore funded by the Loan Commission of Arizona under the act of 1890, "are hereby declared to be valid and legal for the purposes for which they were funded, and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided, until January 1, 1897."

This act was held in *Utter* v. *Franklin* to require the refunding of the bonds involved in the case under consideration. There is no suggestion of any attempt having been made to repeal it. This opinion was pronounced January 3, 1899, and on March 13 of the same year the legislature passed a territorial act abolishing the Loan Commission. This act is in the following language:

"An Act to abolish the Loan Commission and to repeal sundry laws relating thereto.

"*Be it enacted by the Legislative Assembly of the Territory of Arizona.* SECT. 1. That par. 2039, Sect. 1, Chapter one, Title 31, of the Revised Statutes of the Territory of Arizona; also that Sect. 1 of Act No. 79, Session Laws of the 16th Legislative Assembly of the Territory of Arizona, also Act No. 33, and Act No. 74, Session Laws of the 18th Legislative Assembly of the Territory, are hereby repealed."

It will be observed that paragraph 2039, thus repealed, is the first section of the territorial act of 1887, whereby the territorial governor, auditor and secretary were constituted Loan Commissioners; that section 1 of Act No. 79 was the territorial act of March 19, 1891, reënacting the act of Congress of June 25, 1890, which, as before stated, was a substituted copy of the territorial act of 1887. Act No. 33 and Act No. 74 have no bearing upon this case. The former referred only to territorial indebtedness, and the latter merely remedied defects in the records of the Loan Commissioners.

Upon this repealing act being presented to Governor Murphy, one of the defendants, for his approval, he submitted it to the Attorney General for his opinion, and was advised by him that the act was void so far as attempting to abolish the Loan Commission was concerned. He advised the governor that, so far as the bill attempted to repeal section 1 of the territorial act of 1887, it was nugatory, as there was no such section to repeal, Congress having reënacted it and having repealed all acts or parts of acts in conflict with it, and that if it were the intention of the repealing act to repeal the act of 1887 as approved and confirmed by Congress, it was beyond the province

of the territorial legislature to do so. Upon this opinion the governor returned the act without his approval, but the legislature proceeded to pass it over his veto by a two-thirds vote.

Had the territorial statute of 1887 been the sole authority for the appointment of Loan Commissioners, there would be much force in the argument that the repeal of this statute as well as that of 1891, in 1899, terminated their official existence and operated even on pending cases, *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Ex parte McCardle*, 7 Wall. 506; *In re Hall*, 167 U. S. 38; but, as we have already indicated, we think the Congressional act of 1890 had already operated as a repeal of that act. Unless we are to take the position that the repeal of a territorial act operates as a repeal of an act of Congress covering the same subject, it is impossible to deny that the Congressional act of 1890 is still in force. Had the latter been a mere amendment of the territorial act, the result would have been different, and a repeal of the original operated as a repeal of the Congressional amendment.

It is true that the preamble of the act of 1890 declares that the funding territorial act of 1887 "is hereby amended," and "as amended the same is hereby approved and confirmed, *subject to future territorial legislation*," and it is insisted that, under this power to amend, it was competent for the territorial legislature to repeal the act altogether, and that such repeal would operate also to repeal the Congressional act of 1890. That, as the legislature, before the approval by Congress of the act of 1887, had the undoubted power to abolish the commission which it had created, and as the act of 1887 was declared by Congress to be "subject to future territorial legislation," it had the power to do after the act of 1890 whatever it might have done before. But we think this is giving to the words "subject to future territorial legislation" too broad a scope. It was doubtless intended by these words to give to the territorial legislature power to make such new regulations concerning the funding act as future exigencies might seem to require. This power was properly exercised in the territorial act of March 19, 1891. Congress itself exercised the same power of amendment by its acts of July 13, 1892, August 3, 1894, and

June 6, 1896. While we held in the recent case of *Schuerman* v. *Arizona*, 184 U. S. 342, that the territorial statute of 1887 was the foundation for the appointment of the Loan Commissioners, and that their authority must be exercised in the manner prescribed by the territorial laws, it by no means follows that it was within the contemplation of Congress to authorize the legislature to repeal the act of 1890 under which their existence was continued. It was entirely reasonable to assume that the territorial legislature might wish to extend the power of refunding the bonds to those issued by its own municipalities, as well as by itself, as it did by the act of March 19, 1891, but it is inconceivable that, after having passed a complete and independent act of its own for the refunding of territorial bonds, Congress should authorize a territorial legislature to repeal it. While the territorial and Congressional legislation, subsequent to the act of Congress of June 25, 1890, has but little bearing upon the question now in controversy in this case, it indicates plainly that, under the power given for future territorial legislation, it was contemplated that such legislation should be in furtherance and extension of the main object of the act of 1890, whereby the power of refunding territorial indebtedness should be extended to the indebtedness of counties, municipalities and school districts of the Territory, and that it could not have been contemplated that power should be given to the territorial legislature to abolish the whole system without the consent of Congress.

The result is that, even if we are mistaken in saying that the Congressional act of 1890 operated as a repeal of the territorial act of 1887, it is still a separate and independent act which it was beyond the territorial legislature to repeal, and that the office of Loan Commissioners, continued by the act, was not terminated by the repeal of 1899.

But in addition to this, there is a saving clause in the Revised Statutes of Arizona of 1887, which provides as follows:

"2934, (Sec. 7). The repeal or abrogation of any statute, law or rule does not revive any former statute, law or rule theretofore repealed or abrogated, nor does it affect any right then already existing or accrued at the time of such repeal, or any

action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby."

It may admit of some doubt whether the petitioners had obtained any such "right" at the time of the repealing act of 1899, as could be said to be then "existing or accrued," and thereby saved by this section, inasmuch as they had obtained no judgment upon the refunding bonds before applying for a writ of mandamus, as was the case in *Memphis* v. *United States*, 97 U. S. 293, although, it is true, they had obtained the opinion of this court that such bonds should issue.

But without expressing an opinion upon this point, we think that the petition for this mandamus was a "proceeding theretofore taken" within the meaning of the saving clause of section 2934, and that the right of the petitioners was saved thereby, even if it be conceded that the Loan Commission had been abolished. In the case of *Memphis* v. *United States*, already alluded to, it was said that "when the alternative writ of mandamus was issued March 22, 1875, a proceeding was commenced under or by virtue of the statute." The defendants insist that the action or proceeding must have resulted in a judgment prior to the repealing statute, in order that the rights should be saved by section 2934. This, however, confounds the distinction between a "right" already "existing or accrued" and an "action or proceeding theretofore taken," since, if the proceeding had culminated in a judgment, the latter clause would be superfluous, and the judgment would be saved by the former clause with respect to a right already existing or accrued. Every word or clause used in a statute is presumed to have a meaning of its own, independent of other clauses, and if a statute preserve not only rights but proceedings it will be presumed that the legislature intended to save both classes, and to give to "proceeding taken" a broader meaning than would be indicated by the words "right existing or accrued."

3. The only remaining questions urged against the issue of a mandamus in this case is that these bonds do not come within the provisions of the act of June 6, 1896, for the reason that the Arizona legislature, finding that an attempt was being made

to include the bonds in question in that act, adopted certain memorials in 1897 and 1899 urging the President to veto the act of Congress legalizing the bonds, and urging upon Congress to pass such legislation as would exclude from the provisions of the act of June 6, 1896, the bonds issued by Pima County to the Arizona Narrow Gauge Railroad Company, so that the act should not be so construed as to validate these bonds. These memorials, however, seem to have been unsuccessful. No interest, however, was paid upon the bonds, and it was shown by the findings of fact that the present owners, Coler & Company, bought them as they matured with notice that the first coupons had been protested, and that the bonds had been repudiated by Pima County from the start. The court below, however, made a finding of fact from which it appeared that the original bonds of Pima County were issued in literal compliance with an act of the Territory of Arizona, approved February 21, 1883, in exchange for bonds of the Narrow Gauge Railroad Company. It is true that the county of Pima derived little or no benefit from the building of the few miles of railroad, but, as was said by the Supreme Court, "there was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company or its contractor, Walker and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done, and did not have the resources to go on and complete the work. Can the court say that, notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the county of Pima thereby received no benefit from the same. The question of a failure of consideration is to be dis-

tinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor, showing that each five miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, has validated the territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial, but a literal, compliance, as well, with the requirements of the act under which they were issued."

But a further answer to these objections to the validity of the bonds is that all the facts upon which these objections are founded existed and were known to the Loan Commissioners at the time the original answer was filed and before the case of *Utter* v. *Franklin* was heard or decided by this court, and should have been then set up as a defence upon the merits.

Upon the whole case we are of opinion that the judgment of the Supreme Court of Arizona, ordering a peremptory mandamus to issue to the present Loan Commissioners, was right, and it is therefore

Affirmed.

Mr. Justice Gray did not sit in this case and took no part in its decision.

BEYER *v.* LEFEVRE.

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

No. 237. Argued April 25, 28, 1902.—Decided May 19, 1902.

The agreement of parties to submit questions to a jury, the trial there, and a stipulation for returning the testimony for consideration is a waiver of objection to jurisdiction.

When the trial court and the appellate court agree as to the facts established, this court accepts their conclusion.

Under the facts in this case the jury were not warranted in finding that the execution of the will was procured by fraud or undue influence.

It is the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory, is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence.

THIS was a bill filed in the Supreme Court of this District on April 7, 1899, to set aside the following will:

"In the name of God, Amen.

"I Mary Beyer of the city and county of Washington and District of Columbia being now of sound and disposing mind, do make, ordain, publish and declare this to be my last will and testament: That is to say, first after all my lawful debts are paid and discharged the residue of my estate, real and personal I give, devise, bequeath, and dispose of as follows: to wit all the furniture and personal effects now in the home, number 2258 Brightwood avenue I desire to remain there during the life of my husband Louis Beyer or so long as it remains the family home and in the event of the house not being retained as a family home then the furniture and all other personal effects belonging to me are to go to and belong to my nephew and adopted son born Charles Lewis Smith but adopted by me at birth and thereafter always called Louis Beyer, Junior.

"To my sister Elizabeth Kersinski Maus of Philadelphia Pa. I leave five dollars.

"To my sister Caroline Kersinski LeFevre of Brookland D. C. I leave five dollars.

"To my niece Helen J. Fenton of Washington, D. C., I leave five dollars.

"All the rest and residue of my estate, real, personal and mixed, of which I may die seized or possessed, whatsoever and wheresoever, of what kind, nature and quality soever the same may be, and not hereinabove given or disposed of, I hereby give, devise and bequeath, unto my nephew and adopted son, Louis Beyer, Junior, and Helen B. Johnson my niece in equal shares, as tenants in common and not as joint tenants, their heirs and assigns, absolutely and forever.

"Having full faith and confidence in the honesty, integrity and affection of my said adopted son and of my said niece, I leave them all the property stated herein knowing that they will provide a home and home comforts for Louis Beyer, Senior during his natural life but this is not to be construed to mean that said Louis Beyer, Junior and Helen B. Johnson are to be restricted from disposing of any or all of the property if their judgment so dictates but in the event of disposing of all of the property before the death of Louis Beyer, Senior they are to always maintain a home and home comforts for my beloved husband, Louis Beyer, Senior.

"Likewise I make, constitute, and appoint, my adopted son born Charles Lewis Smith but always known as Louis Beyer, Junior to be executor of this my last will and testament, hereby revoking all former wills made by me and I request that he be not required to give bond as such executor.

"In witness whereof I have hereunto set my hand, subscribed my name and affixed my seal this fourteenth day of July in the year of our Lord one thousand eight hundred and ninety-six in my home at Washington, D. C.

"MARY BEYER. [SEAL.]

"The above-written instrument was subscribed by the said Mary Beyer in our presence and acknowledged by her to each of us, and she at the same time published and declared the above instrument so subscribed to be her last will and testament, and we at the testator's request and in her presence and in the presence of each other have signed our names as wit-

nesses hereto and written opposite our names our respective places of residence.

"P. J. Brennan,
"1418 F St. N. W., Washington, D. C.
"Wade H. Atkinson,
"707 12th St. N. W., Washington, D. C.
"Thomas C. Smith,
"1133 12th St. N. W., Washington, D. C."

The parties named as defendants were Louis Beyer, the husband of the testatrix; Louis Beyer, Junior, a nephew; Helen B. Johnson, a niece; Louis Beyer, Junior, as executor, and Meyer Cohen and Adolph G. Wolf, trustees in a deed of trust executed by the husband of the testatrix on May 13, 1897. The ground of attack was the alleged mental incapacity of the testatrix and undue influence on the part of Louis Beyer, Junior, and Helen B. Johnson. The personal property belonging to the testatrix was of little value, but she owned certain real estate, subject to a trust deed, which in the bill was alleged to be of the value of $25,000 over and above the incumbrance. Louis Beyer, Junior, and Helen B. Johnson, answering separately, denied mental unsoundness and undue influence; alleged that the will was duly executed, and challenged the jurisdiction of the court, sitting as a court of equity, to entertain the bill. The trustees pleaded that the bill stated nothing entitling the complainant to relief in equity, and averred that their deed of trust was a valid lien. Louis Beyer demurred generally. On June 20, the court having made no ruling upon the question of jurisdiction, the parties signed this stipulation:

"It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the Circuit Court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal as in cases of issues from the orphans' court being hereby reserved."

And thereupon the court made this order:

Statement of the Case.

"Ordered by the court this 20th day of June, 1899, (the parties to this cause consenting hereto,) that the following issues to be tried by a jury be, and they hereby are, certified to the Circuit Court to wit:

"First. Was the said Mary Beyer at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will and testament, of sound and disposing mind, memory and understanding and capable of executing a valid deed or contract?

"Second. Was the execution of the said paper-writing bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention or undue influence practiced or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them or by any other person?

"Third. Were the contents of the paper-writing bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?"

This order was assented to by all the parties. In pursuance thereof the case came on for trial before Mr. Justice Cole and a jury, and the jury, after hearing the testimony and the instructions of the court, answered each of the questions in the affirmative. A motion for a new trial was overruled by the presiding judge. A stipulation was entered into by the parties that the full report of the testimony and proceedings had before Mr. Justice Cole and the jury should be produced, read and heard by the equity court as a part of the record on the hearing in that court and in the appellate court to which the cause might be carried by either or any of the parties. Thereupon a full report of the proceedings was presented to Mr. Justice Barnard, holding the equity court, who, on May 14, 1900, filed an opinion sustaining the verdict of the jury, and directing a decree in accordance with the prayers of the bill. From that decree Louis Beyer, Louis Beyer, Junior, and Helen B. Johnson appealed to the Court of Appeals. On December 6, 1900, the Court of Appeals affirmed the decree. From that decree Louis Beyer, a severance being had, appealed to this court.

Mr. Henry E. Davis and *Mr. Franklin H. Mackey* for appellant.

Mr. Clayton E. Ewing and *Mr. Charles Poe* for appellee.

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

The appellant contends, first, that the Supreme Court of the District, sitting as a court of equity, had no jurisdiction of this cause; second, that the verdict of the jury was not sustained by the evidence; and, third, that there was duress and coercion of the jury by the court, which resulted in an unjust verdict.

We pass the first question with the observation that, whatever might have been the conclusion if the defendants had stood upon their challenge of the jurisdiction, the agreement of the parties to submit certain questions to a jury, the trial before the jury and the stipulation for returning the testimony there taken to the equity court for consideration by the judge thereof, must be held a waiver of the objection to the jurisdiction. Under the Federal system the same judge may preside whether the court is sitting in equity or as a common law court. While the pleadings and procedure are dissimilar and the rights of the parties, especially in respect to juries, are different, yet in many cases a party who appears in one branch of the court and consents to a hearing and adjudication, according to the practice there prevailing, of an issue presented by the pleadings and in respect to a subject-matter, which is within the general scope of its jurisdiction, may be estopped from thereafter and in an appellate court challenging such jurisdiction. *Reynes* v. *Dumont*, 130 U. S. 354, 395. This is such a case. The determination of the title to real estate is within the scope of the general jurisdiction of a court of equity. The issue of undue influence in respect to any transaction such a court is competent to determine. The proceeding consented to, and in fact had, was practically the trial of a feigned issue out of chancery. It is too late now to raise the question of jurisdiction.

Passing to the second question, we premise by saying that

it is well settled that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion and not attempt to weigh conflicting testimony. *Stuart* v. *Hayden*, 169 U. S. 1, 14, and authorities cited in the opinion. And this rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts are found by a master or a jury. *Furrer* v. *Ferris*, 145 U. S. 132, and cases cited in the opinion. These propositions we have often affirmed. At the same time there has always been recognized the right and the duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a reexamination. And after having carefully examined the record in this case we are constrained to the conclusion that there is no testimony which justified the answer returned to the second question. On the contrary, if a will is set aside upon such a flimsy showing as was made of undue influence, few wills can hope to stand.

The facts are these: The testatrix was a woman sixty-five years of age; had been married forty-five years, but was childless; her relations with her husband and sisters were pleasant; her near relatives were two sisters, Caroline LeFevre, the present appellee, and Mrs. Maus, the mother of Helen B. Johnson. Another sister had died many years ago, leaving two children, Charles Lewis Smith (known in the record as Louis Beyer, Junior) and Helen C. Fenton. Louis Beyer, Junior, while a little child, and on the death of his mother, was taken by the testatrix and brought up as her son. There does not appear to have been any formal adoption, but he went by the name of Louis Beyer, Junior, and was recognized and treated as her son. He was twenty-seven years old at the time of her death. Helen B. Johnson was, as stated, the daughter of Mrs. Maus, a sister of testatrix. She, too, lived with the testatrix the most of her life, although it does not appear that she had been recognized as a daughter. The testatrix died of cancer in the abdomen. The first indications of trouble were in December, 1893, though at that time the appearances were of an ordinary

case of indigestion, and the fact that it was cancer was not developed until some time in the early part of 1896, the year in which she died. In the month of June of that year she went on a visit to the home of Helen Johnson's mother-in-law, twelve miles south of Richmond. She returned about the first of July, was about the house for a week or so after her return, and then took to her bed, dying on July 26. When spoken to, at different times prior to her visit to Richmond, about making a will she had declined, saying she intended the property should go to her husband; but being advised, either before or after her visit to Richmond, that in case she died without a will the property would go to her sisters and their descendants, she decided to have a will made, and so informed Louis Beyer, Junior, on Sunday, July 12; she also inquired if a will made on Sunday was valid, and was told by him, after an examination of a cyclopaedia, that it would be. He suggested an attorney living near, to whom she objected, whereupon he proposed to call in Mr. Brennan, who occupied an office in the same building in which he was employed. This was satisfactory. Mr. Brennan was sent for. Witnesses were asked to attend, among them her regular physician. Mr. Brennan came in the afternoon, found her lying in bed, received instructions from her how she wanted the will drawn, and wrote it then and there. It was thereafter read to her, signed and acknowledged by her in the presence of himself, the regular physician, and a Mr. Sullivan, and signed by them as witnesses. That will was similar to the one finally executed, except that it devised the property to Louis Beyer, Junior, alone. Mr. Brennan took the will to his office. On examination he found that he had left out the word "heirs," so that, as he thought, only a life estate would pass to the devisee, and on Monday prepared a new will, exactly like the one which had been executed, with the addition of the word "heirs." He called on the testatrix and explained the change he had made; she then said that, inasmuch as there had to be a new will executed, she would like to have Mrs. Johnson included with Louis Beyer, Junior. Whereupon Mr. Brennan went to his office and wrote a will the third time, and on Tuesday went back to the house, and there it was executed.

That is the will in dispute. It was taken by him to his office and kept in his hands until after her death. That the contents of this will were known to her at the time of its execution, and that she was "of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract," were found by the jury, and were abundantly proved by the testimony, among the witnesses thereto being her regular physician, the minister who visited her, the lawyer who drafted the will, and others wholly disinterested.

Before noticing what is claimed to be evidence of undue influence, we remark that the will was not an unnatural one for the testatrix to make. As long as she supposed her husband would inherit the real estate, she declined to make any. She meant that he should have the benefit of the property. She found, however, that it was necessary for her to make a will in order to secure this result. He was an old man, and in the natural course of events could not be expected to live many years. It is not strange that, with the utmost affection for her sisters, she should prefer that, after he had had the enjoyment of her property, it should go to the nephew and niece who had made their home with her, who had been brought up by her, and one of whom, at least, was regarded as an adopted child. So she makes a will vesting the fee in them, but charged with the duty of furnishing a home to her husband as long as he lived, and relying upon their affection to give to him the comforts of a home such as they all had had together in the past. While she gave them the power of alienation, she coupled with it the proviso that whatever was done with this property they should still secure a home to him during his lifetime. She trusted much to their affection, but is this singular considering the length of time they had been members of her family and that which she must have known to be the relation subsisting between them and him? Yet she did not leave provision for her husband entirely to their affection. She directed in terms that such provision should be made, and she doubtless believed that that direction would be binding, and it was binding. It was in the nature of a precatory trust, and so expressed as to be obligatory upon the devisees and enforcible in the courts. *Colton* v. *Colton*,

127 U. S. 300. It is no ground of criticism that others might have made a different will. That she did not give the fee to her husband, but to her adopted son and niece, burdened with this precatory trust, may have been owing to a fact which is, at least, suggested by the testimony, that her husband was visionary, and she feared might waste his property in developing some of his supposed inventions. That she was justified in placing confidence in the affection of the devisees for her husband is shown by the fact that they conveyed to him a large portion of the property upon hearing that he was dissatified with the contents of the will. It is true that some time thereafter, owing to his contemplated marriage, the pleasant relations between him and them seem to have ceased, but this unfortunate condition does not prove that the testatrix did not at the time have good reason to trust in their affection for him.

Turning now to the testimony offered to show undue influence, it comes from two witnesses, Mrs. Stone, the daughter of the appellee, and Fanny Perry, a colored servant in the house of the testatrix. Mrs. Stone's testimony is mainly concerning the condition of the testatrix during her last sickness, and had a tendency to show that she was in a drowsy condition, if not unconscious, during the last fourteen days of her life, though as she was at the house of the testatrix only every other day, and then for but a few minutes at a time, her testimony was properly considered by the jury as of no great significance and overborne by that of the physician and other witnesses. She does testify to one thing in reference to Mrs. Johnson, which will be considered hereafter. The only other witness, and the one upon whom the appellee substantially relies, is Fanny Perry, the servant. Now, in respect to her testimony, and indeed all the testimony in the case, it must be observed that there is not a syllable tending to show that Louis Beyer, Junior, ever urged the testatrix to make a will, ever suggested or spoke to her in respect to the matter, and that all the connection he had with it was in response to requests to ascertain what would be the disposition of the property without a will, the validity of a will made on Sunday, and in suggesting the name of a lawyer to prepare the will and asking him to come. Now, to find that

the will was obtained by undue influence on his part, when there is not the slightest syllable tending to show that he ever said or did a thing toward securing the execution of the will except at her request, is a proposition which cannot for one moment be entertained. With this must also be remembered that the will which was first drawn, the one executed on Sunday, made him the sole devisee, and that it was intended by the testatrix to vest the property absolutely in him, so as to deprive the appellee and other of her relatives of any interest in the property. That it did not have that effect was owing to a mistake of the scrivener in omitting the word "heirs," a mistake which, when discovered by him, he proceeded promptly to correct, and only when the corrected will was presented to her did she authorize a change so as to include Mrs. Johnson. Suppose it were true that Mrs. Johnson did after the first will by her importunity persuade the testatrix to include her as a devisee, the change wrought no prejudice to the interests of the appellee. It took away nothing from her. It only added a new devisee, and that not the appellee—another one to share in the property.

But now, let us see what is the testimony which is claimed to show that Mrs. Johnson exercised undue influence. Mrs. Stone testified that she boarded with the testatrix for a couple of years, (and that was a year or two before the death of testatrix,) and that during that time, when Mrs. Johnson seemed displeased at something, she heard the testatrix say that "it was because she did not make a will and she never intended to make a will." Fanny Perry testified that she lived with the testatrix about three years prior to her death; that Mrs. Stone called at the house on the Sunday when the first will was executed, and she heard Mrs. Johnson say to Louis Beyer, Junior, "you go down stairs, and after you get the wagon hitched up take Mrs. Stone around to the Christian Endeavor encampment first, and then take her home; if she knows what is going on here she won't leave here to-night unless she gets a share in the profits;" that she had heard Mrs. Johnson ask the testatrix to make a will, but the testatrix refused, saying that she would leave everything to Mr. Beyer just as it was, and for them to

stay with him and treat him right, and when he died he would do right by them. To which Mrs. Johnson replied: "This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I'll get for doing it;" that after the testatrix had taken to her bed she asked her to make a will, but she said she would not, but would leave the property to her husband, to which Mrs. Johnson said: "Yes, you will leave it to him, and he will sink it in a boat or rum mill;" and the testatrix replied: "Nellie, how can you talk about your uncle like that?" and also, "Nellie, you are harassing me to death." Whereupon Mrs. Johnson said she would go if the will was not made, and the testatrix replied: "You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it."

We put out of consideration the fact that Mrs. Johnson contradicts the witness and denies ever having urged the testatrix to make a will in her behalf or to make a will at all, and inquire whether, giving the fullest weight to this testimony, it warrants a finding that the execution of this will was secured by undue influence. We are clear that it does not. The conversations which the witness states were had while the testatrix was about the house and attending to her ordinary duties were conversations which might naturally be had between one brought up in the family, as Mrs. Johnson was, and one who had been to her as a mother. It would not be strange that having lived all her life in the family she felt that there was something due to her in respect to the disposition of the property. It will be remembered that it is not influence, but undue influence, that is charged, and is necessary to overthrow a will. The question No. 2 puts in the same category fraud, circumvention and undue influence. Placing undue influence along with fraud and circumvention interprets the character of the influence. *Noscitur a sociis.* Surely there is nothing in these conversations which has in it anything suggestive of fraud or circumvention, nothing wrongful or misleading.

With reference to the last conversation detailed by the witness, that which took place after the testatrix had taken to her

bed, it may be conceded that there is a display of urgency and petulance on the part of Mrs. Johnson and a rebuke on the part of the testatrix, but is there enough in it to justify a finding that the will was procured by undue influence? May not one situated as was Mrs. Johnson properly plead her claims for recognition in a will? May she not give her reasons why a will should be made and why property should not be left to a particular person without being subject to the charge of exerting undue influence? The only threat made by her was that she would go if the will was not made. We do not, of course, approve of such importunity to a sick person, and it may often be carried to such an extent that a jury is justified in finding that a will was executed in pursuance of it, and through undue influence, but these significant facts must be borne in mind in respect to this case: The witness, Fanny Perry, does not locate the time of this conversation, whether before the first will was executed or after. If before, plainly it had no effect upon the testatrix, for she made a will giving the property to her adopted son and leaving Mrs. Johnson out all together. If after, while it may have had the effect of causing the insertion of Mrs. Johnson's name in the second, such change wrought no injury to the rights of the appellee. If the testatrix had made up her mind to give her property to an adopted child with a precatory trust in behalf of her husband, then any change made in the devisees, as the result of whatever importunity, was a change which wrought no prejudice to the parties who were not named in either will.

We are clearly of the opinion that the jury were not under the circumstances of this case warranted in finding that the execution of the will was procured by fraud, circumvention or undue influence practised or exercised upon the testatrix.

One who is familiar with the volume of ligitation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish

it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.

The decrees of the Court of Appeals and of the Supreme Court of the District are reversed and the case remanded to the latter court, with instructions to set aside the decree in favor of the appellee, and for further proceedings in conformity to this opinion.

MR. JUSTICE HARLAN and MR. JUSTICE GRAY did not hear the argument and took no part in the decision of this case.

FELSENHELD *v.* UNITED STATES.

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

No. 205. Argued April 7, 8, 1902.—Decided May 19, 1902.

It is within the power of Congress to prescribe that a package of any article which it subjects to a tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

The coupons described in the statement of facts are within the prohibitions of the act of July 24, 1897, 30 Stat. 151.

Neither question three or question four presents a distinct point or proposition of law, and, as each invites the court to search the entire record, the court declines to answer them.

THIS was a proceeding commenced in the Circuit Court of the United States for the District of West Virginia, seeking a forfeiture of certain tobacco. Attachment and monition were duly issued. The case was submitted upon an agreed statement of facts, and a judgment of forfeiture was entered. Whereupon the case was taken on error to the Circuit Court of Appeals for the Fourth Circuit, which certified four questions.

Statement of the Case.

The facts as found in the agreed statement are these: At times a practice prevailed among manufacturers of tobacco of placing in their packages of tobacco other articles of intrinsic value, such as penknives, etc. On November 4, 1891, the Commissioner of Internal Revenue issued this circular:

"Manufacturers of tobacco, in marking the gross, tare and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by the collectors to prevent foreign articles of any kind being included in any of the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else."

On July 24, 1897, Congress passed what is known as the Dingley Bill. 30 Stat. 151, c. 11. The third clause of the tenth section thereof amended section 3394 of the Revised Statutes so as to read:

"None of the packages of smoking tobacco or fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws; nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward."

On the 23d day of September, in the year 1898, at the city of Wheeling, in the district aforesaid, the internal revenue collector of the United States seized 1440 packages of chewing and smoking tobacco known by the name and brand of Merry World tobacco, weighing one and two thirds ounces to the

package, and having a total weight of 150 pounds, and afterwards, on the 5th day of April, in the year 1899, J. K. Thompson, the marshal of the United States for the said district of West Virginia, in pursuance of the attachment and monition appearing in the record, took into his possession the said 1440 packages of tobacco, and now holds the same in his possession.

At the time of the seizure by the collector there was in each of the packages a small slip of paper called a coupon, with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale. These coupons were all alike, and on each of them were the following words and figures, that is to say, upon one side thereof the following words and figures:

"*Merry World Tobacco Coupon.*

"With the tobacco packed herewith the purchaser has bought a definite share in any of the articles mentioned on the other side of this voucher.

"We will send you postpaid any or all of the articles listed on the other side for the number of coupons as stated.

"Mail these coupons to the Merry World Tobacco Co., Wheeling, W. Va., stating number of coupons sent, articles wanted, your name, street and number, city or town, county and State."

And on the other side the following words and figures:

"Will send you postpaid for 20 coupons, 1 picture, 14×28, handsome water-color fac-simile, 12 subjects.

"30 coupons, 1 picture, 20×24, fine pastel fac-simile, 12 subjects.

"40 coupons, 1 picture, 20×30, beautiful Venetian scenes, 4 subjects.

"50 coupons, 1 picture, 22×28, elegant water-color gravures, 2 subjects.

"60 coupons, 1 picture, 22×28, magnificent water-color gravures, 4 subjects.

"No advertising or lettering on any of the above. Such excellent works of art have never before been offered, except

through dealers, at very high prices. They are suitable decorations for the most elegant home, and to be appreciated must be seen. See descriptive catalogue mailed on application. Order by subjects.

"20 coupons, 1 book of Popular Seaside Library, 300 titles by favorite authors.

"50 coupons, 1 cloth-bound book, 160 titles by eminent authors. Catalogues of our books mailed on application.

"25 coupons, 1 scarf-pin solid sterling silver.

"25 coupons, 1 pipe, genuine French briar.

"40 coupons, 1 rubber tobacco pouch, self-closing.

"75 coupons, 1 elegant pocketbook, finest quality leather, gent's or ladies.'

"70 coupons, 1 pocket-knife, first quality, American manufacture, razor steel hand forged, finely tempered blades. Stag handle. Your choice between jack-knife or pen-knife.

"95 coupons, 1 fine razor, highest grade steel, hollow ground.

"40 coupons, 1 bicycle lock, nickeled, gent's sprocket or lady's with chain.

"150 coupons, 1 cyclometer, 1000 miles repeating. In ordering state size of wheel.

"550 coupons, 1 excellent open-face watch. Guaranteed without qualification. Has all improvements up to date. It will wear and perform well for a lifetime if only ordinarily cared for.

"Illustrated catalogue for the above mailed upon application."

This coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself, and has upon it no picture of any kind and does not affect, in any way, the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax. The value of the five cases of tobacco of 288 packages each is and was when they were seized as aforesaid fifty-four dollars ($54.00). The packages were owned by Emanuel Felsenheld, who at the proper time intervened and claimed the property.

The following are the questions certified by the Court of Appeals :

"First. Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States?

"Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition?

"Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?

"Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes?"

Mr. Henry M. Russell and *Mr. John De Witt Warner* for plaintiff in error.

Mr. Charles J. Faulkner and *Mr. Assistant Attorney General Beck* for defendant in error.

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

The first two questions may be considered together. There can be no doubt that the coupon comes within the letter of the statute. That prohibits packing in, attaching to or connecting with the package "any article or thing whatsoever" other than certain specified labels and stamps. If Congress intended excluding from the package absolutely everything not named, it used the words to express that intent, and could not have used any more strongly indicative of it. "Any article or thing whatsoever" is a descriptive clause as broad and comprehensive as could be selected, and since that clause is used, followed by an express exception, the coupon must come within the exception or else it falls within the comprehensive clause. The debatable question arises upon the fact stated in the agreement

that the coupon is printed on thin paper of inappreciable weight, without intrinsic value, and does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax. There seems to have been a discussion in the internal revenue department whether Congress could rightfully prevent the insertion in the package of an article whose presence in no way affected the collection of the internal revenue tax, and therefore on the theory that Congress could not have intended an unconstitutional provision, whether the act should be construed as including such an article.

In the internal revenue legislation Congress has not simply prescribed that certain articles shall pay a tax, but has provided a series of rules and regulations for the manufacture and sale of such articles, including therein directions as to the size and form of packages, and such other matters as in its best judgment were necessary or advisable for the purposes of effectually securing the payment of the tax imposed. Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that the only matter in which the National Government is concerned is the tax; that it is in no manner responsible for what goes into the commercial world covered by its stamp; that it has no police power, no duty of caring for the health or safety of citizens or others who buy articles upon which its stamp is placed; that it does not guarantee either quantity or quality, and, in short, that its power is limited to such provisions as are essential or helpful in the collection of the tax.

It may be conceded that the Government's stamp is not a guaranty of quantity or quality, and that no responsibility attaches to it, although the manufacturer puts into the packages less than the specified quantity of goods or goods of inferior quality. But does it follow that the Government has no power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles and only the arti-

cles which it purports to tax and which its stamp certifies that it has taxed? Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the Government take the money, affix its stamp, and thus in effect certify that the contents are that which it has imposed a tax upon? Manufactured goods are not necessarily sold in this country, but may be shipped to other countries and sold there, and can it be that the stamp of this Government is absolutely worthless as an assurance that that which is within the package is the article which the Government purports to have taxed? It is one thing to say that the Government's stamp is not a guarantee of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting something which is not that which is stamped, but it is a very different thing to hold that the Government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. Whatever courts may rule as to the constitutional limits of the power of Congress the great majority of people here and elsewhere will believe in and rely upon the truthfulness of a certificate made by the Government, and will be shocked to be told that it means nothing to them, but only money to the Government.

It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be either expressly or by implication an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute and the

courts may not draw a line between the foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold in reference to a particular package the act valid if the size or weight is appreciable and invalid if it is not.

Among the regulations prescribed by Congress in its internal revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3392) that cigars shall be put up in boxes containing twenty-five, fifty, one hundred, two hundred and fifty, or five hundred each. There is no special efficacy in either of these numbers. Boxes containing fifteen, thirty or sixty cigars would apparently afford just the same facilities for taxation, and yet can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may for purposes of uniformity compel compliance with the rule. So, if it should prescribe that at least nine tenths of every package, purporting to be a package of a particular kind of tobacco, and subject to a special tax, should be that particular kind of tobacco, would the manufacturer be permitted to make one third of the contents of some other kind of tobacco or any other substance? The proportion might be arbitrarily selected, it is true, but is it not clearly within the power of Congress in its regulations to make such arbitrary selection? And if it may say that not less than nine tenths of the contents shall be that particular tobacco, the subject of the tax, is it any the less within the power of Congress to prescribe that there shall be nothing in the package save that tobacco?

Indeed, the admission that the Government may require that the contents of a package shall be partly of the goods which it taxes is a concession that it may also require the entire contents to be such goods.

There is in this statute no trespass upon the manufacturer's right to fully advertise his goods or to offer with the utmost freedom inducements for their purchase. He can put into the

box in which he ships his packages all the advertising material he sees fit. That which is required is that each separate package shall be in its entirety a package of tobacco, and only tobacco. Beyond that the manner in which he shall sell, or the advertisement he shall make of his tobacco after the tax has been paid, and the packages have been stamped, is a matter for him to determine.

We are of opinion that it is within the power of Congress to prescribe that a package of any article which it subjects to a tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

Questions three and four do not come within the rules respecting the certification of questions by the Court of Appeals. Those rules were thus stated by the present Chief Justice in *United States* v. *Union Pacific Railway Company*, 168 U. S. 505, 512:

"It is settled that the certification provided for in sections five and six of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes. *Columbus Watch Company* v. *Robbins*, 148 U. S. 266; *Maynard* v. *Hecht*, 151 U. S. 324; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60.

"By those rules, as repeated in these cases from prior decisions, 'each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions.' *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510."

Neither of these questions presents a distinct point or proposition of law. Each invites us to search the entire record, and in effect determine whether the judgment of the District Court

should be affirmed or reversed. But as settled in the cases referred to in the last quotation, the Court of Appeals cannot thus send up a whole case for consideration and disposition.

We, therefore, answer the second question by saying that the coupons described are within the prohibition of the statute; the first, that the statute so construed is not in conflict with the Constitution of the United States. The third and fourth we decline to answer.

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

MR. JUSTICE PECKHAM dissented.

BOWKER *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 247. Argued April 30, May 1, 1902.—Decided May 19, 1902.

Cases in which the jurisdiction of the District or Circuit Courts of the United States is in issue, can only be brought directly to this court after final judgment on the whole case.

When a libel and cross-libel are filed in admiralty, they should be heard together, and if the cross-libel is dismissed for want of jurisdiction before the whole case is heard and determined, this court cannot take jurisdiction of the order of dismissal under section five of the judiciary act of March 3, 1891.

THE case is stated by the District Court, in substance, as follows: On November 3, 1899, a libel was filed on behalf of the United States in the District Court of the United States for the District of New Jersey against the schooner William H. Davenport, her tackle, apparel and furniture, and against all persons intervening therein, in case of collision, civil and maritime, seeking to recover the sum of $5000 damages alleged to have been sustained by the light-house tender Azalea in a

collision with that schooner on October 2, 1899, off Cornfield Point light-ship in Long Island Sound. It was averred in the libel that the collision was in no way caused by the fault or negligence of those on board the light-house tender Azalea, but that it was solely due to the carelessness and negligence of those in charge of the schooner William H. Davenport in certain particulars stated. The libel concluded with the formal prayer that process might issue in due form of law against the schooner, her tackle, apparel and furniture; that all persons interested might be cited to appear and answer; and that the schooner might be condemned and sold to pay libellant's claim with interest and costs; "and that the court will otherwise right and justice administer in the premises." Process in due form was issued against the schooner, and on November 8, 1899, the marshal filed his return certifying that on November 4 he had made due attachment of the schooner and that the vessel was then in his custody. November 22, 1899, F. S. Bowker, managing owner, filed a claim to the schooner on behalf of her owners, a stipulation for costs and a stipulation for value, and thereupon the schooner was released from custody and restored to the possession of her owners. The claimant, Bowker, filed his answer to the libel December 11, 1899, denying that the collision was caused or contributed to by those in charge of the schooner, alleging that the collision and the damage resulting therefrom were caused wholly by the fault of the steamer Azalea and of those in charge of her, in certain particulars stated, and concluded with the prayer that the libel be dismissed with costs. December 29, 1899, Bowker, for and on behalf of himself and his coöwners, filed a cross-libel against the United States seeking to recover the sum of $6000 damages alleged to have been sustained by the schooner and by her cargo in said collision. It was alleged in the cross-libel that the collision was wholly due to the negligence and fault of the steamer Azalea and of those in charge of her, the particulars being set forth, and the prayer of the cross-libel asked "that a citation, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, may issue to the said respondents above named, citing and admonishing them to

appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the damages, with interest and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner William H. Davenport by the filing of a libel against said schooner, on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross-libel, and that this honorable court will give to the cross-libellants such other and further relief as in law and justice he may be entitled to receive, this said action being a counterclaim arising from the same cause of action for which the original libel was filed against the said William H. Davenport."

Citation was issued and served on the United States attorney for the district, who was the proctor of record for the libellant in the original suit. The United States attorney filed a notice of motion to quash the citation, February 14, 1900, and a motion to that effect was argued by counsel. December 17, 1900, the District Court filed its written decision, holding that the cross-libel could not be maintained because the court had no jurisdiction to entertain the cause or to enter a decree as prayed for against the United States, whereupon and on that day the court entered a decree that the citation be quashed and that the cross-libel be dismissed with costs. 105 Fed. Rep. 398. The cross-libellant thereupon appealed to this court and the appeal was allowed on the question of jurisdiction. The District Court made a statement of the facts, to which a copy of the record was attached, and certified five questions in respect of jurisdiction under the cross-libel to this court for decision.

Mr. G. Philip Wardner and *Mr. Eugene P. Carver* for appellant.

Mr. Assistant Attorney General Beck for appellee.

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

Opinion of the Court.

This appeal is prosecuted under the fifth section of the judiciary act of March 3, 1891, providing "that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: (1) In any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

By the sixth section the Circuit Court of Appeals, in cases within its appellate jurisdiction, may certify to the Supreme Court "any questions or propositions of law concerning which it desires the instruction of that court for its proper decision," and our thirty-seventh rule requires in such cases that "the certificate shall contain a proper statement of the facts on which such question or proposition of law arises."

The District Court has observed that rule in form, but it is under the fifth section that our jurisdiction is invoked, and, as the record accompanies the statement, we are enabled to dispose of the appeal.

It was settled, soon after the passage of the act of 1891, that cases in which the jurisdiction of the District or Circuit Courts was in issue could be brought to this court only after final judgment. *McLish* v. *Roff*, 141 U. S. 661; *Railway Company* v. *Roberts*, 141 U. S. 690. The subject was carefully considered in the opinion of Mr. Justice Lamar in the first of these cases, and the conclusion reached was in accordance with the general rule that a case cannot be brought to this court in parcels. *Railway Company* v. *Postal Telegraph Company*, 179 U. S. 641.

The preliminary question is, therefore, whether the decree dismissing this cross-libel is a final judgment within the rule upon that subject. It was long ago held that a decree dismissing a cross-bill in equity could not be considered, standing alone, as a final decree in the suit, and was not the subject of an independent appeal to this court under the judiciary act of 1789; and that it could only be reviewed on an appeal from a final decree disposing of the whole case. *Ayres* v. *Carver*, 17 How. 591; *Ex parte Railroad Company*, 95 U. S. 221.

It is argued that *Ayres* v. *Carver* is distinguishable from the case at bar because the twenty-second section of the judiciary act of 1789, under which the appeal in that case was taken, provided in terms for the revision of final decrees, whereas no specific mention is made of final decrees or judgments in section five of the judiciary act of 1891. But that difference was specifically disposed of in *McLish* v. *Roff*, as not affecting the principle that the decree must be final in order to be appealable.

Counsel quote the language of Mr. Chief Justice Waite in *Railroad Company* v. *Express Company*, 108 U. S. 28, that "a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined;" and insist that the decree on the cross-libel has definitely determined the right of respondent to affirmative relief. But the litigation between the parties on the merits embraced the right of libellant to recover because of the fault of respondent, as well as the right of respondent to recover because of the fault of libellant, and until the question as to which of the parties was at fault, or whether both were, is determined, that litigation cannot be said to have terminated. If the District Court had held that it had jurisdiction to award affirmative relief against the United States on the cross-libel, the cause would have stood for hearing on the whole case. Its decision that it did not have jurisdiction simply prevented respondent from obtaining affirmative relief over, assuming that the facts justified it. And however convenient it might be that the question of jurisdiction of the cross-libel should be adjudicated in advance, it is nevertheless true that when a decree was rendered on the original libel, the error, if any, committed in dismissing the cross-libel, could be rectified. That this course might result in delay, and perhaps sometimes in hardship, if it should turn out that jurisdiction could be exercised on the cross-libel, is not a sufficient reason for entertaining an appeal, if the decree did not so dispose of the case as to enable this court to take jurisdiction.

Generally speaking, the same principles apply to cross-libels

as to cross-bills, and this case affords no ground of exception therefrom.

In admiralty, if the respondent desires to obtain entire damages against the libellant, or damages in excess of those claimed by libellant, a cross-libel is necessary, although matters of recoupment or counterclaim might be asserted in the answer. *The Sapphire*, 18 Wall. 51; *The Dove*, 91 U. S. 381.

In *The Dove* a final decree was entered in favor of the libellants in the original suit, and a decree rendered at the same time dismissing the cross-libel. No appeal was taken from the decree of dismissal, but the case was carried to the Circuit Court from the District Court by appeal from the decree on the libel, which was affirmed, and the cause brought to this court.

The principal question involved on the appeal to this court was whether the submission to the dismissal of the cross-libel in the District Court by the parties who had filed it, prevented them from making the same defence to the original libel that they might have made if no cross-libel had been filed, and it was held that while the parties were bound by the decree of the District Court dismissing the cross-libel, the issues of law and fact involved in the original suit were not thereby disposed of.

In the course of some general observations, Mr. Justice Clifford, delivering the opinion, after remarking that causes of that kind might be heard separately, said: "Usually such suits are heard together, and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross-suit adverse to the libellant, even if the decree is entered before the original suit is heard, will not impair the right of the respondent in the original suit to avail himself of every legal and just defence to the charge there made which is regularly set up in the answer, for the plain reason that the adverse decree in the cross-suit does not dispose of the answer in the original suit. . . . Whether the controversy pending is a suit in equity or in admiralty, a cross-bill or libel is a bill or libel brought by a defendant in the suit against the plaintiff in the same suit, or against other defendants in the original suit or against both, touching the matters in question in the original

bill or libel. It is brought in the admiralty to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross-bill is sometimes used to obtain a discovery of facts. New and distinct matters, not included in the original bill or libel, should not be embraced in the cross-suit as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit, and no others, as the cross-suit is, in general, incidental to, and dependent upon, the original suit. *Ayres* v. *Carver*, 17 How. 595; *Field* v. *Schieffelin*, 7 Johns. Ch. 252; *Shields* v. *Barrow*, 17 How. 145."

In this case the cross-libel was, as stated therein, "a cross-libel brought under admiralty rule 53 of the Supreme Court of the United States, being a counterclaim arising out of the same cause of action as the suit brought by the United States against the said schooner William H. Davenport in a cause of collision, by a libel filed November 3, 1899, in said court." The 53d admiralty rule provides that the respondents in a cross-libel shall give security to respond in damages, unless otherwise directed, and that all proceedings on the original libel shall be stayed until such security shall be given.

The cross-libel and the answer to the libel were consistent, the subject-matter of the libel and the cross-libel was the same, and the latter, in no proper sense, introduced new and distinct matters. The cross-libel occupied the same position as a cross-bill in equity, and the general rule is that the original bill and the cross-bill should be heard together and disposed of by one decree, although, where the cross-bill asks affirmative relief, and is therefore not a pure cross-bill, the dismissal of the original bill may not dispose of the cross-bill, which may be retained for a complete determination of the cause. *Holgate* v. *Eaton*, 116 U. S. 33, illustrates this. There the bill and cross-bill were heard together, and it was held that the original bill must be dismissed, but that relief might be accorded on the cross-bill. The cross-bill was not filed merely as a means of defence, but of obtaining affirmative relief, and the defeat of the bill sus-

tained the disposition of the cause on the cross-bill. Such might be the result here if it turned out on the hearing that the Azalea was in fault and not the schooner, provided jurisdiction could be maintained to award relief against the United States. But in any point of view, the decree on the cross-libel did not so finally dispose of the whole case as to entitle us to take jurisdiction under section 5 of the act of 1891.

Appeal dismissed.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA dissented.

WARD *v.* JOSLIN.

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

No. 245. Argued April 30, 1902.—Decided May 19, 1902.

As between creditor and stockholder the provision of the Constitution of Kansas that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," applies to indebtedness incurred in the legitimate and contemplated business of the corporation.

Where a judgment has been rendered in Kansas against a corporation of that State, by default, on contracts which the corporation had no power to make, a stockholder when sued by virtue of the constitution and laws of Kansas in that behalf, may insist, in defence, on the invalidity of the contracts.

On the facts found the judgment below is correct and is affirmed.

SEPTEMBER 12, 1888, S. S. Hite and Mary L. Hite executed and delivered to one J. E. Ethell their promissory notes in writing of that date, whereby for value received they promised to pay to the order of Ethell on September 12, 1892, the principal sum named in each, with interest thereon at the rate of seven per cent per annum, payable semi-annually, according to the tenor of eight interest coupons bearing interest and attached to each of the notes; and afterwards and before the maturity of the notes, Ethell endorsed, transferred and deliv-

Statement of the Case.

ered them to Ward. At that time the Western Investment Loan and Trust Company, a corporation of Kansas, guaranteed in writing the payment of the notes in the following words endorsed on each: "For a valuable consideration the Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity." The notes not having been satisfied, Ward brought suit against the Western Investment Loan and Trust Company on the guaranties in the District Court of Smith County, Kansas, and recovered judgment against the company by default; and execution having been issued on the judgment and returned *nulla bona*, Ward brought this action December 15, 1896, against Edward Joslin in the Circuit Court of the United States for the District of New Hampshire to recover of him as a stockholder in said Western Investment Loan and Trust Company, an amount equal to the amount of stock owned by him in said corporation.

The declaration contained two counts. The first alleged the recovery of judgment; the issue of execution and return *nulla bona*; insolvency of the company July 1, 1894, and its want of "property or assets of any kind or value whatever;" that defendant was the owner of one hundred shares of stock; and that, "by reason of the premises and by virtue of the constitution and statutes of the State of Kansas, in such case made and provided, a right of action hath accrued" to plaintiff.

The second count alleged that the loan and trust company "was a corporation chartered and organized for the purpose of transacting a general investment loan and trust business, and under its charter, as it was authorized to do, endorsed and guaranteed the payment of notes and obligations negotiated by it;" that these notes and coupons "were in fact negotiated by said corporation, the Western Investment Loan and Trust Company, in the regular course of its business;" that judgment was recovered and execution returned *nulla bona*; "and that by reason of the premises and by virtue of the constitution, statutes and laws of the State of Kansas in such case made and provided," the right of action had accrued.

Statement of the Case.

Among other special matters set up in defence was "that the claim against the Western Investment Loan and Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a debt due from or debt of said corporation, for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas." And that the Western Investment Loan and Trust Company "never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described, or to guarantee the payment of said notes and obligations."

A jury was waived and the cause submitted to the Circuit Court for trial, and the court made and filed its findings of fact and conclusions of law.

After finding that the defendant was a stockholder of one hundred shares of the par value of fifty dollars each in the company in question, the findings thus continued:

"I find as matter of fact, upon the evidence contained in the record, and upon the arguments, that Ward's claim against the trust company was upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company.

"I find that the plaintiff brought an action at law in the District Court of Smith County, in the State of Kansas, against the trust company, on December 23, 1892, on these guaranties, by a writ served upon the president of said corporation, and on March, 1893, recovered judgment thereon against the company for $9787.50, with interest at 12 per cent; and, as shown in the record, on December 11, 1893, $4924.75 was paid thereon, and on September 14, 1896, an execution issued for the balance, and was returned wholly unsatisfied as shown by the officer's return printed in the record.

"I also find that the trust company was not a railway, religious or charitable corporation, and the business which the corporation was authorized to do was 'to buy and sell personal property, including stocks, bonds, bills, notes, real and

chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company;' that some time after the organization of the company, and before the defendant became a stockholder, the directors thereof resolved 'that the president and secretary of the company be, and they hereby are, authorized to guarantee the payment of all securities negotiated by the company by endorsing upon any such security one of the following forms of a guaranty;' and the resolution of the corporation and the forms of guaranties printed in the record are referred to and made a part of the findings.

"Ascertaining the relations of the parties under the contract, which resulted from the Kansas constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guaranty of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas constitution as a due or a debt within such scope. I also find, so far as it is a fact, that it was not within the scope of the resolution which assumed to authorize the president and secretary to guarantee securities negotiated by the company, and there is no evidence that the defendant stockholder had knowledge that the company was assuming, through its president and secretary, to guarantee the payment of claims not negotiated by itself; and there being no evidence of notice, I find, as a matter of fact, that he was not aware of it.

"I also make a general finding for the defendant."

The rulings of law were stated in the opinion of the court set forth in the record, and reported 100 Fed. Rep. 676.

The Circuit Court ruled that "the relations of the parties are contractual, and the term 'dues,' in the Kansas constitution ought to be accepted as applying only to claims resulting from the legitimate and contemplated business of the corporation or company, such as arise in respect to transactions within the reasonable scope of the business contemplated; and, as between the creditor and stockholder, they should not be extended

to claims which arise from the transaction of unauthorized business."

That " while under paragraph 1192 of the General Statutes of Kansas providing a remedy, a judgment against the corporation may be accepted, under proper limitations, as conclusive, in a proceeding against the stockholder as to the amount and liability of the company upon claims in respect to transactions within the contemplation of the constitution and of the parties to the contract, it should not be accepted as conclusive upon the question of the nature and character of the claims, for the reason that paragraph 1192 is only intended to give a remedy to the creditor in respect to the kind of claims contemplated by the constitution. The judgment on this ground is accepted as conclusive, because it relates to a corporate affair, and because the stockholders' interests are supposed to be represented by the officers of the bank in respect to affairs within the scope of its contemplated, legitimate and authorized transactions;" but the stockholder ought not to be concluded " as to the question whether the foundation and nature of the claim were within the fair intendment of the constitutional provision and the contract between the parties, upon the ground of representation, for the reason that such a question is not one which, in the natural and usual course of litigation between the bank and the creditor, would be presented or adjudicated."

That " the contract, under the constitution, is between the creditor and the stockholder, and the bank, in a proceeding against it by the creditor to which the stockholder was not a party, would neither be called upon, nor be expected or allowed to present such a question for adjudication."

That " the amount of the bank's indebtedness, or its liability, on a question of this kind, could and would be put in issue in a suit between the creditor and the corporation; but whether such a due is within the scope of the contract between the creditor and the stockholder under the constitution would not and could not be put in issue in a suit between a creditor and the bank to which the stockholder is not a party."

That " in the original case against the bank by the creditor, the question as to the character of the claim, whether it was one

contemplated by the contract between the creditor and the stockholder, was neither presented nor litigated, nor was it in a situation to be presented or litigated; while in the case now under consideration the question is not whether the claim was an indebtedness or a due for which the bank was liable, which question was litigated and concluded by the judgment, but a question whether it was the kind of a debt or due which the statutory contract between the creditor and stockholder covered or contemplated. This precise question, as has been said, was not presented, could not have been presented, in that case, and therefore is not concluded." That this judgment came within "an exception to the general rule that a judgment against the corporation is conclusive."

Plaintiff moved for a new trial, which was denied, and judgment entered for defendant. The case was taken on error to the United States Circuit Court of Appeals for the First Circuit and the judgment affirmed. 105 Fed. Rep. 224. This writ of certiorari was then issued.

Mr. William Reed Bigelow for petitioner. *Mr. E. L. Waterman* and *Mr. Park B. Pulsifer* were on his brief.

Mr. J. S. H. Frink for respondents.

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

When a case is tried by the court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based. The question remains whether or not the facts found are sufficient to support the judgment, and rulings to which exceptions are duly preserved may be reviewed.

Plaintiff excepted to the refusal of the court to rule that upon all the evidence plaintiff was entitled to recover as matter of law, and also to the refusal to make other rulings requested, and to the rulings made. The correctness of these rulings was questioned in fifteen errors assigned in the Circuit Court of Appeals, but they need not be recapitulated.

The Circuit Court found as facts that the guaranties on which plaintiff's judgment in the state court was based were not guaranties of the payment of securities negotiated by the company; that the business which the corporation was authorized to do was "to buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company;" that the guaranty of these notes was not within the reasonable and proper scope of the business of the company; and that defendant had no notice that the company was assuming to guarantee the payment of claims not negotiated by itself. The court referred to a resolution of the board of directors authorizing the guaranty of securities negotiated by the company, and found this guaranty not within its scope.

This corporation was organized in 1888 under the general laws of Kansas, authorizing the creation of loan and trust companies, by voluntary association as prescribed, with the powers, among others, "to make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock;" and "to enter into any obligation or contract essential to the transaction of its ordinary affairs." The charter of each corporation was required to set forth "the purpose for which it is formed;" and the statute provided that: "No corporation created under the provisions of this act, shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." Comp. Laws, Kan. 1885, p. 210, c. 23, §§ 5, 6, 11, 26.

The purposes for which the corporation was formed were set forth in its charter, and were as found by the Circuit Court. The by-laws provided for a loan committee with power "to discount or purchase bonds, bills, notes and other evidences of debt," but did not embrace the power to guarantee. As before stated, the Circuit Court found that these guaranties were not "within the reasonable and proper scope of the business, as contemplated by the parties."

The purview of the words "loan and trust" does not appear

to have been defined by statute or decision in Kansas, but the declaration alleged that this company was organized "for the purpose of transacting a general investment loan and trust business, buying and selling commercial paper, obligations and securities," and it must be assumed that the general rule is applicable that such companies have no implied power to lend their credit, or to bind themselves by accommodation endorsements. They may guarantee paper owned by them, or paper which they negotiate in due course of business and the proceeds of which they receive, but the naked power to guarantee the paper of one third party to another is not incidental to the powers ordinarily exercised by them. The power as exercised here was certainly not "essential to the transaction of its ordinary affairs," nor within "the legitimate objects of its creation." And so far as the question might be resolved by the usage in Kansas, the findings were adverse to plaintiff.

In *Commercial Bank* v. *Cheshire Provident Institution*, 59 Kan. 361, a judgment against a bank on a guaranty, where the record did not contain any of the evidence, and there was a general finding for plaintiff, was sustained. The court said that it must be presumed that the guaranty "was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business;" and that while "it is true that, in this case, the paper itself does not indicate that the Commercial Bank ever owned it, nevertheless it may have received the proceeds and the guaranty may have been made strictly in the interest of the bank." But the findings in this case take it out of the range of that decision and forbid resort to presumption to make out validity.

We are of opinion that, upon the facts found, the guaranties were given without authority.

The second section of article twelve of the constitution of Kansas provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

In *Woodworth* v. *Bowles*, 61 Kan. 569, it was held that this constitutional provision was not self-executing, but required legislative action to give it effect.

Section thirty-two of chapter twenty-three of the Compiled Laws of Kansas of 1885 provided that when an execution had been issued against a corporation, and property could not be found on which to levy it, then "execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; . . . or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 44: "If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; . . ." Section 45: "If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action." Section 46: "No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." These sections were all carried forward into the Complied Laws of 1889, with the same chapter and numbers, but that compilation also gives a general number, and the general number of section 32 is 1192. There was no compilation from 1889 to 1897. Sections 32, 44, 45 and 46 reappear in sections 49, 50, 51 and 53 of chapter 66 of the General Statutes of 1897.

The word "dues" thus appears to have been regarded as equivalent to debts or that which is owing. Mr. Justice Story in *United States* v. *Bank*, 6 Pet. 29, 36, said, in construing the statute there referred to: "The whole difficulty arises from the different senses in which the word 'due' is used. It is sometimes used to express the mere state of indebtment, and then is an equivalent to owed or owing. And it is sometimes used to express the fact that the debt has become payable."

Opinion of the Court.

In *Whitman* v. *Oxford National Bank*, 176 U. S. 559, it was said that: "The word 'dues' is one of general significance, which includes all contractual obligations." Can an obligation which a corporation had no right to incur be a contractual obligation and the basis of "dues," as that word is used in the state constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken.

One of the grounds on which the doctrine of *ultra vires* rests, is that the interest of the stockholders ought not to be subjected to such risks. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation.

The rule in this court is that a contract made by a corporation beyond the scope of its powers, expressed or implied, cannot be enforced, or rendered enforcible, by the application of the principle of estoppel. The rule in Kansas seems to be that when the contract has been executed and the corporation has received the benefits of it, the corporation is estopped from questioning its validity, and so in respect of evidences of indebtedness purchased before maturity in good faith and without notice. *Atchison, Topeka & Santa Fé Railroad Company* v. *Fletcher*, 35 Kan. 236; *Sherman Center Town Company* v. *Morris*, 43 Kan. 282; *Alexandria, Arcadia & Fort Smith Railroad Company* v. *Johnson*, 58 Kan. 175. But we are not persuaded that if the defence of *ultra vires* had been interposed in the action against this company, and the facts had been found to be as they have been found here, the defence would not have been sustained in the courts of Kansas. If, however, under the state decisions, the corporation would be held estopped from denying the liability, it does not follow that the stockholders must therefore be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word "dues," as used in the state constitution, cannot be properly treated as brought within the scope of that

word, simply because the corporation may be so situated as to be estopped from denying their validity.

Whether in this case the corporation would have been held estopped if it had made the defence of *ultra vires*, it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas constitution. *National Bank* v. *Farnham*, 176 U. S. 640. But we did not there hold that it was not open for a stockholder to show that the judgment was not enforcible against him when rendered against the corporation on a contract beyond its power to make. It must be remembered that in the case before us the right of action accrued, and the action was accordingly averred to have been brought, "by virtue of the constitution and the statutes of the State of Kansas in such case made and provided." We think it was not error to permit the stockholder to go behind the judgment so far as to show, or, at all events, to insist, for the judgment record introduced below disclosed the invalidity of the guaranties, that he was not liable under that constitution and those laws.

In *Schrader* v. *Manufacturing Company*, 133 U. S. 67, it was ruled that although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts and engagements, "that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business;" and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation "was not binding on the stockholders in the sense that it could not be reëxamined."

In *Brownsville* v. *Loague*, 129 U. S. 493, it was held that "if a petitioner for a writ of mandamus to compel the levy of a tax to pay a debt evidenced by a judgment recovered on coupons of municipal bonds is obliged to go behind the judgment in order to obtain his remedy, and it appears that the bonds were void, and that the municipality was without power to tax to pay them, the principle of *res judicata* does not apply upon the question of issuing the writ." The petition in that case set up the judgment and averred that "petitioner's only

Counsel for Parties.

remedy to enforce the collection of his judgments is that awarded by the act authorizing the issue of the bonds from which the coupons were detached upon which said judgments were obtained." And we held that as the relator was compelled to go behind the judgments as money judgments merely, "to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists."

As then the provision of the constitution of the State of Kansas, if properly construed, imposes the liability in question only in respect of corporate indebtedness lawfully incurred, that is to say, in respect of dues resulting in regular course of business and in the exercise of powers possessed, plaintiff cannot recover in this action by virtue of the constitution and laws of the State, on the facts found, and the judgment must be affirmed.

As to the denial of the motion for new trial it is not within our province to interfere with the discretion of the Circuit Court.

Judgment affirmed.

MR. JUSTICE GRAY did not hear the argument or take any part in the decision.

NESBITT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 578. Submitted April 18, 1902.—Decided May 19, 1902.

This was an appeal from a judgment of the Court of Claims, sustaining a plea to the jurisdiction of the court to hear a petition filed by appellants, under the Indian Depredation Act of 1891. The plea was sustained.

THE case is stated in the opinion of the court.

Mrs. Belva A. Lockwood for appellants.

Mr. William H. Robeson filed a brief for same.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims sustaining a plea to the jurisdiction of the court to hear a petition filed by appellants under the Indian Depredation Act of 1891.

The purpose of the petition was to recover the sum of $7950 against the United States, for the value of eighteen head of mules and twenty-nine head of horses, alleged to have been taken and driven away by the Sioux Indians on or about the 25th day of July, 1864.

The plea to the jurisdiction of the court was based upon the fact that the depredation charged was alleged to have been committed "prior to the 1st of July, 1865, and that no claim for such depredation was ever presented to the Secretary of the Interior or the Congress of the United States, or any superintendent, agent, subagent or commissioner, authorized under any act of Congress to inquire into such claims, within the meaning of the first proviso of the second section of the act of March 3, 1891." C. 538, 26 Stat. 851.

Section 2 of the act of 1891 reads as follows:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the government: *Provided*, That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed or has been or is pending prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent or subagent, or commissioner authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred."

The claim was filed in the Interior Department March 2, 1891, before the passage of the act, but it is contended by the Government that it was not "pending" before the Secretary of the Interior because no evidence had been "presented therein."

The affidavit of Joseph A. Nesbitt accompanied the claim, and was very full as to the locality and circumstances of the depredation. It also stated the attempts which were made to recover the animals and the failure of the attempts, and gave the names of the witness by whom the depredation could be proved.

The question in the case is whether such affidavit constituted the presentation of evidence of the claim so as to bring the claim within the statute.

Claims for Indian depredations filed in the Interior Department after 1872 were filed under the act of 1872. 17 Stat. 190, c. 233. Section 7 of the act reads as follows:

"That it shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims, as may be presented, subject to the rules and regulations prepared by him, and report to Congress at each session thereof the nature, character and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided*, That no payment on account of said claim shall be made without a specific appropriation therefor by Congress."

In pursuance of that act the Secretary of the Interior established the following regulations:

"1. Application for indemnity, or satisfaction for the loss or injury sustained, must be made by the claimant, his attorney, or duly authorized agent, . . . to the United States, . . . Indian agent, subagent, within whose jurisdiction or charge the nation, tribe or band is to which the offenders or depredators belong.

"2. The necessary documents and proofs must accompany the application of the claimant, his attorney, or agent, and should be in legal form, and consist—

"First. Of the sworn declaration of the claimant, setting forth when and where the depredation was committed, and by what Indians, their tribe or nation being named; describing fully the property stolen or destroyed, and giving the quantity of each article or number, condition, or quality thereof, and the just value of each article or piece of property at the time the same was so taken or destroyed. Should the depredation have been committed while the claimant was in the Indian country, he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authorities, or was *en route* through said country to a place of ultimate destination at some point within the limits of any State or Territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision, or by executive order; and he in such declaration must further state whether any of the property so stolen or destroyed has subsequently been recovered by or for him, the claimant; and whether the claimant has at any time received part compensation therefor; and if so, how much, when, and from what source; and further, that the claimant has in no way endeavored to obtain private satisfaction or revenge.

"Second. Of depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimant, which depositions must set forth the means of knowledge which deponents have as to the fact of the depredation, when, where, by what Indians, and under what circumstances the depredation was committed, of what the property consisted that was so taken or destroyed by the Indians, describing it as fully as practicable, and stating the value thereof. If the deponents, or any of them, were at the time of the depredation in the employment of the claimant it must be so stated, and in what capacity. Regulations Indian Department, 1884, p. 81."

To the requirements of the act of 1872, and the regulations

authorized by it, the word "evidence," in the act of 1891, must be considered as referring, and the claim of the appellant was not accompanied by such evidence. It was accompanied by the deposition of one of the claimants, but not of "depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimants." Persons having such knowledge existed, it was stated, and their affidavits promised, but they had not been presented.

Nor is the petitioner helped by section 4 of the act of 1891, which provides that—

"In considering the merits of claims presented to the court any testimony, affidavits, . . . and such other papers as are now on file in the departments relating to any such claims, shall be considered by the court as competent evidence."

That provision is applicable to the claim after it is presented to the court, and does not relieve from the conditions expressed in section 2. See *Weston's case*, 29 C. Cl. 420, 424, where the provisions of the statutes and the reasons for them are clearly expressed.

Judgment affirmed.

WILLIAMS *v.* GAYLORD.

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

No. 208. Argued April 8, 9, 1902.—Decided May 19, 1902.

This suit was brought by petitioner, as trustee of a mortgage. *Held*, that when a corporation sells or incumbers its property, incurs debts or gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation.

THIS suit was brought by the petitioner as trustee of a mortgage made by the Gold Hill Mining Company, a corporation of West Virginia, upon certain mining ground in the State of California. Subsequently to the execution of the mortgage

the corporation, in the conduct of its mining operations in the State of California, became indebted to the respondents for materials, labor and supplies. Mechanics' and materialmen's liens were filed by respondents and judgments obtained by them upon which executions were issued and the property mortgaged was sold. The respondents became its purchasers.

The corporation made default in the foreclosure suit, and a decree *pro confesso* was taken against it. The respondents pleaded their judgments and the titles which were claimed thereunder; and pleaded, further, that the mortgage was void because it had not been ratified by the stockholders of the corporation as required by a statute of California, passed April 23, 1880, and entitled "An act for the further protection of stockholders in mining companies," section 1 of which act is as follows:

"SEC. 1. It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain, in any way, any additional mining ground, unless such act be ratified by the holders of at least two thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution, duly passed at a stockholders' meeting called for that purpose."

The Circuit Court sustained the defences, 96 Fed. Rep. 454; and its ruling was affirmed by the Circuit Court of Appeals. 102 Fed. Rep. 372.

The mortgage was given to secure one hundred coupon bonds of $500 each. They were dated July 1, 1890. The mortgage bore the same date, and the manner and authority for its execution, the record exhibits, as follows, being the minutes of a meeting held June 5, 1890:

"The meeting was called to order by C. Littlefield, who nominated G. Livingston Morse, temporary chairman; nomination was seconded by W. W. Tucker and unanimously carried.

"C. Littlefield then proposed W. W. Tucker for temporary

secretary; motion was seconded by R. H. Pettigrew, Jr., and was unanimously carried.

"Waiver of notice of corporators was then agreed to by all present as per roll-call.

"Roll-call of incorporators being made, all were found present as follows: M. J. Shoecraft, Calvin Littlefield, G. Livingston Morse, R. H. Pettigrew, Jr., and W. W. Tucker.

"The chairman said: We were now ready for business, whereupon Mr. M. J. Shoecraft presented a duplicate copy of papers of incorporation, and a telegram from Secretary of State of West Virginia, stating that the charter of this company was duly filed June 23, 1890, which was adopted.

"On motion of W. W. Tucker, seconded by R. H. Pettigrew, Jr., it was—

"*Resolved*, That the said Gold Hill Mining Company issue one hundred first-mortgage bonds, of the denomination of five hundred dollars each, each bond bearing date of July 1, 1890, and bearing interest at the rate of ten per cent per annum, payable semi-annually, on the first day of January and July in each year, and to run five years from July 1, 1890; with the privilege of the said company paying off and redeeming the same sooner, by giving to the holders of said bonds six months' notice of the company's intention thus to do; to pay off said bonds and redeem the same on any day interest is payable, or on payment of six months' interest in advance; and the president and the secretary of said company are hereby authorized and directed to execute said bonds and mortgage for said company, and the said board hereby authorize and direct the seal of said company to be affixed to the same.

"On motion of C. Littlefield, seconded by M. J. Shoecraft, the chairman, G. L. Morse, was elected trustee for the bondholders. Motion carried.

"On motion of W. W. Tucker, seconded by R. H. Pettigrew, Jr., Mr. G. L. Morse was appointed to draw up a proper bond, have same executed and lithographed; also a stock certificate book of two hundred certificates, total cost not to exceed ninety-five dollars.

"On motion of M. J. Shoecraft, seconded by G. L. Morse, it

was voted that the incorporators of the Gold Hill Mining Company be named as directors of said company. Motion carried.

"On motion of C. Littlefield, seconded by M. J. Shoecraft, the company's seal was ordered to be made, and Mr. Shoecraft be a committee to have the same made. Motion carried.

"Mr. Shoecraft reported that the by-laws were not quite ready, and the chairman suggested that he report a full set at a future meeting.

"On motion, the meeting was declared adjourned to the second Tuesday in July, 8th inst.

"W. W. TUCKER,
"*Temporary Secretary.*"

It was testified that the gentlemen present at the meeting held all of the stock of the company.

The record also contains the minutes of a meeting held July 10, 1890, at which meeting a president, vice president, secretary and treasurer and general manager were elected. The following resolution was passed:

"On motion of Mr. Morse, seconded by Mr. Pettigrew, resolved, That the directors of this company be authorized and directed to purchase of M. J. Shoecraft the mines formerly known as the Nevada City Gold Quartz Mining Company, and pay therefor one hundred and sixty thousand shares of the capital stock of this company, being its total issue, and twenty-five thousand ($25,000) dollars in first mortgage bonds. Motion carried.

"On motion adjourned, to meet at the call of the president."

It was also testified that a paper was "executed by the Gold Hill Mining Company for the purpose of correcting the form of the mortgage as originally executed."

The paper was introduced in evidence. It was dated August 28, 1890, and recited that—

"Whereas, by a resolution of the board of directors of the Gold Hill Mining Company, duly passed and adopted on the twenty-fifth day of June, 1890, and in accordance with and in pursuance of said resolution, a mortgage was executed and de-

livered to G. Livingston Morse, as trustee for the use and purposes therein mentioned, on the first day of July, 1890, by the president and secretary of said company, they being authorized and directed in and by said resolution thus to do, and duly acknowledged by them, and the corporate seal of said company duly affixed to said mortgage by the like authority of said board of directors."

Certain mistakes were then stated to have been made in the morgage, and the secretary, Calvin Littlefield, was given authority to correct them, and he and the president were directed and authorized to execute a paper on behalf of the company and to affix the corporate seal of the company thereto. The paper was duly executed and recorded in Nevada County, California. Other facts are stated in the opinion.

Mr. C. Walter Artz for Williams.

Mr. Curtis H. Lindsay for Gaylord and others. *Mr. Henry Eickhoff* was on his brief.

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

The Circuit Court and the Circuit Court of Appeals based their judgments upon the act of 1880 as construed by the Supreme Court of the State of California, regarding that construction as binding upon Federal tribunals. The conclusion is attacked by petitioner, and he urges the following propositions against it:

"I. The decision of the Supreme Court of California, to the effect that judgment creditors may take advantage of the act of 1880, is not binding upon the Federal courts either as constructive of that statute or determinative of a local rule of property.

"II. The act of 1880 does not apply to foreign corporations because the legislation of one State has no effect upon the powers and internal management of corporations organized in other States.

"III. Even if it should be held that the California statute (Statutes of 1880, p. 131) does apply to foreign corporations, the mortgage is valid, and a decree of foreclosure and sale should be directed."

(1) To sustain this proposition the petitioner makes a distinction between the construction of the statute and its application, conceding the binding force of the state decisions as to the former but denying their authority as to the latter. The contention enjoins a review of the decisions of the Supreme Court of the State.

In *McShane* v. *Carter*, 80 Cal. 310, the plaintiff claimed title to mining property and certain appurtenant water rights under two deeds from the Nevada Reservoir Ditch Company, a mining corporation. He brought suit to enjoin the sale of the property under a judgment obtained against the company by one of its creditors. Judgment passed for the plaintiff in the trial court, but was reversed by the Supreme Court of the State. The latter court, by Hayne, Commissioner, said—

"The important question arising on the appeal is, (p. 312) whether the evidence is sufficient to show that the plaintiff was the owner of the property which the sheriff was proceeding to sell, and this depends upon whether the directors of said mining companies had power or authority to convey the property in the absence of a ratification by the stockholders as specified in the act of 1880.

"1. We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them, and to so construe it would be to practically nullify the act. In our opinion, the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two thirds of the stock, given as prescribed by the act. And it follows without such consent the title does not pass. And if this be so, the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof.

"Nor can the consent of the stockholders be presumed from

the mere fact of the conveyance, whether under the corporate seal or not, for such consent or 'ratification' may be after the deed is executed, and hence is not necessarily or presumptively involved in the execution of such deed."

Counsel for petitioner says that the Supreme Court in its opinion not only construed but applied the act of 1880—construed it in that portion of the opinion which denied authority to directors of mining corporations to convey mining property without the consent of the stockholders; applied it in that portion of the opinion which declares that without the consent of the stockholders the title of mining property does not pass, and that "the question can be raised by any one who connects himself with the title of the corporation, . . . as well as by the stockholders thereof." This conclusion, it is asserted, is not warranted by the words of the statute, is opposed to the decisions of the courts of other States and of this court construing similar statutes, and is not binding upon the Federal courts. And it is urged that the Circuit Court of Appeals "failed to distinguish between a decision of the state court construing the terms outlining the effect of the statute as enacted and a decision declaring that certain other persons not mentioned or referred to in the statute may by reason of relations existing between them and the stockholders, under general principles of corporation law, become beneficiaries of the statute under consideration." And it is further urged "that a case of the latter class does not construe a statute or establish a local rule of property, but is merely a decision upon the general law of corporate relations."

We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implications of state statutes, and confine interpretation to the mere letter. The Supreme Court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute beyond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence, and if whenever such application occurs the authority

of the state courts to interpret the statute ceases, the Federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the States.

The construction of the act of 1880 was certainly directly presented to the Supreme Court of California, and that construction determined the judgment which was rendered. The court declared that the provisions of the act extended "to the power or authority of the directors," and that without the consent of holders of two thirds of the stock the title did not pass. In other words, the title remained in the corporation; the property remained the property of the corporation; and hence the deduction of the court, "the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof." And this in consequence of the statute, and it is not the less so because the statutes of other States have been interpreted differently. It could hardly be contended that the legislature of California had not the authority to make such a consequence; and whether the legislature expressed its purpose or left it to inference, whether it expressed itself clearly or obscurely, the power of the state court to declare that purpose was none the less plenary.

McShane v. *Carter* was followed and affirmed in *Pekin Mining Co.* v. *Kennedy*, 81 Cal. 356; *Granite Gold Mining Co.* v. *Maginness*, 118 Cal. 131; *Johnson* v. *California Lustral Co.*, 127 Cal. 283; *Curtin* v. *Salmon River Co.*, 130 Cal. 345, 351.

(2) That the act of 1880 applies to foreign corporations was decided in *Pekin Mining Co.* v. *Kennedy*, 81 Cal. 356. That case, however, it is said, is practically overruled by *Miles* v. *Woodward*, 115 Cal. 308. Woodward was a stockholder in a mining corporation organized under the laws of the State of California. He brought an action against Miles, who was a director of the corporation, for $1000 damages for the violation of an act of the State, (Stats. 1880, p. 400,) which required the directors of the corporation to make or cause to be made, posted and filed, weekly reports of the superintendent.

"It is first contended," the court said, "that the act in question is unconstitutional for the reason that it operates only upon

domestic corporations, and thereby allows foreign corporations to transact business within this State upon more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State, in violation of article XII, section 15, of the constitution."

This was denied, and the act was held constitutional as being properly confined to domestic corporations because it was "directed to the internal affairs of the corporation, and not to its outside dealings or to the conduct of its business."

As to the conduct of the business of foreign corporations, the court said the State could "exercise full powers of control," but over their organization and internal government the State had no such power, because "the laws of the State did not have extraterritorial force." And further the court said: "The law is designed to protect stockholders of domestic corporations, and to that end has declared that the directors of those corporations, the conduct of whose internal affairs is subject to the control of the legislature, shall do specific acts under a prescribed penalty for their failure and refusal."

The views expressed by the court were justified by the nature of the reports required to be made. They were of matters which alone concerned the stockholders—did not affect in any way the rights of others. To make such reports was not doing business; it was only giving information of business done. But when a corporation sells or encumbers its property, incurs debts or gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation. And it is certainly within the power of a State to say what remedies creditors of corporations shall have over property situated within the State. Therefore *Miles* v. *Woodward* is not an authority for petitioners' position.

(3) Even if it be held that the act of 1880 applies to foreign corporations, it is nevertheless contended that the mortgage is valid, and a decree of foreclosure and sale should be directed. In support of that position it is urged that (*a*) the meeting of June 25, 1890, at which the execution of the bonds and mortgage were resolved upon and authorized, though denominated a meeting of incorporators, was really a meeting of stockholders;

(*b*) if this was not so, the corporation afterward, by its action of July 30, 1890, after the board of directors was organized, ratified the mortgage by the resolution which authorized its correction; (*c*) that not only those who participated in the meetings held more than two thirds of the stock of the corporation, but that the president, M. J. Shoecraft, at the time of the execution of the mortgage owned two thirds of the stock. In other words, it is urged, that the corporation either executed the mortgage or ratified it, and that the stockholders both authorized and concurred in its execution. The evidence of the facts involved in these claims is the minutes of the meetings set out in the statement of facts and of the following testimony of a witness (Calvin Littlefield) for complainant:

"Q. It appears that the following individuals were present at that meeting, namely: M. J. Shoecraft, Calvin Littlefield, G. Livingston Morse, R. H. Pettigrew, Jr., and W. W. Tucker. Can you tell me whether these gentlemen held all of the stock of the company at that time or not? A. They did.

* * * * * * * *

"Q. Do you know whether Mr. Shoecraft owned as much as two thirds of the stock of the company at the time when this mortgage was acknowledged? A. I do not.

* * * * * * * *

"Q. Have you the certificate book of the defendant company in your possession? A. I have.

"Q. Tell me, if you can, the amount of stock in the name of M. J. Shoecraft at the date when the mortgage was acknowledged, namely, July 24, 1890. A. One hundred and sixty thousand shares.

"Q. Shares at what value? A. Five dollars each.

"Q. What was the entire capital of the company? A. Eight hundred thousand dollars—one hundred and sixty thousand shares.

"Q. Can you tell me what date this mortgage was acknowledged by the president and yourself? A. I think the date of the acknowledgment.

"Q. That is what? A. Twenty-fourth day of July, 1890.

"Q. Do you know why the mortgage was dated the 1st? A. Yes.

"Q. Can you say why? A. The arrangement with the owner—the first of July. By agreement the mortgage was to commence when the settlement ended."

Cross-examination:

"Q. You say that on the twenty-fourth day of July the whole number of shares were issued to M. J. Shoecraft? A. I do.

"Q. As appears by certificate No. I? A. Yes.

"Q. Certificate No. 1 (showing) is now before you? A. Yes.

"Q. Is that in a book? A. Yes.

"Q. What is it? A. The stock book.

* * * * * * * *

"Q. Certificate No. 1 has never been taken out of the book? A. It has not.

"Q. It bears date the twenty-fourth day of July, 1890? A. It does.

* * * * * * * *

"Q. Certificate No. 1, marked Exhibit 'C,' has never been separated from its stub? A. It has not.

"Q. And certificate No. 2 has never been separated from its stub? A. It has not.

"Q. All the other certificates about which you have testified, from No. 3 to No. 21, inclusive, have been separated from their stub at some time or other? A. Yes, sir."

The witness also testified that shares were issued in certain amounts which were named and to certain persons who were named, "from certificate No. 1." A number of certificates which the witness testified about were introduced in evidence. They all bore date of July 24, 1890.

But as to the effect of this testimony and of the contentions of petitioners we are not called upon to express an opinion. The statute of California prescribed the manner of ratification to be "either in writing signed and acknowledged by such stockholders or by resolution duly passed at a stockholders' meeting called for that purpose." This manner of ratification was held to be necessary as we have seen, in *McShane* v. *Carter*, *supra*, and that case has not been limited or varied by any subsequent case. And we have no doubt of the power of the

State to so prescribe, not only from its power over the manner of conveyance and the disposition of property situated within the State, but from its power over foreign corporations doing business within the State. *Clarke* v. *Clarke*, 178 U. S. 176; *Hooper* v. *California*, 155 U. S. 648. Nor can we contest that power though we might, if we were permitted to exercise an independent judgment, construe the statute as only illustrative and not as exhaustive of the manner of ratification.

Judgment affirmed.

Mr Justice Harlan concurred in the judgment.

LEE LUNG *v.* PATTERSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 189. Argued and submitted April 21, 1902.—Decided May 19, 1902.

Under the statutes referred to in the opinion of the court, jurisdiction is given to the collector of the port at which an alien Chinese seeks to land, over his right to do so, and necessarily also to pass upon the evidence presented to establish that right.

The case is stated in the opinion of the court.

Mr. John H. Mitchell for appellant.

Mr. Assistant Attorney General Hoyt for appellee submitted on his brief.

Mr. Justice McKenna delivered the opinion of the court.

This is an appeal from a judgment which dismissed a petition in *habeas corpus* on the ground that the court had no jurisdiction to grant the relief which was prayed. The petitioner

represented that he was a citizen of the Chinese Empire, and for more than twenty years last past a merchant in the city of Portland, Oregon. He went on a visit to China, but returned to the United States in the month of October, 1898, on the ship Monmouthshire, accompanied, as he claimed, by his wife, whose name is Li Tom Shi, and by his daughter, whose name is Li A. Tsoi. The collector of customs at Portland promptly permitted him to land, recognizing his right to do so as a merchant, but denied the right and refused to permit his wife and daughter to land, although they were not laborers, and presented "certificates issued by the government of Hong Kong, and viséd by the consular representative of the United States at the colony of Hong Kong, China," which identified them as the wife and daughter respectively of petitioner, were "in all respects in full compliance with article III of the treaty of 1894, and in all respects in full compliance with section 6 of the act of Congress of July 5, 1884, and acts supplemental to and amendatory thereof," although compliance therewith, it was alleged, was not necessary. The collector made a pretended and partial examination of said certificates, "but no such examination as the law contemplates," asserted the right "to inquire into or decide *aliunde* the certificates," and ignored the same; and his said wife and daughter, it was alleged, "were each, wrongfully and unlawfully and in violation of their rights under the provisions of the treaty of 1894, refused entry into the United States." And it was further alleged—

"That immediately on the rendition of said alleged and pretended decision by the said collector of customs each of said persons, the said wife and daughter of your petitioner aforesaid, took an appeal from said alleged and pretended decision of said collector of customs to the Secretary of the Treasury of the United States; and your petitioner avers that the Secretary of the Treasury has never yet either examined into said appeals nor made any decision therein one way or the other, nor has said appeals or either of them ever been considered, examined or decided, either by O. L. Spaulding, Assistant Secretary of the Treasury, or by any other person except as hereinafter stated.

"That on April 18, 1900, one W. S. Chance, then chief of the special agents of the Treasury Department at Washington, D. C., pretended to examine said appeals and rendered a pretended decision therein, which pretended decision purports to affirm the alleged decision of the collector of customs aforesaid refusing to allow said Li Tom Shi and said Li A. Tsoi, wife and daughter of your petitioner, to enter the United States.

"Your petitioner avers that it is claimed, as your petitioner is advised and believes, by the collector of customs aforesaid, that said alleged decision by said W. S. Chance, as hereinbefore stated, is the decision of O. L. Spaulding, Assistant Secretary of the Treasury; but your petitioner denies that said O. L. Spaulding, either as Assistant Secretary of the Treasury or otherwise, has ever made any examination of said appeals, or has ever made any decision therein one way or the other.

"And your petitioner further avers that the said O. L. Spaulding as Assistant Secretary of the Treasury has no authority or jurisdiction whatever to examine into or decide said appeals or either of them; that said O. L. Spaulding, as Assistant Secretary of the Treasury, has never been legally or lawfully designated by the Secretary of the Treasury to examine into and decide such appeals, and your petitioner avers furthermore that the Secretary of the Treasury has no jurisdiction or power whatever to designate or authorize Assistant Secretary of the Treasury O. L. Spaulding, or any other Assistant Secretary of the Treasury, to examine into or decide said appeals."

That the collector of customs, notwithstanding the invalidity of the alleged decision of W. S. Chance, and that the appeal had not been examined or decided by the Secretary of the Treasury, detained petitioner's wife and daughter on board the steamship Braemen and threatened and intended to send them back to China.

That the collector had no jurisdiction to make the decision he claims to have made, and that no examination or decision of the appeals as the law contemplates was ever made by the Secretary of the Treasury, or by any Assistant Secretary of the Treasury who had any jurisdiction or power to examine and

decide such appeals. That the wife and daughter of petitioner have the right to have their appeals decided, and until such decision the collector had no power or jurisdiction to send the wife and daughter of petitioner back to China; and should they be sent back they will be removed from the jurisdiction of the court. A writ of *habeas corpus* was prayed for.

The collector of customs made due return to the writ, and denied that Li Tom Shi was the wife of the petitioner, and that Li A. Tsoi was his daughter; denied that the certificates were in regular form, and alleged they were not in conformity with the laws of the United States, in that they were signed by one F. A. May, who was captain general of police of Hong Kong and not the registrar general; that a Mr. Lockhart was registrar general, and that his name did not appear on the certificates. Denied that he (the collector) was without jurisdiction or that he ignored the certificates. Alleged that he took testimony, and on that testimony and the certificates he rendered his decision, as follows, refusing the said Li Tom Shi and Li A. Tsoi the right to land:

"No. 1.

"Office of the collector of customs, district of Willamette.

"Portland, Oregon, April 7, 1900.

"Now at this time comes on for hearing the application of Mrs. Li Tom Shi, a subject of the Emperor of China, for admission to the United States as a wife of Lee Lung, and after hearing the evidence of applicant and witnesses on behalf of the applicant, and the evidence of Lee Lung and Miss Li A. Tsoi, and irregularity of consular certificate, and no evidence of marriage, and being at this time fully advised in the premises, it is ordered that the said Mrs. Li Tom Shi be refused a landing upon the ground that the evidence produced by said applicant is insufficient and unsatisfactory to prove her right to land.

[SEAL] "I. L. PATTERSON,

"*Collector of Customs.*"

A like decision was rendered in the case of Li A. Tsoi. The return admitted that the said persons took an appeal from the decision to the Secretary of the Treasury, but denied that the

Secretary had not examined into said appeal or rendered a decision therein, and denied all the other allegations of the petition in regard to such appeal: admitted that, under the decision of the Secretary of the Treasury affirming his (the collector's) decision, he held the said Li Tom Shi and Li A. Tsoi in his custody for deportation to the country from whence they came.

The certificates were attached to the return, but as the only criticism of them is that they were not issued by the registrar general of Hong Kong, they are omitted. They were signed "F. H. May, by registrar general, Hong Kong." They were sealed with the seal of the registrar general and certified to by R. Wildman, United States consul general.

The following was also attached to the return:

"Division of special agents,
"Treasury Department, Office of the Secretary,
"Washington, April 18, 1900.

"Collector of customs, Portland, Oregon.

"SIR: The department has received your letter of the 11th instant, transmitting an appeal from your decision denying admission to Chinese persons named Li Tom Shi and Li A. Tsoi, the alleged wife and daughter of Lee Lung, a Chinese merchant domiciled in this country.

"The applicants presented to you certificates in the form prescribed by section 6 of the act of July 5, 1884, executed by 'F. H. May by registrar general,' Hong Kong, and you state that Mr. May is the captain of police at Hong Kong and not the registrar general. You are advised that certificates so issued are not valid, the incumbent of the office of registrar general at Hong Kong only being recognized as the proper authority for the issuance of such certificates.

"The appeal filed in this case refers to the recent decision of the Supreme Court in the case of *The United States* v. *Mrs. Gue Lim et al.*, promulgated in Synopsis 22056, wherein it was held that 'when the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child, of one of the members of a class mentioned in the treaty as entitled to enter,

then that person is entitled to admission without the certificate.'

"In this case Li Tom Shi is admitted to be the second and plural wife of Lee Lung, a Chinese merchant domiciled in this country, whose first wife resides in China, and it is claimed that Li A. Tsoi is the minor child of the said Lee Lung by said first wife.

"The laws of the United States do not recognize plural marriages as valid, and while they may be so recognized in China, the said Li Tom Shi is not the valid wife of Lee Lung under our laws and in the light of the decision of the Supreme Court referred to.

"In a letter addressed to the collector of customs at Port Townsend, Washington, it was stated that 'in instances where women or minor children apply for admission at your port, claiming to be the wives or children of Chinese persons lawfully domiciled here as persons of the exempt class of Chinese, you should require such women or children to produce evidence sufficient to satisfy you that they are the wives or children of such persons.'

"In the cases under consideration the evidence presented in the case of Li A. Tsoi is conflicting and inconclusive, and not of the satisfactory character required.

"Confirming department's telegram of this date, you are therefore advised that the appeals of Li Tom Shi and Li A. Tsoi are overruled and your decision denying them admission is sustained. The enclosures of your letter are herewith returned.

"Respectfully, O. L. Spaulding,
"*Assistant Secretary.*
"W. S. C."

The petitioner filed a reply to the return, in which he again averred the conformity of the certificates to law. Denied that they were required to be signed by the registrar general of Hong Kong, and averred, however, that the certificates were signed by F. A. May, "at the instance and under the direction of the registrar general and as and for him," and contained his seal. Again averred that the action of the collector in regard

to the certificates and the admission of evidence was in excess of his jurisdiction. Denied that the Secretary of the Treasury, by O. L. Spaulding, rendered any opinion affirming the decision of the collector; averred that the decision attached to the return shows on its face that it was the decision of W. S. Chance, chief of the special agents of the Treasury Department, and averred that "the pretended hearing before the collector of customs on the 7th day of April, 1900, as aforesaid, was had before your petitioner had secured any counsel, and he had no counsel present to advise him as to his rights before the collector of customs, and that such examination was without jurisdiction, perfunctory and was not a thorough examination of the case."

The testimony of several witnesses was introduced before the District Court against the objection of the district attorney. It showed that the petitioner was a merchant of Portland, Oregon; that he had gone back to China and there married Li Tom Shi according to the Chinese customs and with the usual Chinese ceremonies, but that he had another wife with whom he lived when in China, and that Li A. Tsoi was the daughter by that wife. It was testified that a man in China could have as many wives as he had means to support.

The District Court, however, determined that it had no jurisdiction to review the action of the executive officers, and dismissed the petition. The court cited *Nishimura Ekiu's case*, 142 U. S. 651, and *United States* v. *Gin Fung*, decided by the Circuit Court of Appeals of the Ninth Circuit, 100 Fed. Rep. 389. The District Court said *In re Lee Lung*, 102 Fed. Rep. 132, 134:

"These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the Secretary of the Treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of Congress have provided shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive. Under the doc-

trine of these cases, it is immaterial, so far as the jurisdiction of this court is concerned, whether the petitioner's appeal to the Secretary of the Treasury is heard by the Secretary in person or by a subordinate official in his department, or is heard at all."

It was decided in *Nishimura Ekiu's* case that Congress might entrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, "and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reëxamine the evidence on which he acted, or to controvert its sufficiency." This doctrine was affirmed in *Lem Moon Sing* v. *United States*, 158 U. S. 538, and at the present term in *Fok Yung Yo* v. *United States*, 185 U. S. 296, and *Lee Gon Yung* v. *United States*, 185 U. S. 306.

Counsel for petitioner concede the rule but deny its application to the pending case. Their argument is that the sixth section of the act of 1884, regarding it in force, precludes inquiry beyond the certificates. The applicable provisions are quoted as follows:

". . . Such certificate, vised as aforesaid, shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States, but such certificate may be controverted and the facts therein stated disproved by the United States authorities."

It is urged that the statute makes the certificates evidence, and that the collector had no power to disregard the certificates, and "whether he did not consider them at all and did not pass upon their validity or invalidity, as in either view of the case, we respectfully submit the collector is not chargeable merely with error, in which event his decision is not reviewable by the court, but with the more serious charge of hav-

ing exceeded his jurisdiction, in which case, we submit, his decision is reviewable."

But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.

The hearing before the collector is described in the petition as "pretended," but its extent, and upon what evidence, the record does not disclose. The record does show that appearance by counsel was not considered necessary, but "every facility for appearing" was given. And even if it were essential, in our judgment, could we conclude that the decision of the collector established that the certificates alone were considered?

It is further contended that the treaty of 1894 alone provides the evidence which a member of the exempted class of Chinese must produce, and abrogates the act of 1882 and the acts amendatory theref, and also aborogates the treaty of 1880.

Article III of the treaty of 1894, 28 Stat. p. 1211, is as follows:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States they may produce a certificate from their government, or the government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart."

This court, however, held adversely to the contention of petitioner in the case of *United States* v. *Lee Yen Tai*, 185 U. S. 213, decided at the present term. In that case the twelfth

section of the act of 1882 was more immediately under consideration, but the reasoning applies to the sixth section as well.

Counsel for petitioner do not urge the insufficiency of the decision of Assistant Secretary Spaulding, therefore we may consider that it is conceded to have been made by the authority of the Secretary. The District Court, however, in its opinion, seems to imply that, if there had been no hearing by the Secretary, the court, nevertheless, would have been without jurisdiction to restrain the deportation of the Chinese persons. On that we do not think it is necessary to express an opinion. There is an intimation to the contrary by the Circuit Court of Appeals of the Ninth Circuit in the case of *United States* v. *Gin Fung*, *supra*.

Judgment affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

MR. JUSTICE GRAY did not hear the argument and took no part in the decision.

GALLAWAY *v.* FORT WORTH BANK.

MOTION TO SUE OUT WRIT OF ERROR, WITHOUT GIVING BOND REQUIRED BY LAW.

Submitted May 19, 1902.—Decided June 2, 1902.

The act of Congress of July 20, 1892, 27 Stat. 252, has no application to proceedings in this court.

THE case is stated in the opinion.

Mr. A. Gallaway in *propria persona*.

No appearance opposing.

THE CHIEF JUSTICE. This is an application for leave to prosecute a writ of error to a state court, without giving security

as required by section 1000 of the Revised Statutes, under an act of Congress of July 20, 1892. 27 Stat. 252.

The motion must be denied. Our ruling has uniformly been, and has been enforced in repeated instances that that act has no application to proceedings in this court.

Motion denied.

HATFIELD *v.* KING.

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

No. 221. Submitted May 2, 1902.—Decided June 2, 1902.

This case having been decided below on demurrer, and having been brought to this court on appeal, and it appearing that the appearance of one of the defendants below was improvidently entered, and certain charges having been made involving the conduct of counsel, the case was remanded, for reasons stated, to the Circuit Court for the Northern District of West Virginia, to be dealt with, 184 U. S. 162, notwithstanding that while it was pending here that State was divided into two districts, 31 Stat. 736, c. 105, and ordinarily the case would fall within the Southern District. On motion to change the decree to that effect, the court, in view of the terms of the act and the situation of the case, declined to modify it.

THE case is stated in the opinion of the court.

Mr. Holmes Conrad for appellants.

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

In this case a decree was entered in favor of King on June 2, 1900, in the Circuit Court for the District of West Virginia, from which an appeal was allowed to this court, and the case docketed, and the record filed, January 3, 1901. Subsequently certain motions were made, on the submission of which it was contended by appellants that the decree against them ought to be set aside because they had not had the hearing in that court

to which they were entitled by law; that they were not served with process; and that counsel, unauthorized by them, had entered their appearance. The matter was submitted November 11, 1901, and decided February 24, 1902. *Hatfield* v. *King*, 184 U. S. 162. Our decree remanded the cause "to the Circuit Court of the United States for the Northern District of West Virginia, with directions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require."

In the course of the opinion it was said: "It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

After the case had been docketed, and on January 22, 1901, an act was approved, which divided the State of West Virginia into two judicial districts, called the Northern and Southern Judicial Districts, and provided that the District Judge of the District of West Virginia in office at the time the act took effect should be the District Judge for the Northern Judicial District of West Virginia as thereby constituted. 31 Stat. 736, c. 105.

By the eighth section of the act it was provided that causes and proceedings then pending in the courts of the District of West Virginia, which would have been cognizable in the courts of the Northern Judicial District as created by the act, were transferred to that district; and similarly as to pending causes and proceedings falling within the new Southern District.

This proviso was added: "Provided, that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy now pending in said judicial district of West Virginia as heretofore constituted, in which the evidence has been taken in whole or in part before the present district judge of the judicial district of

West Virginia as heretofore constituted, or taken in whole or in part and submitted and passed upon by the said district judge, shall be proceeded with and disposed of in said northern judicial district of West Virginia as constituted by this act."

We think it sufficiently appears from the record that this case, when decided below, was pending in the Circuit Court of the United States for the District of West Virginia, at Charleston, in the county of Kanawha, a county included in the Southern District created by the act; and it involved lands situated in counties now in that District.

The decree entered by this court, February 24, 1902, remanded the cause to the Northern District of West Virginia, that the decree of the Circuit Court might be set aside, and certain proceedings be taken. A motion is now made to amend that decree so that the case may be sent to the Southern District, not only in respect of final hearing and decree on the merits therein, but also as to matters involved on the motions treated of in our previous opinion, which we considered it best should be passed on by the judge who rendered the original decree, the correctness of which view is confirmed by observations of counsel.

The motions were twofold, to reverse the decree and to remand the cause for further proceedings in accordance with law, and also to proceed against certain persons as for contempt of court. We concluded that an investigation ought to be had, and that it ought to take place in the court where the wrong was asserted to have been done, and before the judge who had been imposed upon, if the charges were correct, as to which we expressed no opinion. And we did not feel constrained by the terms of the act to remand the case to the Southern District; but on the contrary, as by the proviso, motions and causes submitted, in which the evidence had been taken in whole or in part, that is to say, matters *in gremio*, were to be proceeded with and disposed of in the Northern Judicial District, we regarded that proviso as broad enough to permit the course taken by us in the order made. While it may be said that a suit is pending even after decree rendered,

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yet the words "now pending," used in the eighth section, literally apply to cases remaining unheard and undecided, and no particular provision was therein made in reference to cases pending on appeal. Nevertheless it is true that if there had been nothing more in this case than a decree by this court, affirming or reversing the decree below, the case would have been remanded to the district in which the property in controversy was situated, and in which the case would have been brought if the new District had then existed. But, as will have been seen, the case was not determined on its merits here, and proceedings were thought necessary to be taken independent of the ultimate disposition of the case. Therefore we entered the decree of February 24, and, upon further reflection, have concluded that it should not be amended.

Motion denied.

MR. JUSTICE HARLAN took no part in the consideration and disposition of this motion.

HANOVER NATIONAL BANK *v.* MOYSES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 203. Argued and submitted April 7, 1902.—Decided June 2, 1902.

The bankruptcy law of 1898 is not unconstitutional because it provides that others than traders may be adjudged bankrupts; and that this may be done on voluntary petition.

Nor is it unconstitutional for want of uniformity because of its recognition of exemptions by the local law.

The notices provided for by the act are sufficient under the Constitution of the United States, and the discharge of the debtor under proceedings at his domicil authorized by Congress is valid throughout the United States.

THIS was an action brought by the Hanover National Bank of New York against Max Moyses in the Circuit Court of the

United States for the Eastern District of Tennessee, November 20, 1899, on a judgment recovered against him in the Circuit Court of Washington County, Mississippi, December 12, 1892.

The amended declaration averred the execution of a certain promissory note by defendant payable to the bank of Greenville, Mississippi; the endorsement thereof to plaintiff in New York; default in payment, suit in the state court of Mississippi having jurisdiction *in personam* against defendant, who was then a citizen and resident thereof; recovery of judgment; and that the judgment "still remains in full force and effect, unappealed from, unreversed, or otherwise vacated, and the plaintiff hath not obtained any execution or satisfaction thereof." It was also averred that after the rendition of the judgment in Mississippi, defendant changed his domicil and residence to the State of Tennessee, and thereafter, "not being a merchant or a trader, nor engaged in business or in any commercial pursuits, nor using the trade of merchandise, and being without mercantile business of any kind, filed his voluntary petition in bankruptcy in the District Court of the United States for the Southern Division of said Eastern District of Tennessee, under the act of Congress of the United States of America, approved July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,'" and was adjudged bankrupt, and "since August 1, 1898," "granted an adjudication of his discharge in bankruptcy from all of his debts, including that herein sued for." 30 Stat. 544, July 1, 1898, c. 541.

It was admitted that the discharge was "good and effectual if said act of Congress and the proceedings thereunder are valid," but charged that the act was void because in violation of the Federal Constitution in many particulars set forth.

Plaintiff also stated that it was and had continued to be domiciled in and resident in New York; that it was not a party to said proceedings in bankruptcy, nor did it enter its appearance therein for any purpose, nor did it prove its claim, nor did it in any way subject itself to the jurisdiction of the District Court in said proceedings; that plaintiff was not served with process

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of any kind on said petition for adjudication, and had no notice, personal or otherwise, of the said proceeding by voluntary petition for adjudication; nor was any notice of the proceeding to adjudicate defendant a bankrupt given plaintiff, or any one else, "nor is any notice of any kind of such proceeding to adjudicate a person a bankrupt upon his voluntary petition required by said act of Congress, and in this said act of Congress violates the Fifth Amendment," as does the "adjudication of defendant as a bankrupt;" that the *situs* of the promissory note, on which the judgment was rendered, was never within the jurisdiction of the District Court; and that the court never acquired jurisdiction of plaintiff nor of the debt sued on.

Demurrer was filed to the amended declaration, the demurrer sustained, and final judgment entered dismissing the suit. The Circuit Court stated that it took this action on the authority of *Leidigh Carriage Company* v. *Stengel*, 95 Fed. Rep. 637. Thereupon the bank brought this writ of error.

Errors were specified as follows: That the discharge under the act of Congress of July 1, 1898, was a nullity, because:

"1. Said act violates the Fifth Amendment to the Constitution of the United States in this:

"(*a*) It does not provide for notice as required by due process of law to the creditor in voluntary proceedings for adjudication of bankruptcy and for the discharge of the debt of the creditor.

"(*b*) Ten days' notice by mail to creditors to oppose discharge is so unreasonably short as to be a denial of notice.

"(*c*) The grounds of opposition to a discharge are so unreasonably limited as, substantially, to deny the right of opposition to a discharge. Thereby the act is also practically a legislative promulgation of a discharge contrary to article III, section 1, of the Federal Constitution.

"2. Said act violates article I, section 8, paragraph 4, of the Constitution in this:

"(*a*) It does not establish uniform laws on the subject of bankruptcies throughout the United States.

"(*b*) It delegates certain legislative powers to the several States in respect to bankruptcy proceedings.

"(*c*) It provides that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions."

Mr. Marcellus Green for plaintiff in error.

Mr. George White for defendant in error submitted on his brief.

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

By the fourth clause of section eight of article I of the Constitution the power is vested in Congress "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." This power was first exercised in 1800. 2 Stat. 19, c. 19. In 1803 that law was repealed. 2 Stat. 248, c. 6, In 1841 it was again exercised by an act which was repealed in 1843. 5 Stat. 440, c. 9; 5 Stat. 614, c. 842. It was again exercised in 1867 by an act which, after being several times amended, was finally repealed in 1878. 14 Stat. 517, c. 176; 20 Stat. 99, c. 160. And on July 1, 1898, the present act was approved.

The act of 1800 applied to "any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying or selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer," and to involuntary bankruptcy.

In *Adams* v. *Storey*, 1 Paine, 79, Mr. Justice Livingston said on circuit: "So exclusively have bankrupt laws operated on traders, that it may well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject." But this doubt was resolved otherwise, and the acts of 1841 and 1867 extended to persons other than merchants or traders, and provided for voluntary proceedings on the part of the debtor, as does the act of 1898.

It is true that from the first bankrupt act passed in England, 34 & 35 Hen. VIII, c. 4, to the days of Queen Victoria, the

English bankrupt acts applied only to traders, but, as Mr. Justice Story, in his Commentaries on the Constitution, pointed out, "this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors." § 1113.

The whole subject is reviewed by that learned commentator in chapter XVI, §§ 1102 to 1115 of his works, and he says (§ 1111) in respect of "what laws are to be deemed bankrupt laws within the meaning of the Constitution:" "Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said, that laws, which merely liberate the person of the debtor, are insolvent laws, and, those, which discharge the contract, are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. . . . Again, it has been said, that insolvent laws act on imprisoned debtors only at their own instance; and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense insolvents, or bankrupts. And if an act of Congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying that the act was unconstitutional, and the commission a nullity. It is believed, that no laws ever were passed in America by the colonies or States, which had the technical denomination of 'bankrupt laws.' But insolvent laws, quite coextensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and state legislation. No distinction was ever practically, or even theoretically, attempted to be made between bankruptcies and insolvencies. And a historical review of the colonial and state legislation will abundantly show, that a bankrupt law may contain those regulations, which are generally found in insolvent laws; and that an insolvent law may contain those, which are common to bankrupt laws."

Sturges v. *Crowninshield*, 4 Wheat. 122, 195, was cited, where Chief Justice Marshall said: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law."

In the case, *In re Klein*, decided in the Circuit Court for the District of Missouri, and reported in a note to *Nelson* v. *Carland*, 1 How. 265, 277, Mr. Justice Catron held the bankrupt act of 1841 to be constitutional, although it was not restricted to traders, and allowed the debtor to avail himself of the act on his own petition, differing in these particulars from the English acts. He said among other things: "In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word 'bankruptcy.' It is employed in the Constitution in the plural, and as part of an expression; 'the subject of bankruptcies.' The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is—to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress. With the policy of a law, letting in all classes,—others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers."

Similar views were expressed under the act of 1867, by Mr. Justice Blatchford, then District Judge, in *In re Reiman*, 7 Ben. 455; by Deady, J., in *In re Silverman*, 1 Sawyer, 410; by Hoffman, J., in *In re California Pacific Railroad Company*, 3 Sawyer, 240; and in *Kunzler* v. *Kohaus*, 5 Hill, 317, by Cowen, J., in respect of the act of 1841, in which Mr. Justice Nelson, then Chief Justice of New York, concurred. The conclusion that an act of Congress establishing a uniform system of bankruptcy throughout the United States, is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion.

The framers of the Constitution were familiar with Blackstone's Commentaries, and with the bankrupt laws of England, yet they granted plenary power to Congress over the whole subject of "bankruptcies," and did not limit it by the language used. This is illustrated by Mr. Sherman's observation in the Convention, that "bankruptcies were, in some cases, punishable with death by the laws of England, and he did not choose to grant a power by which that might be done here;" and the rejoinder of Gouverneur Morris, that "this was an extensive and delicate subject. He would agree to it, because he saw no danger of abuse of the power by the legislature of the United States." Madison Papers, 5 Elliot, 504; 2 Bancroft, 204. And also to some extent by the amendment proposed by New York, "that the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders; and the States, respectively, may pass laws for the relief of other insolvent debtors." 1 Elliot, 330. See also Mr. Pinkney's original proposition, 5 Elliot, 488; the report of the committee thereon, 5 Elliot, 503; and The Federalist, No. 42, Ford's ed. 279.

As the States, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of Congressional legislation retained it, the limitation was imposed on the States that they should pass no "law impairing the obligation of contracts."

In *Brown* v. *Smart*, 145 U. S. 454, 457, Mr. Justice Gray

said: "So long as there is no national bankrupt act, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. Yet each State, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction." Many cases were cited, and, among others, *Denny* v. *Bennett*, 128 U. S. 498, where Mr. Justice Miller observed: "The objection to the extraterritorial operation of a state insolvent law is, that it cannot, like the bankruptcy law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded."

Counsel justly says that "the relation of debtor and creditor has a dual aspect and contains two separate elements. The one is the right of the creditor to resort to present property of the debtor through the courts to satisfy the debt; the other is the personal obligation of the debtor to pay the debt, and that he will devote his energies and labor to discharge it," 4 Wheat. 198; and "in the absence of property the personal obligation to pay constitutes the only value of the debt." Hence the importance of the distinction between the power of Congress and the power of the States. The subject of "bankruptcies" includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do.

The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical and not personal, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule.

Section 6 reads: "This act shall not affect the allowance to bankrupts of their exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Section 14 of the act of 1867 prescribed certain exemptions, and then added: "And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four." This was subsequently amended, and controversies arose under the act as amended which we need not discuss in this case. Lowell on Bankruptcy, § 4.

It was many times ruled that this provision was not in derogation of the limitation of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets. Mr. Justice Miller concurred in an opinion to that effect in the case of *Beckerford*, 1 Dillon, 45.

Mr. Chief Justice Waite expressed the same opinion in *In re Deckert*, 2 Hughes, 183. The Chief Justice there said: "The power to except from the operation of the law property liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law, to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that

of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution."

We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States.

Nor can we perceive in the recognition of the local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power. *In re Rahrer, Petitioner*, 140 U. S. 545, 560.

But it is contended that as to voluntary proceedings the act is in violation of the Fifth Amendment in that it deprives creditors of their property without due process of law in failing to provide for notice.

The act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," (§ 4*a*,) and that "upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition." § 18*g*. With the petition he must file schedules of his property, and "of his creditors, showing their residences, if known, if unknown, that fact to be stated." § 7, subd. 8. The schedules must be verified, and the petition must state that "petitioner owes debts which he is unable to pay in full," and "that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law." This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition. These are not issu-

able facts, and notice is unnecessary, unless dismissal is sought, when notice is required. § 59 *g*.

As Judge Lowell said: "He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property." *In re Fowler*, 1 Lowell, 161.

Adjudication follows as matter of course, and brings the bankrupt's property into the custody of the court for distribution among all his creditors. After adjudication the creditors are given at least ten days' notice by publication and by mail of the first meeting of creditors, and of each of the various subsequent steps in administration. § 58. Application for a discharge cannot be made until after the expiration of one month from adjudication. § 14.

Form No. 57 gives the form of petition for discharge and the order for hearing to be entered thereon, requiring notice to be published in a designated newspaper printed in the district, and "that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated."

Section 14 *b* provides for the granting of discharge unless the applicant has "(1) committed an offence punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

The offences referred to are enumerated in section 29, and embrace misappropriation of property; concealing property belonging to the estate; making false oaths or accounts; presenting false claims; receiving property from a bankrupt with intent to defeat the act; extorting money for acting or forbearing to act in bankruptcy proceedings.

It is also provided by section 15 that a discharge may be revoked, on application within a year, if procured by fraud and not warranted by the facts.

Notwithstanding these provisions, it is insisted that the want of notice of filing the petition is fatal because the adjudication

per se entitles the bankrupt to a discharge, and that the proceedings in respect of discharge are *in personam*, and require personal service of notice. The adjudication does not in itself have that effect, and the first of these objections really rests on the ground that the notice provided for is unreasonably short, and the right to oppose discharge unreasonably restricted. Considering the plenary power of Congress, the subject-matter of the suit, and the common rights and interests of the creditors, we regard the contention as untenable.

Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, and we cannot find anything in this act on that subject which would justify us in overthrowing its action.

Nor is it possible to concede that personal service of notice of the application for a discharge is required.

Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, as Mr. Justice Grier remarked in *Shawhan* v. *Wherritt*, 7 How. 643. And in *New Lamp Chimney Company* v. *Brass and Copper Company*, 91 U. S. 662, it was ruled that a decree adjudging a corporation bankrupt is in the nature of a decree *in rem* as respects the *status* of the corporation. Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the *status* of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicil. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree.

Judgment affirmed.

CHIN BAK KAN *v.* UNITED STATES.
CHIN YING *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Nos. 525, 526. Argued March 13, 14, 1902.—Decided June 2, 1902.

The ruling in *United States* v. *Lee Yen Tai*, 185 U. S. 213, affirmed.

The legislation considered, the act of May 5, 1892, is satisfied by proceedings before a United States commissioner.

It was competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under the decision in *United States* v. *Wong Kim Ark*, 169 U. S. 649.

The same reasoning with respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals.

COMPLAINT under oath was duly made before a commissioner of the United States for the Northern District of New York, charging "that Chin Bak Kan did, on or about the 13th day of March, 1901, at Burke in said district, knowingly and wrongfully come from Canada, in the province of Quebec, into the Northern District of New York, to wit: into Burke in the county of Franklin and State of New York, in the United States, he, the said Chin Bak Kan being then and there a Chinese person and laborer, and a person prohibited by the laws of the United States of America from being and remaining in the United States, and he, the said Chin Bak Kan, then and there being such Chinese person as aforesaid, was then and there found unlawfully in the United States at Burke aforesaid, in violation of the acts of the Congress in such case made and provided."

A warrant for the apprehension of Chin Bak Kan was issued March 13, 1901, and he was arrested and brought before the commissioner. He was informed of the charge against him, advised that he would be permitted to make a statement without or with oath, or to refuse to make any statement or to an-

swer any question put to him, and was entitled to reasonable time to send for counsel and procure the attendance of witnesses. He pleaded not guilty to the charge, "but admitted that he had just come into the United States." He was thereafter represented by counsel. Subsequently a hearing and trial was commenced before the commissioner who issued the warrant. That officer having been taken sick, the hearing was continued and concluded before another commissioner, who found and adjudged upon the evidence as follows: "I now hereby find and adjudge that the said Chin Bak Kan is a Chinese person and laborer, that he is not a diplomatic or other officer of the Chinese or any other government, and unlawfully entered the United States, as charged in said complaint. And I further adjudge him, said Chin Bak Kan, guilty of not being lawfully entitled to be or remain in the United States. I further find and adjudge that he, said Chin Bak Kan, came from the Empire of China, but he has not made it appear to me that he was a subject or citizen of some other country than China. And I hereby order and adjudge said Chin Bak Kan to be immediately removed from the United States to the Empire of China. A certified copy of this judgment shall be the process upon which said removal of said Chin Bak Kan shall be made from the United States to the Empire of China. And said process shall be executed by the Hon. C. D. MacDougall, United States marshal for said district."

An appeal was prosecuted to the District Court of the United States for the Northern District of New York, but the appeal was dismissed and the judgment for the deportation of the defendant was affirmed.

From the final order of the District Court an appeal was then taken to this court.

Mr. Max J. Kohler for Chin Bak Kan and Chin Ying.

Mr. Assistant Attorney General Hoyt for the United States.

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

By section one of the act of May 6, 1882, 22 Stat. 58, c. 126,

it was provided that from and after the expiration of ninety days, and until the expiration of ten years, the coming of Chinese laborers to the United States should be suspended, and during such suspension it was made unlawful for any Chinese laborer to come, or, having come after the expiration of said ninety days, to remain within the United States.

By section four provision was made for certificates to be granted to such Chinese as were entitled under the treaty of November 17, 1880, to go from, or come to, the United States, of their free will and accord, in order to identify them.

The twelfth section of the act was as follows: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States."

This section was amended by the act of July 5, 1884, 23 Stat. 115, c. 220, so as to read as follows: "That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or

United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States, who may not have been permitted to land from any vessel by reason of any of the provisions of this act."

By section one of the act of May 5, 1892, 27 Stat. 25, c. 60, it was provided: "That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for the period of ten years from the passage of this act."

Sections two, three and six were as follows:

"SEC. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: *Provided*, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

"SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

"SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their re-

spective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost.

"Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases, the cost of said arrest and trial shall be in the discretion of the court.

"And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge."

Section six was amended by the act of November 3, 1893, 28 Stat. 7, c. 14.

Article I of the treaty with China, proclaimed November 8, 1894, 28 Stat. 1210, was: "The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited."

Article II provided: "The preceding article shall not apply

to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. . . . And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required."

Article V: "The government of the United States, having by an act of the Congress, approved May 5, 1892, as amended by an act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named act to be registered as in said act provided, with a view of affording them better protection, the Chinese government will not object to the enforcement of such acts, and reciprocally the government of the United States recognizes the right of the government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said acts of Congress,) citizens of the United States in China, whether residing within or without the treaty ports."

In *United States* v. *Lee Yen Tai*, 185 U. S. 213, just decided, the question was propounded to us by the Circuit Court of Appeals for the Second Circuit on certificate: "Is section 12 of 'An act to execute certain treaty stipulations relating to the Chinese, approved May 6, 1882,' as amended by section 3 of the amendatory act of July 5, 1884, repealed by the treaty or convention with China of December 8, 1894?" and that question we answered in the negative.

The act of March 3, 1901, 31 Stat. 1093, c. 845, provides:

"That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing.

"Sec. 2. That a United States commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese exclusion laws.

"SEC. 3. That no warrant of arrest for violations of the Chinese exclusion laws shall be issued by the United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

The errors assigned may be grouped into those which presented the question of the effect of the treaty of 1894 by way of repeal, and these have been disposed of by our decision in *United States* v. *Lee Yen Tai*, 185 U. S. 213; those in respect of the assertion of citizenship and the action taken thereon; and certain objections of want of jurisdiction because of insufficiency of the complaint. The latter relate to lack of positive averment of the facts, and as to the official character of the person who made the complaint. The complaint was made by one Ketchum, and, although it was not therein stated, it appears from the official register of the government that he was a Chinese inspector, and as such authorized under the statute.

The charge was made on information and belief, but no objection was raised to the complaint on that ground, and we think the ruling in *Fong Yue Ting* v. *United States*, 149 U. S. 729, applies that defects in complaint or pleadings do not affect the authority of the commissioner or judge or the validity of the statute.

Something is said in respect of want of jurisdiction in the commissioner because section six of the act of 1892 provides that Chinese laborers without certificates may be "taken before a United States judge;" but we concur in the views of the Circuit Court of Appeals for the Ninth Circuit in *Fong Mey Yuk* v. *United States*, 113 Fed. Rep. 898, that the act is satisfied by proceeding before "a justice, judge, or commissioner." These are the words used in section twelve of the act of 1882; section twelve of the act of 1884; section thirteen of the act of 1888; and section three of the act of 1892; while the first sec-

tion of the act of March 3, 1901, explicitly authorizes the district attorney to designate the commissioner before whom the Chinese person may be brought. The words "United States judge," "judge" and "court," in section six, seem to us to refer to the tribunal authorized to deal with the subject, whether composed of a justice, a judge, or a commissioner. A United States commissioner is a *quasi* judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

But it is argued that the commissioner had no jurisdiction to act because the claim of citizenship was made. The ruling in *United States* v. *Wong Kim Ark*, 169 U. S. 649, was to this effect: "A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States." It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision.

By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.

Opinion of the Court.

Section thirteen of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath, "by any justice, judge, or commissioner of any United States court," and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. "But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

It seems to have been assumed, during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the District Court of the United States for the Northern District of New York, and, upon hearing, the District Court affirmed that judgment. From the judgment of the District Court, this appeal was taken under section five of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question. Except in cases under that section where the question of jurisdiction alone is certified, we have power to dispose of the entire case, but as the jurisdiction of the commissioner is sustained, we are of opinion that we cannot properly reëxamine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is, *a fortiori*, justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts.

Judgment affirmed.

CHIN YING *v.* THE UNITED STATES.

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

No. 526. Argued March 13, 14, 1902.—Decided June 2, 1902.

MR. CHIEF JUSTICE FULLER. This case is similar to that just decided, and the judgment of the court below is

Affirmed.

MR. JUSTICE GRAY did not hear the argument and took no part in these decisions.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

DENVER FIRST NATIONAL BANK *v.* KLUG.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 599. Submitted May 5, 1902.—Decided June 2, 1902.

It having been found in the District Court that a person proceeded against in involuntary bankruptcy was "engaged chiefly in farming," and the petition having been dismissed accordingly, *held*, That no appeal lies to this court from that decree.

Mr. Charles J. Greene and *Mr. R. W. Breckenridge* for appellants.

Mr. John F. Shafroth for appellees.

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

The bankrupt act, act of July 1, 1898, c. 541, 30 Stat. 544, provides: "Any natural person, except a wage earner or a per-

son engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act." § 4 *b*.

In this proceeding by petition in involuntary bankruptcy filed against John P. Klug, a trial before a jury was had on the issue whether Klug was "engaged chiefly in farming," within the meaning of the act. The District Court, upon the evidence, directed the jury to find that Klug was a farmer and engaged chiefly in farming, within the meaning of the act, and, the jury having found accordingly, entered judgment dismissing the petition with costs. Petitioners prayed an appeal directly to this court, which was allowed, and the District Court thereupon made and filed its findings of fact and conclusions of law in pursuance of the third subdivision of General Order in Bankruptcy, XXXVI.

Section 24 of the bankrupt act provides:

"*a*. The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"*b*. The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Our jurisdiction of this appeal depends on the act of March 3,

1891, by the fifth section of which an appeal or writ of error from or to the Circuit or District Courts will lie directly "in any case where the jurisdiction of the court is in issue," and in such cases "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." In this case there is no such certificate, and, moreover, the District Court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned. *Mueller* v. *Nugent*, 184 U. S. 15; *Louisville Trust Company* v. *Comingor*, 184 U. S. 25; *Smith* v. *McKay*, 161 U. S. 355.

It is not contended that the case falls within either of the other classes of cases mentioned in section five.

Section 25 provides:

"*a.* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

"*b.* From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

"2. Where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of

the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

This appeal does not come within those provisions.

Subdivision *d* of the same section is: "Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

The words "bankruptcy proceedings" are used in this section in contradistinction to controversies arising out of the settlement of the estates of bankrupts, as they are also so used in sections 23 and 24. The certification referred to is that provided for in sections 5 and 6 of the act of March 3, 1891, and this case in that particular does not fall within those sections.

Apart from section 25, the Circuit Courts of Appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under section 6 of the act of 1891. *Mueller* v. *Nugent*, 184 U. S. 1; *Huntington* v. *Saunders*, 163 U. S. 319; *Aztec Mining Company* v. *Ripley*, 151 U. S. 79, 81.

But the question before us is whether this appeal was properly brought, and we do not think it was.

Appeal dismissed.

CLARK *v.* HERINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 223. Submitted April 14, 1902.—Decided June 2, 1902.

While the two statutes making the Union Pacific Railroad grants did not double the price of the even numbered sections within the place limits, yet that was done by the act of March 6, 1868, c. 20, 15 Stat. 39, and the even numbered sections within the place limits were from that time not open to selection as indemnity lands.

The act of Congress provides in terms that the sections of land should be subject to entry only under the homestead and preëmption laws, and the Land Department had no power to turn one of those sections over to a railroad company.

No title to indemnity lands is vested until an approved selection has been made; up to which time Congress has full power to deal with lands in the indemnity limits as it sees fit.

This is not an action to recover the possession of land, or to quiet title thereto; but it is clearly a matter of ordinary judicial cognizance, not excluded therefrom.

The contention that plaintiff in error is an innocent purchaser for value was not set up as a defence in the state courts.

On May 20, 1899, Monroe D. Herington, the defendant in error, recovered a judgment in the District Court of Labette County, Kansas, against Lee Clark, for the sum of $3032.28, which judgment was affirmed by the Supreme Court of that State on November 10, 1900. Thereupon the case was brought here on writ of error.

The facts are these: The action was one to recover damages for breach of warranty in the conveyance of a part of section 22, township 15, range 5, in Morris County, Kansas. The tract was outside the place and within the indemnity limits of the land grant made July 26, 1866, 14 Stat. 289, c. 270, to the Union Pacific Railroad Company, Southern Branch, a corporation whose name was subsequently changed to Missouri, Kansas and Texas Railroad Company. The railroad company duly constructed its road, and, failing to obtain within the place limits the full quota of lands granted to it, selected, on October 22,

1877, the tract in controversy among others in lieu thereof. At the time of such selection the tract was unimproved and without actual occupation. The selection was approved by the Commissioner of the General Land Office, but no patent was issued. On September 5, 1884, the railroad company conveyed the land to Lee Clark. He conveyed by warranty deed. Herington is a subsequent grantee in the chain of title, and is also the assignee from Clark's immediate grantee of all his rights under Clark's deed, including the right to recover damages for any breach of the covenants therein contained.

The tract was in an even-numbered section and within the place limits of the grant, made by acts of Congress of date July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, to the Union Pacific Railroad Company, Eastern Division.

On July 21, 1886, the selection by the Missouri, Kansas and Texas Railroad Company was canceled by order of the Commissioner of the General Land Office. Notice of this order was given to the railroad company, as also time to appeal therefrom, but no appeal was ever taken. On July 28, 1888, E. M. Cox, who had, on July 31, 1886, taken forcible possession of the land, filed his declaratory statement, claiming settlement. On July 26, 1889, he made final proof, paid the government price and received his patent certificate. Thereafter on October 15, 1890, a patent was issued to him.

Mr. James Hagerman, *Mr. T. N. Sedgwick* and *Mr. J. M. Bryson* for plaintiff in error.

Mr. John H. Mahan for defendant in error.

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

The paramount Federal question is whether the Missouri, Kansas and Texas Railroad Company was authorized to select as indemnity lands in satisfaction of its grant any even-numbered sections within the place limits of the prior grant to the Union

Pacific Railroad Company. Upon this question *United States* v. *Missouri &c. Railway*, 141 U. S. 358, is cited. The railway company, defendant in that case, is the successor in interest of the Missouri, Kansas and Texas Railroad Company. The act making its land grant is the one referred to in the foregoing statement of facts, as made July 26, 1866. 14 Stat. 289, c. 270. It claimed under the authority of that act the right to take as indemnity lands even-numbered sections within the place limits of what is known as the Leavenworth road, in whose benefit a grant was made March 3, 1863. 12 Stat. 772. The court held against this claim, saying (p. 370):

"Now, it is clear that the *even*-numbered sections, within the place limits of the Leavenworth road, were reserved by the act of 1863, for purposes distinctly declared by Congress, and which might be wholly defeated if the Missouri-Kansas company were permitted to take them as indemnity lands under the act of 1866. The requirement in the second section of the act of 1863, that the 'reserved sections' which 'remained to the United States' within ten miles on each side of the Leavenworth road, 'shall not be sold for less than double the minimum price of the public lands when sold,' nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual *bona fide* settlers, under the preëmption and homestead laws, to purchase *those lands* at the increased minimum price, after due proof of settlement, improvement, cultivation and occupancy; and the right accorded to settlers on such sections under the homestead laws, improving, occupying and cultivating the same, to have patents for not exceeding eighty acres each, are inconsistent with the theory that the *even*-numbered sections, so remaining to the United States, within the place limits of the Leavenworth road could be taken as *indemnity* lands for a railroad corporation."

While the two statutes making the Union Pacific Railroad grants did not double the price of the even-numbered sections within the place limits, yet that was done by the act of March 6, 1868, 15 Stat. 39, c. 20, which in terms provided "that such sections shall be rated at two dollars and fifty cents per acre, and sub-

ject only to entry under those (the preëmption and homestead) laws." The even-numbered sections within the place limits of the Union Pacific Railroad grants were from that time therefore not open to selection as indemnity lands. It is true that this statute was not passed until after the grant to the Missouri, Kansas and Texas Railroad Company, nor until after it had filed its map of definite location with the Secretary of the Interior, which appears from an agreed statement of the facts to have been on January 7, 1868, but it was passed before the completed construction of the railroad and long before the selection made by the company, and it is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas Pacific Railroad* v. *Atchison Railroad*, 112 U. S. 414, 421: "Until selection was made the title remained in the government, subject to its disposal at its pleasure." See, also, *Ryan* v. *Railroad Company*, 99 U. S. 382; *Grinnell* v. *Railroad Company*, 103 U. S. 739; *Cedar Rapids &c. Railroad* v. *Herring*, 110 U. S. 27; *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, 731; *Barney* v. *Winona &c. Railroad*, 117 U. S. 228, 232; *Sioux City Railroad* v. *Chicago Railway*, 117 U. S. 406, 408; *Wisconsin Railroad* v. *Price County*, 133 U. S. 496, 511; *United States* v. *Missouri &c. Railway*, 141 U. S. 358, 375; *Hewitt* v. *Schultz*, 180 U. S. 139; *Southern Pacific Railroad Company* v. *Bell*, 183 U. S. 675.

It is contended by plaintiff in error that the selection by the railroad company, when approved by the Land Department, operated to convey the title as effectively as would a patent to it therefor; that the even-numbered sections within the place limits, although double minimum lands, were public lands and within the jurisdiction of the Land Department, and that hence the approval of the selection by the Land Department, even if erroneous, operated to vest the title in the company. But this is a mistake. The act of Congress provided in terms that such sections should be subject only to entry under the homestead and preëmption laws, and the Land Department had no more power to turn one of those sections over to a railroad company

than it had to grant lands in a military or Indian reservation. While the lands were within the jurisdiction of the Land Department for some purposes they were not for all. The mode of their disposal was limited, and the Land Department had no authority to ignore that limited mode and dispose of them in any other way. This general doctrine as to the limitation of the powers of the Land Department has been affirmed by this court in many cases and under different circumstances. *Wilcox* v. *Jackson*, 13 Peters, 498; *United States* v. *Stone*, 2 Wall. 525.

It is further contended that it was not within the power of the Land Department to cancel the selection by the company, after the conveyance of the land by the company, without notice to all the transferees, and in support thereof, *Cornelius* v. *Kessel*, 128 U. S. 456; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, and *Hawley* v. *Diller*, 178 U. S. 476, are cited. It is undoubtedly true, as held in those cases and others, that while the Land Department has full jurisdiction over the disposition of public lands—a jurisdiction which may be exercised until the passing of the legal title by the issue of a patent or otherwise—yet such jurisdiction cannot be exercised so as to destroy any equitable rights without notice to the claimants thereof. While that is true, the courts are not thereby debarred from an inquiry into and a determination of the validity of any equitable title. They do not assume any direct appellate jurisdiction over the rulings of the Land Department, and they accept the findings of that department as conclusive upon questions of fact. *Shepley* v. *Cowan*, 91 U. S. 330; *Quinby* v. *Conlan*, 104 U. S. 420. But, notwithstanding this, prior to the issue of any patent a party may have rights in the land of one kind or another which courts will enforce. Thus, where the full equitable title to land has passed from the government to an individual, the land is subject to state taxation, although no patent has issued. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210. Where, prior to the issue of a patent, land in possession of an individual is sought to be charged with state taxes, he may contest in the courts the liability of the land therefor on the ground that full equitable title has not passed to him, or that something yet remains to be done before

the rights of the government are ended. *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444.

Again, even before the acquiring of even an equitable title to the land as against the government, contracts made by actual settlers concerning their possessory rights and the title hoped to be acquired from the United States, may be valid as between the parties thereto, and enforced in the courts. *Lamb* v. *Davenport*, 18 Wall. 307; *Stark* v. *Starr*, 94 U. S. 477.

Again, it is a well-known fact that many agricultural lands and many mining claims are held by their owners with only final receipts from the government and without the issue of any patent. Yet the rights which accompany title are exercised by the parties and enforced by the courts.

It will be noticed that this is not an action to recover the possession of any land, or one to quiet the title thereto. It is simply an action to recover damages for the breach of a contract in respect to the land, and the decision, in no respect controlling the action of the officers of the Land Department, is simply a determination of the rights which the parties have acquired by proceeding in the Land Department. This is clearly a matter of ordinary judicial cognizance, and one which by no statute of Congress or rule of the common law is excluded from such cognizance. *Garland* v. *Wynn*, 20 How. 6; *Monroe Cattle Company* v. *Becker*, 147 U. S. 47, 57; *Turner* v. *Sawyer*, 150 U. S. 578.

A final contention in this matter is that the plaintiff in error is an innocent purchaser for value, and that, therefore, he and his grantees are entitled to be protected in their title by virtue of the act of March 3, 1887, 24 Stat. 556, c. 376, and March 2, 1896, 29 Stat. 42, c. 39. It is a sufficient answer to this contention that this defence was not set up in the state courts, and that it does not appear anywhere in the record that Clark, to whom the railroad company conveyed, or any subsequent grantee in the chain of title, was a citizen of the United States or had declared his intention to become a citizen, and hence the act of 1887, which purports to confirm alone the titles of citizens or those who have declared their intention to become citizens, has no

application; that the act of 1896 also has no application because that refers only to cases of lands patented or certified, and the confirmations of lands acquired by deed or contract from the party holding the patent or certificate, and here the railroad company never received any patent or certificate. In addition, prior to the passage of the act, a patent had been issued to Cox, and his title thus fully confirmed.

These considerations dispose of the only Federal question presented in the record, and, there appearing no error, the judgment of the Supreme Court of Kansas is

Affirmed.

MR. JUSTICE GRAY took no part in the decision of this case.

BIENVILLE WATER SUPPLY COMPANY *v.* MOBILE.

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

No. 126. Argued January 22, 23, 1902.—Decided June 2, 1902.

The plaintiff took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and it had not, at the time of the transactions referred to in the pleadings, obtained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply in the county.

The legislature had the right of revocation and amendment.

ON February 21, 1899, the appellant, as complainant, filed its bill in the Circuit Court of the United States for the Southern District of Alabama to restrain the city of Mobile from building or operating prior to July 1, 1908, or before the city should have purchased the waterworks of the complainant, any system of waterworks connected with or having for its source of supply any stream of water in Mobile County. Upon answer and proofs the Circuit Court entered a decree dismissing the bill, whereupon an appeal was taken directly to this court.

Statement of the Case.

The facts are these: In 1840 the city of Mobile made a contract with Albert Stein, which was ratified by an act of the legislature of the State, January 7, 1841. By this contract Stein received the exclusive right to supply the city with water from a stream called Three Mile Creek, and the city the right to purchase his plant at a price to be fixed by arbitration. Stein constructed his plant, and it was for many years the sole source of supply. But it was not satisfactory, and hence the charter to the appellant. This charter was granted by two statutes, dated respectively February 19, 1883, and February 14, 1885. By these statutes the company was given all the rights vested by contract or law in the city to purchase the Stein franchise and plant, and for that purpose was to be considered the assignee of the city; also generally the right to acquire by contract with the owners any franchise and plant for supplying Mobile with water, and in case of disagreement with the owners as to price, the right to condemn and take the said franchise and plant under the State's right of eminent domain. It was given for twenty years, and until a purchase of its plant by the city the exclusive right to supply the city with water from any source in the county of Mobile, other than Three Mile Creek, (the Stein source of supply,) and when it should acquire the Stein franchise the exclusive right from that creek also, subject to this proviso:

"But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company."

It was required to begin its work within four years and to supply water within six years. It was also required to supply water at a cost to the consumers, not exceeding certain maximum rates fixed by the act, and to put fire plugs on any square at the request of the owners of three fourths of the improved property thereon. After twenty years the city was given the right to purchase the plant of the company at a price to be fixed by arbitration.

The owners of the Stein franchise endeavored by litigation to prevent the erection of the appellant's plant, but a decree in

favor of the Bienville company was affirmed by this court. 141 U. S. 67.

Appellant constructed its plant and supplied the city of Mobile with water under contracts, the last of which would not have expired until July 1, 1900.

By an act of February 23, 1899, (Local Acts, Ala. 1898-99, p. 1689,) its charter was amended by striking out the word "exclusive," thus leaving a grant, but not an exclusive grant.

By an act of February 6, 1897, a new charter was granted to the city of Mobile, and by its terms express authority was given to the city to build or acquire public works, subject to the approval of its citizens by a majority vote. On August 2, 1897, there was submitted to vote and approved by a majority of citizens a proposition that the city should purchase, build or otherwise acquire a system of waterworks to cost not exceeding $500,000 and a system of sewerage to cost not exceeding $250,000, to be paid for by bonds secured by a mortgage upon said public works.

By other statutes the city was given power to issue bonds secured by a mortgage on any plant which it should buy or construct; also power to acquire or condemn any property and the water of any stream in Mobile County excepting only Clear Creek, the source of appellant's supply of water; and, third, to condemn all interest, legal or equitable, not owned by the city in the Stein plant.

Nothing had been done by the appellant under the right given it to purchase or condemn the Stein franchise and property, although its treasurer had in its behalf purchased interests in such franchise and property amounting to 54 28-100 per cent of the full value thereof. On February 18, 1898, the city council passed a resolution to purchase the Stein franchise and property. An arbitration was held, and on its report the city took possession of the property and filed a bill against the treasurer of the appellant to compel him to carry out the arbitration and purchase. The Circuit Court, however, held the arbitration illegal, and dismissed the bill.

On February 21, 1899, appellant brought in the Circuit Court of the United States a suit in equity against the city. In

Statement of the Case.

the bill was set forth the contracts of appellant with the city, and it was contended that there was an implied agreement by the latter not to enter into competition. This suit was dismissed by the Circuit Court, and its decree was affirmed by this court. 175 U. S. 109. The present bill, filed on the same date, is based on the rights given to the appellant by its charter, and it is contended that any legislation authorizing the city to violate such charter rights is in conflict with that clause in the first paragraph of section 10 of article I of the Federal Constitution, which prohibits a State from passing any law impairing the obligations of contracts.

The constitution of Alabama (1875), which was in force at the time of the transactions herein referred to, contained these several provisions:

"Article I, section 23: That no *ex post facto* law, or any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities, shall be passed by the general assembly."

"Article XIV, section 1: Corporations may be formed under general laws, but shall not be created by special act, except for municipal, manufacturing, mining, immigration, industrial and educational purposes, or for constructing canals, or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

"Article XIV, section 2: All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the ratification of this constitution, shall thereafter have no validity."

"Article XIV, section 10: The general assembly shall have the power to alter, revoke or amend any charter of incorporation now existing and revocable at the ratification of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of the State; in such manner, however, that no injustice shall be done to the

corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation."

Mr. Frank P. Prichard, *Mr. D. P. Bestor* and *Mr. John G. Johnson* for appellant.

Mr. B. B. Boone for appellees. *Mr. E. L. Russell* was on his brief.

Mr. Justice Brewer delivered the opinion of the court.

There is such a similarity between the two suits commenced by plaintiff on February 21, 1899, as suggests a question whether the decision of the one should not be conclusive as to the disposition of the other. The parties were the same. In each the plaintiff set forth its charter and its contracts with the city, and each prayed a decree restraining the city from building or operating any system of waterworks for supplying the city. It is true the bill in the first case counted specially on the contracts made between the plaintiff and the city, and sought a restraint of the city only during the life of those contracts, while the bill in this case sets up more at large the charter rights of the plaintiff as given by the statutes of the State, contends that those rights are infringed by the subsequent legislation of the State and the action of the city thereunder, and seeks to restrain the city during the twenty years named in the plaintiff's charter and until the city shall buy the plaintiff's plant. But each of these seeks to restrain the city from the time of filing the bill. All the rights which the plaintiff had by virtue of its charter and all the violations of such rights caused by the legislation of the State and the action of the city existed at the time of the filing of the bills and during the lifetime of the contracts with the city, and could have been presented in the first suit and been among the matters to be considered in determining whether the plaintiff was entitled to the injunction sought. If the plaintiff was not entitled to an injunction during the lifetime of the contracts with the city it is not entitled to any similar relief after the expiration of those contracts. In other words, the plaintiff failed to set up in the first suit all its

grounds of relief. Can it be permitted in this to set up additional grounds and obtain the very relief sought in the prior suit as well as additional relief, the same in kind though longer in duration? Will the law permit the splitting up into separate suits of different grounds for the same relief? Will not the judgment or decree in the first be held a final adjudication of the rights of the parties? It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in the Circuit Court. As against this it may be said that the decree in the other suit was neither pleaded nor proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take judicial notice of our own records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this.

But, passing this matter, and leaving out of consideration the special contracts directly between the plaintiff and the city, let us inquire whether any contract rights given to plaintiff by its charter have been violated by subsequent legislation of the State, and the action of the city under such legislation. Plaintiff contends that under its charter, as created by the acts of 1883 and 1885, it acquired the exclusive right to supply the city of Mobile with water from any stream in the county of Mobile, except Three Mile Creek, and the right to purchase or condemn the Stein franchise and plant for supplying the city with water from Three Mile Creek; that by the later legislation such exclusive right was in terms taken away, authority given to the city of Mobile to build waterworks and supply the city with water therefrom, and that the city had taken possession of the Stein plant, was operating that and was building a system of waterworks of its own, and that thereby its contract right was impaired in violation of the prohibition of the Federal Constitution.

It becomes therefore necessary to see not only the extent of the rights conferred upon plaintiff, but also under what consti-

tutional conditions it received its grant, and what power was reserved to the State to modify the terms thereof. In the first place, the plaintiff did not receive the exclusive right to supply Mobile with water. The proviso in the charter reserved to the State the power to charter other companies for such purpose. Obviously the legislature contemplated the fact that in the future other sources of supply and other companies might be necessary in order to furnish an adequate supply for the growing city, and reserved to itself the right to make such provision as it should deem expedient therefor. It is true the companies which might be chartered were not to "interfere with the property rights or the rights of obtaining water pertaining" to the plaintiff. But manifestly "property rights" refer to rights in respect to tangible property, and thus construed the proviso forbade any interference by any new company with the plant of the plaintiff. In addition, it also forbade interference with the "rights of obtaining water pertaining" to the plaintiff. The plaintiff had not at the time of these transactions obtained the Stein franchise for obtaining water from Three Mile Creek, and could only claim an exclusive right of obtaining water from other sources of supply within the county of Mobile.

The plaintiff, therefore, took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and it had not, at the time of these transactions, obtained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply within the county. In reference to this the Supreme Court of Alabama, in an opinion filed on June 11, 1901, *City of Mobile* v. *Bienville Water Supply Co.*, 30 Sou. Rep. 445, 446, and since the decree in the Circuit Court, used this language:

"It cannot be pretended that, in granting a charter to the complainant company in 1883, the legislature conferred on that company any exclusive privilege for supplying the city of Mobile and its inhabitants with water. All rights not exclusively granted to the complainant were reserved, and the rights thus reserved included the granting of a franchise to another corporation to carry on the same business in the same territory.

While the effect of granting such a franchise, afterwards, to the city, might be to impair and possibly by fair competition to ultimately largely destroy the value of complainant's plant, it would not be in excess of legislative power to grant the franchise to the city, nor would it in anywise infringe the Federal Constitution, prohibiting a state legislature from passing laws impairing its obligations. If there is no contract, there is nothing in the grant on which the Constitution could act. The element of a contract by the State with the complainant company did not enter into the grant of its franchise to establish and operate a system of waterworks in Mobile. *Stone* v. *Mississippi*, 101 U. S. 814; *Skaneateles Waterworks Co.* v. *Village of Skaneateles*, 161 N. Y. 154; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *State* v. *City of Hamilton*, 47 Ohio St. 52; *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. 154; 2 Beach, Priv. Corp. secs. 22, 27."

By article I, section 23, of the constitution of Alabama the legislature is prohibited from "making any irrevocable grants of special privileges or immunities."

The significance of this provision was considered by the Supreme Court of Alabama in *Birmingham & Pratt Mines Street Railway Company* v. *Birmingham Street Railway Company*, 79 Ala. 465, in which case it appeared that the city of Birmingham had given what was in terms an exclusive right to the plaintiff to construct a street railway along certain streets, and afterwards had given to the defendant the right to occupy the same streets with a railway. Considering the first grant by the city, the Supreme Court said: "If the power to grant such a franchise resided in this municipality . . . there can be no doubt either of the jurisdiction or of the duty of a court of equity to protect the invasion of the right. . . . If, however, the power in question did not exist, then the grant would be void, so far as it purports to be exclusive in its nature;" and it was held that the city authorities had no power to grant the exclusive right claimed by the plaintiff. In the discussion of the question the court further used this language:

"What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by

the legislature? It seems plain from the very terms used that the evil intended to 'be especially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic.'

* * * * * * * *

"The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. *The Case of The Monopolies*, 11 Rep. 84.

"The exclusive right of the appellee to the privilege claimed, in our opinion, cannot be sustained. The general assembly would itself have no power under the constitution to make such a grant."

It is true that this case was not decided until the December term, 1885, which was after the passage of the last of the two statutes granting the charter to the appellant, and it is also true that in considering questions of an alleged state infringement of a contract we are not concluded by the exposition by the courts of the State of the terms of the contract or the effect of the legislation. At the same time, the opinion of the highest court of the State, even in contract cases, is entitled to most respectful consideration, and should not lightly be ignored.

It is contended by the appellant that section 23 of article I must be considered as qualified by section 10 of article XIV, the section which gives the general assembly power to alter, amend or revoke a charter "whenever, in their opinion, it may be injurious to the citizens of the State; in such manner, however, that no injustice shall be done to the corporators." It is said that while under this provision the judgment of the general assembly upon the question whether the charter is injurious to the citizens of the State may not be subject to judicial exam-

ination, yet whether injustice has been done to the corporators is in the very nature of things a judicial question, and one which no action of the legislature can preclude the courts from considering. As a corollary from this it is argued that if in the opinion of the courts the attempted revocation works injustice to the corporators it will be adjudged an invalid exercise of legislative power. This section is a new one in this court. It is found in the constitutions of more than one State and has been reviewed in some state courts. So far as they have expressed themselves the expressions have been in favor of the right of a judicial review. *Wagner Institute* v. *Philadelphia*, 132 Penn. St. 612, is cited by the appellee, but that case simply holds that whether the charter is injurious to the citizens is a question of legislative determination. Further than that the opinion does not go. *Leep* v. *Railway Company*, 58 Ark. 407, is also cited. In that case a statute which in effect amended railroad charters was sustained. In the opinion the propriety of the amendment was discussed, a limitation to its scope declared, and in reference to a possible construction thereof the court observed (p. 436):

"An amendment to that extent would be, manifestly, unjust to the companies, and violative of the constitution, which, while it grants the right to amend when in the opinion of the legislature the charter is injurious to the citizens, limits the right to do so to amendments that are just to the corporators."

Subsequently, in *St. Louis, Iron Mountain & Southern Railway Company* v. *Paul*, 64 Ark. 83, another section of the same statute was presented and sustained, *Leep* v. *Railway Company* being cited with approval. This case was brought to this court on error and affirmed. 173 U. S. 404. In *Macon &c. Railroad Company* v. *Gibson*, 85 Ga. 1, the application of a similar constitutional provision was considered, and upon it the court observed (p. 16):

"No constitutional principles are infringed by exercising a reserved power to revoke special privileges or immunities, unless the provision of our own constitution is violated, which forbids doing it in such manner as to work injustice to the corporators or creditors of the corporation. Whether the mode adopted

by the legislature in a given instance is just in this respect or not, whilst primarily a legislative question, may, if palpably decided wrong, become a judicial question."

It does not appear that the Supreme Court of Alabama has passed upon this specific question. We do not think it necessary to determine absolutely the precise meaning of this section or the limits of judicial inquiry under it. It may be simply declaratory, for courts have often held that it was beyond the power of the legislature, under the guise of an act amending or repealing a charter, to take away the property of the corporation. Clearly, the question is, in the first instance, presented for the consideration of the legislature, and a presumption of validity attends its action.

Obviously, from the several constitutional provisions which are quoted in the statement of facts, it was intended that the legislature should have the right of revocation and amendment, and that whoever took a charter should take it subject to that right. To what could such revocation or amendment extend? The possible rights of a corporation group themselves into three classes: First, the right to the tangible property which it may acquire; second, the right to do the specific things which are named in the charter; and, third, the right to exclude others from doing like things. It has been held that the right of revocation or amendment carries with it no right to appropriate the tangible property belonging to the corporation. As said by Chief Justice Waite, speaking of the power of amendment, in *Sinking Fund Cases*, 99 U. S. 700, 720: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Nothing of this nature was, however, attempted by this legislation. The plaintiff was left in undisturbed possession of its tangible property. So we need not stop to consider what protection could be afforded if the attempt had been made to take away its property.

The second class includes the power of action granted to the corporation; in other words, the right to use the tangible property for the purposes of the charter. But none of these powers were taken away from the plaintiff. It was left free to use

its plant in supplying the citizens of Mobile with water, and to charge and collect pay for its services. Hence no inquiry is pertinent in respect to the limitations, if any there be, on the right of the legislature to take away such powers.

The remaining class is of those rights which flow from exclusive provisions in the charter—the right to prevent others from doing the same things. It cannot be doubted that such a right is valuable; that, for instance, it would be worth something to the plaintiff to have not only the right of supplying Mobile with water, but also the right to exclude others, and thus prevent all competition. That which gives to a government patent for an invention its chief value is not the right to manufacture and sell the thing invented, but the right to exclude others from so doing—the monopoly for the prescribed term of years. But the grant of a monopoly is forbidden by the Alabama constitution. As said by its Supreme Court, in the quotation just made: "The general assembly would itself have no power under the constitution to make such a grant."

By a separate section of the constitution it is affirmatively declared that the legislature shall pass no act "making an irrevocable grant of special privileges or immunities." While that body may grant special privileges and immunities, grant franchises to build waterworks, construct railways, or other works of public utility, and by a failure to duplicate a grant make it in effect for the time being exclusive, yet no one legislature can forestall action by a succeeding legislature or bind the State by making the grant in terms exclusive. As much force and effect must be given to section 23 as to any other, and it was obviously the intent that even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive feature of plaintiff's grant could not be revoked because thereby injustice might be done to the corporators, is simply to nullify section 23.

For these reasons we are of the opinion that the decree of the Circuit Court was right, and it is

Affirmed.

HARDY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT FOR THE DISTRICT OF ALASKA.

No. 502. Submitted April 28, 1902.—Decided June 2, 1902.

The action of a trial court, upon an application for a continuance, is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused; and in this case it could not be said that an abuse of discretion was clearly shown.

There is no impropriety in permitting the government to search the mind of a juror, to ascertain if his views on circumstantial evidence were such as to preclude him from finding a verdict of guilty, with the extremest penalty which the law allows.

Voluntary statements, made by a defendant before and after a preliminary examination, are admissible in evidence when made to the magistrate who conducted the preliminary examination.

THE case is stated in the opinion of the court.

Mr. Solicitor General for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On September 10, 1901, in the District Court for the District of Alaska, Second Division, Fred Hardy, plaintiff in error, was found guilty of the crime of murder and sentenced to be hanged. Thereupon he sued out this writ of error.

In the record appear thirty-two assignments of error, but in the brief filed by his counsel only three are pressed upon our attention. First, it is claimed that the court erred in refusing the defendant a continuance. "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Isaacs* v. *United States*, 159 U. S. 487, 489, and authorities there cited. See also *Goldsby* v. *United States*, 160 U. S. 70.

This proposition of law is not disputed but it is contended

that abuse of discretion is shown. The pertinent facts are as follows: The indictment charged the murder of Con Sullivan on June 7, 1901. The killing took place on Unimack Island. The defendant filed in support of his motion his affidavit stating that he had been in custody since July 27; that at the time of his arrest he had $685 upon his person, which was taken from him by the arresting officer; that one Captain Mackintosh, and one John Johnson, captain and mate respectively of the schooner Arago, upon which affiant came as a sailor from San Francisco to Unimack Island, would testify that he remained on that vessel continuously from the time it left San Francisco until June 11; that the schooner, with the captain and mate on board, left Alaska prior to the finding of the indictment against him, but that he believed and had been informed that the vessel would probably return within a reasonable time, and if not that the depositions of the captain and mate could be obtained in San Francisco, the place of their residence. The affidavit further stated that two witnesses, whose names were unknown, who were both in the employ of the government on a boat named the Pathfinder, plying in the waters of the Northern Pacific Ocean and the Behring Sea, and which frequently called at Dutch Harbor—within one mile of the place where court was being held—would testify that they knew affiant in San Francisco from about March 26 to April 15, and then saw him in possession of a large amount of money, an amount in excess of $1500, a part of which was the money taken from him when arrested. The affidavit also stated that one Major Whitney, a paymaster of the United States Army, at San Francisco, would testify that on or about March 28 affiant, on his return from the Philippine Islands as a soldier in the United States Army, was mustered out of the service at San Francisco; that said Whitney at that time paid affiant $1875; that the deposition of said Whitney could be obtained, as he was permanently stationed at San Francisco. By these witnesses defendant sought to show that he was on the schooner at the time the murder was charged to have been committed, and also to explain the possession of the money found on his person. But the date named in an indictment for the commission of the

crime of murder is not an essential averment. Proof that the crime was committed days before or days after the date named is no variance. Again, accounting satisfactorily for the money found on his person made no defence. It is not stated in the affidavit that the deceased had money in his possession. There is nothing in the indictment to suggest that he had, and nothing had at that time been disclosed to indicate that the fact that the defendant was in possession of so much money, had any significance in connection with the charge. So that upon this presentation alone it could not be said that an abuse of discretion was clearly shown.

But, further, the government offered the affidavits of several parties, which were received without objection, three of whom testified that they had been soldiers in the United States army, doing service in the Philippine Islands, were convicted of some military offence, and sentenced to imprisonment at Alcatraz Island military prison, San Francisco; that when they arrived at the prison, in the fall of 1900, the defendant Hardy was there as a military prisoner; that he was discharged therefrom the latter part of February or the first of March following, and one of them added that the defendant said that he had been sentenced for a term of five years and a forfeiture of all pay and allowances. Another witness, George Aston, testified that he came with the defendant from San Francisco on the schooner Arago; that affiant left the schooner on June 2, and that on June 20 he met the defendant Hardy, who told him that he had left the schooner three or four days after affiant; also that Hardy showed him a roll of paper money which he said was about $1200, and added: "You know this is more money than I had when I was on board the Arago." Another witness testified that the defendant told him that he left the schooner the day after the witness Aston. Another, that Hardy made a statement to him, which was afterward reduced to writing and signed by Hardy, that he left the schooner Arago about June 9, but could not tell the exact date. Some of these witnesses also testified to the defendant's being in possession of a gold watch and other articles, which he did not have when on the Arago, and which were afterward shown to have belonged to the de-

ceased, and also to Hardy's contradictory statements as to how he obtained possession of those articles, statements which in themselves were, to say the least, singular, and tended to create strong doubts as to the truthfulness of his affidavit.

Under these circumstances it seems to us clear that the court did not abuse its discretion in refusing a continuance. It is true the trial was held in a remote part of the nation, and where facilities for securing the attendance of witnesses were not as great as in more thickly settled portions; but it is also true that many of the witnesses for the government were engaged in prospecting, men without settled abodes, and whose attendance at subsequent terms it might have been difficult to secure, and it must have been perfectly obvious to defendant and his counsel that the longer he could postpone the trial the greater the probability of the absence of witnesses against him. It was the right of the court to consider all these matters, and when it appeared clearly from the testimony that some of his statements were false the court might well have concluded that no reliance was to be placed on the others.

The second assignment of error presented by counsel is that the court erred in permitting the district attorney to propound to juror Hayden the following question: "Q. Have you any such conscientious scruples or opinions as would prevent or preclude you from rendering a verdict of guilty, in a case where the penalty prescribed by law is death, upon what is known as circumstantial evidence?" It is insisted that the district attorney should have been compelled to modify the question by striking out the words "where the penalty prescribed by law is death" and insert "where the penalty prescribed by law may be death," and this because of a provision in the statute which permits a jury finding a party guilty of murder in the first degree to add "without capital punishment." We see no objection to the question. The defendant was not prevented from asking the question in the qualified form which is suggested, nor was any question propounded by him ruled out. There was no impropriety in permitting the government to search the mind of the juror to ascertain if his views on circumstantial

evidence were such as to preclude him from finding a verdict of guilty with the extremest penalty which the law allows.

Finally, it is insisted that the court erred in permitting the government to introduce in evidence a statement made by the defendant to one R. H. Whipple, United States commissioner, before whom the preliminary examination was had—a statement reduced to writing and signed by the defendant. Sections 307 to 311 inclusive of chap. 429, (30 Stat. 1319,) are relied upon to sustain this assignment of error. Those sections provide that on a preliminary examination, after the government's witnesses have been examined, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him, that he is at liberty to waive making a statement, and that such waiver cannot be used against him on the trial; they further provide that if he does waive his right to make a statement a memorandum thereof shall be made by the magistrate, but the fact of the waiver cannot be used at the trial; that if he chooses to make a statement the magistrate must take it in writing, propounding only certain specified questions; that his answer to each of the questions must be read as taken down, and he given liberty to make any corrections that he desires, and that such statement, so reduced to writing, must be authenticated in the following form. It must set forth that the defendant was informed of his rights in respect to making or waiving a statement; it need not contain the questions but must contain the answers, with the corrections or additions made by the defendant, it may be signed by him, but if he refuses to sign his reason therefor must be stated, as he gives it; and the whole must be signed and certified by the magistrate. The magistrate testified that before the preliminary examination was commenced the defendant voluntarily and without any suggestion insisted upon making a statement. Whereupon he, the magistrate, informed him that he was entitled to counsel, that he was under no obligations and need not make any statement, but that if he did it would be used against him on the trial, and also that if he waited an oppor-

tunity would be given to him to make a statement at the proper time; that notwithstanding this he insisted on making a statement, and it was then reduced to writing by the clerk of the court and signed and sworn to by the defendant; that after the examination had commenced and the testimony of witnesses for the government had been taken the statutory questions were put to him, and he was advised that he could then make a statement if he desired, but he refused to say anything. Upon this showing the statement was admitted in evidence. The magistrate also testified that after the examination was over and the defendant had been placed in jail the latter sent word that he wanted to talk with him about the case, and in an interview stated orally that his former statement was untrue, and volunteered a different account of the transactions. There was no contradiction of the testimony as to the circumstances under which these two statements—one written and the other oral—were made, except that in reference to the last statement defendant, when on the witness stand, testified that the magistrate "came up to the jail and ordered me to return to his office for the purpose of securing some information to arrest some other fellows, or get some points of me of other parties." From this testimony it clearly appears that the statements were not made pending the examination or under the provisions of the statute, but voluntarily one before and the other after the examination; that the provision of the statute as to giving him notice pending the examination was complied with, and that at that time he declined to make any statement. So the question is whether voluntary statements made by a defendant before and after a preliminary examination are inadmissible in evidence because made to the magistrate who in fact conducted the preliminary examination. We know of no rule of evidence which excludes such testimony. Of course, statements which are obtained by coercion or threat or promise will be subject to objection. *Bram* v. *United States*, 168 U. S. 532. But so far from anything of that kind appearing the defendant was cautioned that he was under no obligations to make a statement; that it would be used against him if he made one, and that there was a proper time for him to make one if he so de-

sired. Without even a suggestion, he insisted on making, prior to the examination, a statement which was reduced to writing and by him signed and sworn to, and after the examination was over and he had been placed in jail, he had an interview with the magistrate and volunteered a further statement. Affirmatively and fully it appears that all that he said in the matter was said voluntarily, without any inducement or influence of any kind being brought to bear upon him. Indeed, it is not claimed by counsel that there was any improper influence, his contention being only that the provisions of the statute with respect to a statement pending an examination were not complied with in respect to these statements. The statements were properly admitted in evidence. These are the only matters called to our attention. No errors appear in them, nor do we perceive any plain error otherwise in the record. The proof of defendant's guilt is clear and satisfactory, and the judgment is

Affirmed.

JENKINS *v.* NEFF.

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

No. 198. Argued March 20, 1902.—Decided June 2, 1902.

Section 55 of the Laws of 1893, ch. 196, simply places trust companies on an equality with banks, whether corporate or individual, in respect to the matter of interest, and does not give to trust companies power to loan, discount or purchase paper.

It is well settled that the findings of fact in a state court, are conclusive on this court in a writ of error.

In the record in this case there is no evidence of such a discrimination.

This case is before us on a writ of error to the Supreme Court of the State of New York, and is brought to review a final order of that court affirming an assessment of the shares of stock in the First National Bank of Brooklyn. Under the practice prevailing in that State a writ of certiorari was issued

out of the Supreme Court on August 13, 1897, on the petition of the stockholders of the First National Bank of the city of Brooklyn, now plaintiffs in error, directed to the board of assessors of the city of Brooklyn, requiring them to return all their proceedings relative to the assessment of the shares of stock of said bank. A return having been made the assessment was on October 6, 1899, confirmed, with some modifications not material to the present controversy. This order was affirmed by the Appellate Division of that court on January 9, 1900. 47 N. Y. App. Div. Sup. Ct. Rep. 394. On appeal to the Court of Appeals the order was by that court also affirmed, 163 N. Y. 320, and the record remitted to the Supreme Court.

Mr. Seymour D. Thompson and *Mr. Frank Harvey Field* for plaintiffs in error.

Mr. James McKenna for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The right of the State to tax these shares of stock is not denied, but the contention of plaintiffs in error rests on the applicability of that part of section 5219, Revised Statutes, which reads "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." The purpose of this legislation was thus stated in *Mercantile Bank* v. *New York*, 121 U. S. 138, 155:

"A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or

individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The laws of New York in reference to taxation of the shares of stock in national banks are like those in respect to the taxation of shares of stock in state banks, and there are many of the latter in the State. So it is not suggested that the State makes any discrimination between state banks and national banks, but it is contended that the statutes of New York, in reference to the taxation of trust companies, are essentially different; that these trust companies are practically carrying on a banking business; that an enormous amount of moneyed capital is invested in them, and that as a result not merely a theoretical but a practical and burdensome discrimination is made against the moneyed capital invested in national banks. Commenting upon this, it was said by Mr. Justice Woodward, delivering the opinion of the Appellate Division of the Supreme Court in the case at bar:

"It is conceded on the part of the relators that the stock of the First National Bank was assessed upon the same principle applied in the assessment of the stock of the state banks doing business in their immediate vicinity, and that this was done under the provisions of section 24 of the tax law of 1896. In order to pronounce this provision of the law invalid we must, therefore, convict the legislature not alone of hostility to the national banks, but of hostility toward its own creations; we must reach the conclusion that the State of New York is seeking, by an exercise of its taxing power, to advance one class of moneyed corporations at the expense of another, both of which have been created by the legislature and both of which are engaged, presumptively, in promoting the interests of the people. There are no presumptions in favor of this idea, and there is no evidence in the case to show that any of the state institutions have ever complained of an inequality in taxation."

Further, in *Mercantile Bank* v. *New York*, *supra*, decided in 1887, the New York statutes in reference to the taxation of shares of stock of national banks were challenged on the ground of discrimination in favor of moneyed capital otherwise invested,

and several instances of such investment were called to the attention of the court, among them that of trust companies, and it received, as stated in the opinion, "separate consideration." It was held that the system of taxation prevailing in respect to them was not such as to vitiate the statutory methods of taxation of the shares of stock in national banks. It must be borne in mind that for a score of years prior to that decision there had been a series of cases coming to this court from different States, principally from New York, involving statutes with reference to state taxation of national banks, and that during these years changes had been going on in the legislation of the different States in order to conform to the rules laid down by this court in its successive opinions.

Counsel for plaintiffs in error insist that that case is not controlling, and for several reasons: One, because two amendments have been made in the legislation of New York, which it is said give full banking powers to trust companies, save in respect to the power of issuing circulating notes. The first is found in chap. 696, Laws of 1893, which added an eleventh subdivision to section 156 of the banking law (chap. 689, Laws 1892), and which in terms authorizes trust companies: "11. To exercise the powers conferred on individual banks and bankers by section 55 of this act, subject to the restrictions contained in said section."

Section 55, referred to, provides:

"Every bank and individual banker doing business in this State may take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of six per cent per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or evidence of debt has run." 2 Stats. 1892, 1869, c. 689.

This legislation simply places trust companies on an equality with banks, whether corporate or individual, in respect to the matter of interest, and does not give to trust companies power to loan, discount or purchase paper. Whatever powers trust companies had in respect to these matters were given by statutes which were in existence before the decision in *Mercantile*

Bank v. *New York*. That which was in the mind of the legislature was evidently equality in respect to interest and usury. The doctrine that legislative recognition is equivalent to legislative grant is not pertinent. In order to come within the scope of that doctrine there should be in the language a clear recognition of a corporate entity or corporate power actually existing or claimed to exist. A grant of corporate life or corporate power is not made by implication, and the same rule obtains in respect to the matter of recognition. If the language of the legislature is satisfied, has full scope and effect, without reading into it either a grant or a recognition of corporate life or power, neither will be implied. And here so clear is it that the legislature was not contemplating the grant or recognition of any hitherto unauthorized power to loan, discount or purchase paper, but had simply the thought of giving equality in the matter of interest and usury, that it is inadmissible to hold that thereby an additional power, either of loan or discount or purchase, was given to trust companies.

The other change in the legislation referred to is found in section 163 of chapter 689 of the Laws of 1892, which provides that "every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter, and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company." But this gives no new powers to trust companies generally, but simply grants to such companies, incorporated under special laws, the powers of trust companies incorporated under the general statute, and subjects them to the same restrictions, unless inconsistent with their special charters. Clearly, there has been no change in the legislation of New York in respect to the powers of trust companies which calls for any limitation of the decision in *Mercantile Bank* v. *New York*.

Again, it is insisted that that case was submitted on an agreed statement of facts which neglected to disclose fully the manner in which trust companies carried on their business, and also that whatever might have been the facts at that time the testimony here presented shows that almost the entire volume of

the business of the trust companies is banking, pure and simple, and but a small fraction of it is the peculiar and ordinary business of trust companies; but that decision rested mainly upon the powers granted by the statutes of New York to trust companies, and it was held that, tested by such powers, they were not in any proper sense of the term banking institutions.

Further, although there is in the record quite an amount of testimony as to the assets and business of trust companies in Brooklyn, yet the case was determined by the Supreme and Appellate Courts of New York upon findings of fact—which findings do not sustain the contention of plaintiffs in error in this respect—and it is well settled that the findings of fact in the state courts are on a writ of error conclusive with us. *Hedrick* v. *Atchison, Topeka &c. Railroad*, 167 U. S. 673, 677, and cases cited therein; *Bement* v. *National Harrow Co.*, *ante*, 70. In other words, we apply the law to the facts settled in the state courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion.

Still, again, even if we were to pass beyond the findings of fact and, searching the record, should be of the opinion that the testimony justified the contention of the plaintiffs in error that trust companies are mainly using their funds in the carrying on of a purely banking business—and this under an assumption of powers not in fact bestowed by the legislation of the State—what effect would such conclusion have upon the question before us? It is to be presumed that if trust or other companies are exercising powers not conferred by law the State will take the proper steps to keep them within their statutory limits, and a neglect for a limited time to do so cannot be considered as an assent by the State to such an improper assumption of power. It is not to be assumed that the State is acting in bad faith; that it has so legislated that upon the face of the statutes a uniform rate of taxation upon all moneyed capital is provided, while at the same time it has designedly placed the grants of some corporate franchises in such form as to permit the use of moneyed capital in certain ways with peculiar and less stringent rates of taxation. Certainly there is nothing in this case to

indicate any want of good faith on the part of the State of New York. Whatever may have been the practices of trust companies, however much they may in fact have used their funds in a strictly banking business, there is no suspicion of a purpose on the part of the State to discriminate against national banks by permitting trust companies to do a banking business without being subject to the same rate of taxation that is enforced against moneyed capital invested in such banks. Counsel for plaintiffs in error notice several reports of the commissioners of taxes and assessments of the city of New York for years following the commencement of this suit in respect to the relative taxation of banks and trust companies, and it was stated on the argument that, as a consequence perhaps of these reports, legislation has been had with a view of correcting any supposed discrimination.

In reference to some other suggested differences between banks and trust companies in respect to the matter of taxation we make a further extract from the opinion of Mr. Justice Woodward, which in general we approve (p. 402):

"It may not, in view of the importance of this question, be out of place to suggest that the statute under which the trust companies are organized does not compel the capital to be invested in United States bonds; it may be invested in 'bonds and mortgages on unincumbered real property in this State worth at least double the amount loaned thereon, or in the stocks or bonds of this State, or of the United States, or of any county or incorporated city of this State duly authorized by law to be issued.' The Banking Law, Laws of 1892, chap. 689, sec. 159. If the capital of the trust companies should be invested in bonds and mortgages or other securities not exempt from taxation, there would be no inequality in the premises; and as they are not allowed the privilege of issuing notes to be circulated as money upon the security of their United States bonds, which is the real justification for the taxation which is assessed upon the shareholders of the national banks, we fail to find in the record any evidence of such a discrimination against the national banks as would justify us in holding that the law under which the trust companies operate, and the

statutes under which they are taxed, can have the effect of invalidating an otherwise valid statute. The fact that in a given instance, by reason of an exercise of a discretion as to the particular kind of securities purchased, a trust company may have a real or imaginary advantage over investors in the shares of a national bank is not a sufficient foundation for declaring an assessment invalid. It is essential, if the law of the State is to be declared invalid under the limitations expressed in the United States statute, that the enactment of the legislature shall evidence a disposition to evade or override the spirit of the limiting statute; and this is clearly not the case where it provides for equal taxation upon its own state banks, and where it does not require its trust companies, which, it may be conceded, come into a limited competition with the investors in the shares of national banks, to invest their capital in such a way as to necessarily exempt them from taxation upon a portion of their capital stock. If the State refused to allow its trust companies to invest in United States securities there might be a far greater cause for grievance. Trust companies are not organized primarily for banking purposes; they are designed for other purposes, as pointed out in the *Mercantile Bank* case, and it was never the purpose of the Federal government to interfere with the policy of the State in reference to the formation and development of such corporations as it should judge expedient, even though it should be found necessary to invest them with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the State. As was said in the *Mercantile Bank* case in reference to savings banks, 'however large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.'"

While we have not discussed all the questions raised by counsel in their elaborate brief and argument, we have sufficiently

indicated our views upon the general questions involved in the case, and, finding no error, the judgment of the Supreme Court of the State of New York is

Affirmed.

MR. JUSTICE GRAY did not hear the argument and took no part in the decision of this case.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY *v.* MANNING.

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

No. 363. Argued March 10, 11, 1902.—Decided June 2, 1902.

The Court of Appeals made a complete disposition of the controversy in this case, and all that was left for the Supreme Court was the ministerial duty of entering a final injunction in the language of the preliminary order, with the proviso that it should operate until such time in the future as the defendant should voluntarily withdraw from business in the District of Columbia; and this was clearly a final decree.

Courts always presume that a legislature in enacting statutes acts advisedly and with full knowledge of the situation, and they must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action.

While a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations, with private capital, and for private benefit, the language of such regulations will not be broadened by implication.

The decree as directed by the Court of Appeals was erroneous, and cast a burden upon the defendant to which it was not subjected by the legislation of Congress.

ON July 14, 1898, the appellees commenced this suit in the Supreme Court of the District of Columbia, to restrain the defendant from discontinuing its telephone service to them.

Their bill alleged that the defendant was a corporation organized under the laws of the State of New York, and for a long time past engaged in the business of furnishing telephone

exchange service in the District of Columbia; that with the assent and under the direction of the Congress of the United States and the Commissioners of the District of Columbia it was occupying the streets, avenues and alleys of the city of Washington with its conduits and electric wires; that the plaintiffs had a contract with the defendant for such service, terminable by either party upon ten days' notice in writing; that on July 2 they gave notice of their intention to terminate such contract. The bill further alleged the passage by Congress on June 30, 1898, of an act limiting the charges for telephone service; that they desired to continue the use of the telephone service furnished by defendant, and had tendered the amount required to be paid under the act of Congress, but that nevertheless the defendant threatened to remove the telephone and its appliances now in the premises of plaintiffs and to discontinue its telephone service to them.

The defendant answered admitting its incorporation, its business of furnishing telephone service, the passage of the act of Congress, set forth its contract with the complainants and the correspondence in reference to the termination of the contract, and alleged that the act of Congress had no application to any individual desiring telephone service, but only to such service as might be rendered for the public to the District of Columbia; that if it did apply to individuals desiring telephone service the act was beyond the power of Congress, inasmuch as the rates prescribed in it were arbitrary, unjust, unreasonable and unconscionable, because the service could not be furnished at the rates named therein without an actual loss to the defendant, thus practically working a deprivation of its property and property rights without just compensation or due process of law.

A preliminary injunction was granted restraining the defendant from removing the telephone and its appliances from the premises of plaintiffs or discontinuing its telephone service. Other suits of a similar nature were commenced in the same court by different parties against the telephone company. An order of consolidation of all these suits was entered, but the subsequent proceedings were carried on in this suit, the testi-

mony introduced being also used in the others, and their disposition the same as that made of this. A large volume of testimony was taken, and the case was submitted on pleadings and proofs. On February 28, 1900, a decree was entered dissolving the preliminary injunction and dismissing the bill of complaint, with costs. Mr. Justice Barnard, before whom the case was heard, was of the opinion that the rates fixed by the act were unreasonably low for the service and supplies to which they refer, and that, therefore, the act could not be sustained. An appeal was taken to the Court of Appeals of the District, which on May 21, 1901, reversed the decree of the Supreme Court and remanded the case with instructions to enter a decree granting the permanent injunction, as prayed for, but with a single modification. From such decree the case was brought to this court on appeal.

Mr. A. S. Worthington and *Mr. John W. Griggs* for appellant.

Mr. John J. Hemphill and *Mr. Arthur A. Birney* for appellees.

Mr. Justice Brewer delivered the opinion of the court.

A preliminary question is whether the decision of the Court of Appeals is a final decree. We are of opinion that it is. After ordering a reversal of the decree of the Supreme Court, it adds: "And that this cause be, and the same is hereby, remanded to the said Supreme Court, for the entry of a decree granting the injunction in conformity with the opinion of this court." The closing sentence of the opinion is as follows: "For the reasons given the decree will be reversed, with costs, and the cause remanded for the entry of a decree granting the injunction in conformity with this opinion." Prior thereto it is stated:

"Congress could not, and did not, undertake to compel the defendant to remain in occupation of the field of operations and carry on business at the imposed rate against its will.

"If the defendant, convinced that the rate fixed by law is ruinously low, had suspended its business and abandoned all operations within the District, Congress would have no power over it other than to compel it to remove its obstructions from the streets and other public places. Nor would the courts, in such event, have any power to compel the defendant to give its services to any person. But the defendant cannot remain and carry on its former business in defiance of the law. Persisting in its business, it must be regarded by the courts as accepting the condition and coming under obligation to perform its services at the statutory rate. So persisting and at the same time refusing obedience, it is within the judicial power to compel defendant to observe the rate fixed by Congress until such time in the future as it may voluntarily withdraw from business or Congress may relieve.

"According to this view of the defendant's rights and obligations, the preliminary injunction was properly granted, and should have been perpetuated upon final hearing, with the limitation before suggested."

The preliminary injunction, thus referred to by the Court of Appeals, "*ordered*, that upon payment by the complainants to the defendant of the sum of twelve dollars and fifty cents as one quarter's rent for the use of the telephone described in their bill, the defendant, its officers, agents and employés, be, and they are hereby, during the pendency of this suit restrained and enjoined from removing or attempting to remove from the premises of the complainants described in the bill of complaint the telephone and its appliances by said defendant heretofore placed therein, and from refusing or neglecting to connect the same with other telephones upon being requested so to do, and from neglecting or refusing to furnish telephone exchange service to the complainants for the said telephone in the same manner as it has heretofore furnished such service."

It thus appears that the Court of Appeals made a complete disposition of the controversy; that all that was left for the Supreme Court was the ministerial duty of entering a final injunction in the language of the preliminary order, with the proviso that it should operate until such time in the future as the de-

fendant should voluntarily withdraw from business in the District. Clearly this was a final decree. *Commissioners &c.* v. *Lucas, Treasurer*, 93 U. S. 108; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and cases cited in the opinion; *Mower* v. *Fletcher*, 114 U. S. 127.

We pass, therefore, to a consideration of the merits. The legislation of Congress appears as a proviso in the District appropriation act, and is in the following words:

"*Provided*, That from and after the passage of this act it shall be unlawful for any person or any telephone company doing business in the District of Columbia to charge or receive more than fifty dollars per annum for the use of a telephone on a separate wire; forty dollars for each telephone, there being not more than two on a wire; thirty dollars for each telephone, there being not more than three on a wire, and twenty-five dollars for each telephone, there being four or more on the same wire." Act of June 30, 1898, c. 540, 30 Stat. 525, 538.

In its answer defendant pleaded that this legislation "has no application to any individual desiring telephone service, but applies only to such service as may be rendered for the public to the District of Columbia, for the service rendered to said District for fire alarm, police and other public purposes." This defence is undoubtedly based on the fact that the paragraph in which this proviso is found, entitled "telegraph and telephone service," consists solely of appropriations for salaries and supplies in connection with telegraph and telephone service. As the paragraph, therefore, deals solely with public expenditures, the contention is that the proviso is a qualification of such public expenditures. As said by Mr. Justice Story, in *Minis* v. *United States*, 15 Pet. 423, 445:

"The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

See also *Austin* v. *United States*, 155 U. S. 417, 431.

While this is the general effect of a proviso, yet in practice it is not always so limited. As said in *Georgia Banking Company* v. *Smith*, 128 U. S. 174, 181:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In view of the general language of this proviso, it is not strange that appellant has not pressed this defence upon our consideration, and we are informed by counsel for the appellee that it was not called to the attention of the lower courts. We notice it only as leading up to a matter which is now presented. It appears by a stipulation of counsel that on February 1, 1898, while the District of Columbia appropriation act was pending in the House of Representatives, it was amended by adding the proviso in question. The amendment was not reported from any committee. The bill passed the House, February 2, and was thereupon sent to the Senate. On March 2, 1898, the committee on appropriations of the Senate reported the bill back to the Senate, recommending that the proviso be stricken out. This recommendation was rejected by the Senate on March 8, and the bill on that day passed. On the 9th day of March, on account of differences in respect to other parts of the bill, it was sent to a committee of conference. Prior to the passage of the act no investigation or inquiry was made by or at the instance of either house of Congress for the purpose of determining what would be fair and reasonable rates for telephone services in the District of Columbia, except as follows: On February 14, 1898, twelve days after the bill had passed the House and been sent to the Senate, the House adopted a resolution empowering a committee, appointed to investigate gas service in the District of Columbia, to investigate charges

for telephone service. On March 9, the committee began this investigation. On July 8 the committee reported the testimony they had taken, and asked to be continued with full powers and leave to sit in vacation, and report at the next session of Congress. The same day the House adjourned *sine die* without taking any action upon the recommendation of the committee. On February 28, the Senate passed a resolution authorizing the Committee on the District of Columbia to investigate charges for telephone service, and on the 2d of March a further resolution for the payment of expert accountants and stenographers. Immediately thereafter the committee, by a sub-committee, prepared to enter upon an investigation, and requested an expert accountant to examine the books of the defendant. On the 8th of March, after the Senate had rejected the amendment offered by the committee to strike out the proviso, the committee was discharged from further consideration of the matter. The act passed both houses and was approved June 30. Now this quotation is made from the opinion in *Chicago &c. Railway Company* v. *Minnesota*, 134 U. S. 418, 458:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States."

And upon it counsel for the company make these observations: "And if the legislature cannot authorize a commission to fix rates without giving the corporations interested an opportunity to be heard, it is hard to see how the legislature itself can do so, not only without giving an opportunity for a hearing, but, as is admitted to be the fact in this case, without making even any *ex parte* investigation."

But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action. Of course, whether a particular act was passed by Congress does not at all depend upon facts like these. In *Field* v. *Clark*, 143 U. S. 649, 672, it was said:

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable."

But while the conclusiveness of the authentication of the due passage of this act is in no manner impaired by the facts disclosed, yet those facts may be considered in determining what is the meaning and scope of the act. In *Blake* v. *National Banks*, 23 Wall. 307, 319, where there was a question as to the meaning of a statute containing apparently contradictory provisions, it was said:

"Under these circumstances, we are compelled to ascertain the legislative intention by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress."

Again, in *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48, 64, this rule was laid down:

"But in endeavoring to ascertain what the Congress of 1862

intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

And again, in *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464, reference was made to the reports of committees of each house with a view of ascertaining the purpose of Congress in the statute then in question.

So, while we may not infer from the mere fact, that the committees of investigation never completed their work, that Congress acted unadvisedly; yet as each body authorized a full investigation by a committee, and before a report was received from such committee, took the action which it did, it is fairly open for consideration whether the general language found in this proviso is not subject to some limitations or qualifications. In other words, did Congress intend to cover the whole field of telephone service, wherein it was then carrying on an appropriate but unfinished investigation, or was it content with making a limited provision for the present, leaving to future consideration the question of additional legislation? Defendant pleaded that the proviso applied simply to "services rendered for the public to the District of Columbia." But it is difficult to find this limitation suggested by either its terms or its place in the statute. The prohibition is upon any person or any telephone company doing business in the District, and against charging or receiving more than fifty dollars per annum for the use of a telephone on a separate wire, etc. The language is general and it is not easy to read in it a qualification or limitation upon the prior portion of the paragraph, to wit, that portion appropriating money for salaries and supplies, no part of such salaries and supplies going to the telephone company.

We pass then to inquire whether any other limitation or qualification of the prohibition found in this proviso may fairly be read in its language. And we start with the proposition that it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, there-

fore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor. In many buildings, both those belonging to the government or the District, and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business. The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation. So, in an inquiry into the reasonableness of the charges imposed by Congress in this legislation, it is essential that the receipts and expenses from such private telephone systems be excluded from consideration. It may be that the trial court did not take these receipts and expenses

into consideration, but we refer to them because they are referred to in the testimony of some of the witnesses, and unless guarded against might be taken into account in the further investigation of this case.

Again, while a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute. Here the prohibition is against charging or receiving "more than fifty dollars per annum for the use of a telephone on a separate wire." What kind of a telephone service is contemplated, and how much goes with the telephone? It appears from the testimony that there are two kinds of equipment, one more expensive and more reliable than the other; that some of the company's subscribers are using the cheaper and inferior equipment. Was the statutory limitation of $50 per annum intended as the limit for the superior or the inferior equipment? It also appears from the testimony that the defendant furnishes to some of its customers, besides the mere telephone, such additional equipment, as wall cabinet, desk, auxiliary bells, etc., for which separate charges are made. Doubtless these additional appliances facilitate and tend to make more convenient and easy the business of telephoning, but they are not included in the terms of the statute, and all that is required by its language is the furnishing of the telephone. What equipment and appliances are essential and what only matters of convenience may not be clearly shown by the evidence, but obviously there can be no difficulty in securing proof thereof. Suppose, for instance, a legislature should prescribe the rates for the carriage of passengers by a railroad. If the language was limited to the mere transportation of the passengers it would not be held to include accommodations in a sleeper, although such sleeper belonged to the company and was used on its trains. Of course, if the statute in terms pre-

scribed charges for transportation carried on in the manner that it had been carried on, it might include all the conveniences which had been theretofore furnished by the company, but when the statute simply prescribes a rate for transportation it will include only the ordinary and necessary facilities for such transportation, and not those conveniences which make travel more comfortable. So here, if this statute had in terms prescribed that the company should furnish the same conveniences and facilities for carrying on the telephone business that it had been wont to do in the past, it would be held to mean the equipment heretofore used and to include all these auxiliary matters, but when it is limited to the " use of a telephone " the courts cannot extend it beyond its terms and hold the statute to include things not named therein. The order which was directed by the Court of Appeals was one restraining and enjoining the defendant from removing from the premises of the complainant " the telephone and its appliances by said defendant heretofore placed therein, and from refusing or neglecting to connect the same with other telephones upon being requested so to do, and from neglecting or refusing to furnish telephone exchange service to the complainants for the said telephone in the same manner as it has heretofore furnished such service." In other words, the decree directed the defendant to furnish, for fifty dollars per annum, the equipment with all the facilities and appliances which it had theretofore furnished, including not merely the telephone on the separate wire, but the auxiliary matters heretofore referred to.

It may be that Congress, legislating simply for the use of the telephone, felt that the information it already possessed was sufficient to justify it in prescribing a reasonable charge therefor, at least for the inferior equipment, and did not wait for a full investigation in respect to the value of the use of the best equipment together with all these auxiliary matters. It may be that if all these matters are taken into account, and are within the purview of the statute the conclusion of the trial judge was right, that no reasonable remuneration was furnished by the rates prescribed, whereas it may be that, excluding them, it will be evident beyond question that the charges pre-

scribed are reasonable and just. At any rate, the decree as directed by the Court of Appeals was erroneous and cast a burden upon the defendant to which it was not subjected by the legislation of Congress.

Before closing the opinion, one thing must be referred to. The Court of Appeals, not entering into any full inquiry as to the reasonableness of the charges, held that Congress had a right to prescribe them, whether reasonable or unreasonable, and that, if in fact unreasonable and unremunerative, the only recourse of defendant was to retire from its business. This involves a question of constitutional law of great importance, upon which we at present express no opinion. The future investigation may relieve from any necessity of considering it. At any rate, it is well to have the facts settled before we attempt to determine the applicable law. And the facts should be settled by the trial court.

In *Chicago, Milwaukee &c. Railway* v. *Tompkins*, 176 U. S. 167, 179, a case involving the validity of railroad rates established by a commission in the State of South Dakota, and in which we found that there had been error in the methods pursued by the trial court for determining the question of reasonableness, we said:

"The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts, and from those facts deduce the proper conclusion? It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The ques-

tions are difficult, the interests are vast, and therefore the aid of the trial court should be had."

In *Kansas* v. *Colorado*, 185 U. S. 125, the questions before us arose on demurrer to the bill. We declined to enter into any determination of the law based upon the allegations of the bill, but overruled the demurrer and required the parties to introduce the testimony in order that the real facts might be presented before any determination was had in respect to the law, saying at the close of the opinion: "The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence." It may be that in this case further evidence may be needed, and, if so, the trial court may provide therefor.

The decree of the Court of Appeals is reversed, and the case remanded to that court with directions to remand the cause to the Supreme Court of the District of Columbia with instructions to that court to set aside its decree and inquire as to the reasonableness of the rates in the light of the construction we have given to the statute.

Reversed.

MR. JUSTICE GRAY and MR. JUSTICE BROWN did not hear the argument and took no part in the decision of this case.

MR. JUSTICE WHITE dissenting.

My dissent is constrained, not alone because of an inability to concur in the reasoning contained in the opinion of the court and the decree based on it, but also because the court has not decided a question which is necessarily involved in the cause, and which it is essential, in my opinion, to dispose of now in order that justice may be adequately administered. The case is this: The act of Congress of 1898 fixed the rate to be charged for telephone service in the District of Columbia. The plaintiff in error, by whom alone the business of affording telephone facilities was carried on in the District of Columbia, refused to comply with the act of Congress. In other words, the corporation,

though it continued to use the public streets and places, without the use of which it could not carry on its business, asserted its right to disregard the act of Congress and to exact from the public rates largely in excess of the limit fixed by Congress. This the corporation claimed the right to do under the assumption that the rates fixed by Congress, if enforced, would prevent it from reaping adequate remuneration, and hence the result would be the confiscation of its right to use its plant, thereby giving rise to the taking of its property without due process of law. Concerning this proposition, in the trial court, voluminous testimony was introduced, and after an elaborate hearing the court held that the enforcement of the rates fixed by the act of Congress would deprive the company of the right to remuneratively use its plant, and therefore the act of Congress was repugnant to the Constitution. The Court of Appeals of the District reversed the trial court, and held that it was the duty of the corporation, if it continued in business, to conform to the rates fixed by Congress. In reaching this conclusion the court did not pass on what would be the effect of the rates fixed by Congress if they were put in force, because the court concluded even although the rates established by the act of Congress would prevent the corporation from reaping adequate reward for the use of its plant, nevertheless the corporation was under the obligation, if it continued its business, to comply with the act of Congress. In effect, the court held although the corporation was not bound to continue in the business of furnishing telephone facilities, yet if it elected to do so, and therefore used the public ways and streets, the corporation could not lawfully set at defiance the act of Congress. And, reaching this conclusion, as previously stated, the court found it unnecessary to determine what would be the operation of the rates fixed by Congress, and abstained from so doing. The duty which the court thus held rested upon the company, was deduced, not from general considerations, but from the particular relation of the company to the District of Columbia and the express conditions imposed by Congress in granting to the corporation the use of the streets or in legalizing such use.

The finding of the court on this subject was stated in its opin-

ion as follows, and the accuracy of this statement was not controverted in the argument at bar. The court said:

"Congress has passed no act incorporating the defendant, or giving it license to carry on its business in the District of Columbia.

"The only recognition that it claims is to be found in certain items and clauses of appropriation bills, beginning with that of July, 1888. In that act it was provided, after an appropriation for telephone service, that the Commissioners of the District might authorize the wires of any 'existing telegraph, telephone or electric light company now operating in the District of Columbia,' to be laid under the streets, alleys, etc., 'whenever in their judgment the public interest may require the exercise of such authority—such privileges as may be granted hereunder to be revocable *at the will of Congress without compensation.*' 25 Stat. 323, 324.

"An item continuing this authority for another term of Congress under the same condition was contained in the act of March 2, 1889. 25 Stat. 804.

"The act of August 7, 1894, authorized the erection and use of telephone poles in the public alleys, but the privilege was made subject to revocation at the will of Congress without compensation. 28 Stat. 256.

"The act of March 3, 1897, provided that hereafter no wire shall be strung on any alley pole at a height of less than fifty feet from the ground at the point of attachment to said pole; and it was declared that nothing herein contained shall authorize the erection of any additional pole upon any street, avenue or reservation.

"The usual condition of revocation *at will without compensation* was again added. 29 Stat. 678."

Now this court in reversing the decree of the Court of Appeals and remanding the case for a new trial does not consider or decide the only question upon which the Court of Appeals rested its decree, but on the contrary that question is passed by upon the theory that it can be more appropriately decided after a further investigation of the facts to be had on the new trial which the court orders. The action of the court is sustained in

its opinion upon several propositions. Let me briefly consider them.

1. As it is shown there are various kinds of telephone service, some more complete and more expensive than others, and as the act of Congress does not contain a classification and a fixing of rates embracing all classes of such service, therefore it is decided that the case is not in a condition to be now disposed of finally, but must be remanded for a new trial in order that further testimony on this subject may be taken. But this involves a *non sequitur*. Conceding in the fullest degree that there are various kinds of telephone service, some more costly than others, and that the classification of the act of Congress does not embrace all kinds of such service, it is submitted that it should be now decided that the act of Congress applies to that which is customary and reasonable, and as to such customary and reasonable service compliance by the corporation with the act of Congress should be commanded. If it be that the decree below went further than this—which in my opinion it did not—then the decree should not be reversed, but should be modified so as to cause it to conform to the act of Congress, and as thus modified it should be affirmed.

2. As the court finds that there are certain classes of telephones furnished by the company which are for private use and the charge for which Congress has no power to regulate, and as the court considers the proof as to the revenue derived from this character of telephone is not clear, therefore it is held the case must be remanded to take testimony on this subject. But the testimony in the record on the subject of these private telephones is as full as it can be made on the new trial. The number of such telephones is shown, the revenue received from them is established and the influence to be produced upon the result of the rates fixed by Congress by the elimination of charges for such telephones is as clear on this record as it can be made in any record which may hereafter come before us for consideration. It follows then even under the assumption that the limitation upon the power of Congress as to such telephones be well taken, in my opinion no adequate reason is thereby afforded for not deciding the controversy now presented by the

record. This is said, of course, under the assumption, *arguendo* only, that the rule as to private telephones announced by the court is correct.

But putting out of view all these considerations and conceding that what has been previously said is erroneous, in my judgment the case ought not to be reversed and remanded without deciding the fundamental question which the cause presents which was decided by the Court of Appeals, and which, if the view taken by that court be sound, is controlling. Now that question lies at the very threshold of the case. It is wholly independent of and cannot, in the slightest degree, be influenced by any further investigation of fact which may be made on the new trial which is now ordered. I do not know how to more aptly illustrate the duty which exists to decide this question than by taking into view the situation as disclosed by this record. Certainly since the act of Congress was passed in 1898 the corporation has, in defiance of that act, continued to use for its benefit the public streets and property, and has in doing so imposed upon the public burdens which the corporation had no right to exact if the act of Congress was lawful. Beyond all question, this condition of things must now continue for a long period of time during the progress of the new trial which the court now orders. Let me suppose that, after the new trial, when the record again comes here, the rates as fixed by Congress will be found to be so low that they will compel the corporation to abandon the use of the public ways, and hence go out of business. What will be the duty of the court then? Will it not be compelled to decide the question which is now left undecided? Let me further assume that then the opinion of this court will be in accord with that expressed on the case now here by the Court of Appeals. Will it not necessarily follow that the corporation will be held during all the intervening time to have wrongfully violated the act of Congress and to have unlawfully imposed upon the public? And yet all this wrong and all this abuse which must arise under the hypothesis which has been stated can be absolutely prevented if the court now decides the question it will necessarily be called upon to decide hereafter. To me it seems clear that it is no

answer to this proposition to say that it may be, when the case hereafter is presented for decision, the court may conclude that the principle upheld by the Court of Appeals was erroneous. Concede this, and yet the duty of now deciding the question appears to me to be equally manifest. I submit whatever may be the conclusion as to the correctness of the principle announced by the Court of Appeals, that principle can never be overthrown upon the theory that there was no power in Congress to deprive the corporation of the use of the public streets and property without compensation, since in unequivocal and express terms the various permissions granted by Congress to the corporation to use the public streets provide in language, leaving no room for construction, that the power was reserved to Congress to revoke at its will and pleasure the right of the corporation to use the streets. It necessarily follows that the view announced by the Court of Appeals can in any event be disregarded only upon the theory that whilst power is in Congress to take away the right of the corporation to use the streets without giving it compensation, that an act fixing rates is not the exercise by Congress of such power. But if such be the correct view, then that interpretation, in the interest of a sound administration of the law and for the protection of the public, should be now declared. The reason for this is apparent, because, if such a principle were now announced, admonished by the opinion of this court, Congress will more advisedly be able to exert such further action as will prevent the corporation from using the public property in disregard of law, and save the public from extortion if it results from charging higher rates than those fixed by the law now under consideration.

Whilst I am not authorized to say that Mr. Justice HARLAN and Mr. Justice MCKENNA concur in the reasons which I have just given for my dissent, they request me to state that they also dissent from the opinion and decree of the court.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 131. Argued January 23, 24, 1902.—Decided June 2, 1902.

The act of the Legislature of Minnesota, creating a railroad commission, is not unconstitutional in assuming to establish joint through rates or tariffs over the lines of independent connecting railroads, and apportioning and dividing the joint earnings.

Such a commission has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road or for a joint action between railroads in the transportation of persons and property in which the public is indirectly concerned.

Without deciding whether or not connecting roads may be compelled to enter into contracts as between themselves, and establish joint rates, it is none the less true that where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related to transportation over a single line.

The presumption is that the rates fixed by the Commission are reasonable, and the burden of proof is upon the railroad company to show the contrary.

A tariff fixed by the Commission for coal in carload lots is not proved to be unreasonable, by showing that if such tariff were applied to *all* freight the road would not pay its operating expenses, since it might well be that the existing rates upon other merchandise, which were not disturbed by the Commission, might be sufficient to earn a large profit to the company, though it might earn little or nothing upon coal in carload lots.

THIS was a petition for a mandamus filed in the District Court of Ramsey County by the State, upon the relation of the Railroad and Warehouse Commission, against the Minneapolis and St. Louis Railroad Company and several other railroad companies, (the first of which alone answered and sued out this writ of error,) to compel such companies to adopt and publish a joint through rate fixed by the Commission upon shipments of hard coal in carload lots, from the city of Duluth to certain points in the southern and western parts of the State of Minnesota, and to enjoin them from demanding or receiving any

greater sum for such through shipments than that fixed by the Commission.

The facts are substantially as follows: The St. Paul and Duluth Railroad Company, a corporation of the State of Minnesota, operates a line of railroad from Duluth upon Lake Superior to the cities of St. Paul and Minneapolis. Its local rate upon hard coal in carload lots from Duluth to these twin cities was $1.25 per ton, the reasonableness of which local rate is conceded. The Minneapolis and St. Louis Railroad Company, also a corporation of the same State, operates a line of road from St. Paul and Minneapolis southerly through Hopkins, a station nine miles from Minneapolis, to Albert Lea in said State, thence still southerly to Angus in Boone County, Iowa. At Albert Lea and Angus it connects with other railroads, and by virtue of traffic arrangements has access to all the principal markets. It also owns and operates a branch line extending from a connection with its main line at Hopkins, westerly ninety-two miles to Morton, Minnesota, at which point it connects with a railroad owned and operated by the Wisconsin, Minnesota and Pacific Railroad Company, which extends westerly from Morton to Watertown in South Dakota. Winthrop is a station upon the line of the Minneapolis and St. Louis road between Hopkins and Morton, sixty miles west of Hopkins, and at the time the order of the Commission was made the Minneapolis, New Ulm and Southwestern Railroad had constructed and owned a short line of railroad extending south from Winthrop to New Ulm in Brown County. The capital stock of the last-named company was owned by the Minneapolis and St. Louis Railroad Company; but it was nevertheless a separate and independent corporation.

Both the St. Paul and Duluth Railroad Company and the Minneapolis and St. Louis Company are fully equipped to conduct the business of common carriers, have complete track connections and transfer facilities at St. Paul and Minneapolis, and for a long time have been engaged in transporting hard coal in carload lots without change of cars from Duluth to the points upon the line of the Minneapolis and St. Louis road for a joint through rate, which had been established by the mutual agree-

ment of the companies, and which had been divided between them according to that agreement. In dividing earnings under this joint tariff, to which not only the two principal defendants were parties, but the Minneapolis, New Ulm and Southwestern Company, and the Wisconsin, Minnesota and Pacific Company were also parties, there was first set apart to the St. Paul and Duluth Company $1 per ton for transporting the hard coal from Duluth to Minneapolis, the remainder being turned over to one or more of the other three companies participating in the carriage of the coal to its destination.

On September 22, 1898, the Railroad and Warehouse Commission, having resolved to investigate the reasonableness of this joint rate, made an order upon all these railroad companies to answer as to the reasonableness of such rate. The companies duly appeared and took part in the investigation, and on January 19, 1899, the Commission made an order whereby it determined that the joint rate then in force for transporting hard coal from Duluth to the several stations west of the twin cities was unreasonable and unjust, and ordered a reduction to another rate found by the Commission, which was published and served upon the companies, as required by the state laws, but was disregarded by the railroads interested. Under the rate so fixed the St. Paul and Duluth Company was allowed $1 per ton from Duluth to Minneapolis, which was the same price previously agreed upon between the parties, the remainder to be paid to the Minneapolis and St. Louis Company, which was left to settle with the Minneapolis, New Ulm and the Southwestern and the Wisconsin, Minnesota and Pacific Companies for services rendered by those companies in the transportation of coal to points upon their respective roads. Neither of the companies filed or posted schedules of the new tariffs as required by law, and the plaintiff in error, the Minneapolis and St. Louis Railroad Company, on March 3, 1899, and six weeks *after* the Commission made its order, withdrew all tariffs on hard coal in carload lots which had been established under agreement with the Duluth road.

Whereupon this proceeding was taken in the District Court of Ramsey County to compel the railroad companies to com-

ply with the order of the Commission. After trial, judgment was rendered by that court, confirming the order of the Commission, directing the issue of a writ of mandamus as prayed; and the judgment so rendered was affirmed upon appeal by the Supreme Court of Minnesota in *State* v. *Minneapolis & St. Louis R. R. Co.*, 80 Minn. 191.

Whereupon the Minneapolis and St. Louis Railroad Company, against which the full amount of the reduction by the Commission was assessed, sued out this writ of error.

Mr. Albert E. Clarke for plaintiff in error.

Mr. Thomas D. O'Brien for defendant in error. *Mr. W. B. Douglas* and *Mr. Ira B. Mills* were on his brief.

Mr. Justice Brown delivered the opinion of the court.

This case raises two questions: (1) The constitutionality of an act of the legislature of Minnesota passed in 1895, creating a Railroad and Warehouse Commission and defining its duties, (the material portions of which are printed in the case of *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287,) in so far as it assumes to establish joint through rates or tariffs over the lines of independent connecting railroads, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings; (2) whether the tariff fixed by the Commission is wholly inadequate and not compensatory.

1. The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the State to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be

performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the State to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the State to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in *Munn* v. *Illinois*, 94 U. S. 113, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being practically compelled to submit to such terms as the former may choose to exact, unless the State shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges.

The argument for the railroad companies in this case assumes that, while the State may interfere as between the railways and their customers, the shippers of freight, it cannot do so as between the railways themselves, by fixing joint tariffs and apportioning such tariffs among the several railways interested in the transportation. The practical result of that argument is this, that if there were within a certain State five connecting roads of 100 miles each in length, which among themselves had established a joint tariff for the whole 500 miles, the State would be powerless to interfere with such tariff, though its right to do so would be unquestioned if the whole 500 miles were owned and operated by a single company. To state such a proposition is practically to answer it. Granting that a State has no right to interfere with the internal economy of a rail-

road farther than to secure the safety and comfort of passengers, as, for example, to fix the wages of employés or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned.

There is an underlying fallacy in the argument of the railroad company in this connection, that the sum of two reasonable local rates cannot be unreasonable; and, as it is admitted that $1.25 per ton is a reasonable local rate for transporting coal from Duluth to Minneapolis over the St. Paul and Duluth road, and that the local rates for coal from Minneapolis to the designated stations westward and southward are also reasonable, it is impossible that a through rate from Duluth to the same stations which does not exceed the aggregate of these two rates can be unreasonable. We cannot assent to this proposition. The practice of railways in this country is almost universally to the contrary, and a through tariff is almost always fixed at a less sum than the aggregate of local tariffs between nearby stations upon the same road. Doubtless the fixing of a lower through tariff is dictated largely by a desire of each road to get as much mileage as possible from its patrons, as well as by an effort to meet competition over other lines doing business between the same termini; but in addition to this there is an increased cost of local business over through business in the additional fuel consumed and the increased wear upon the machinery of each train involved in stopping at every station. These facts were noticed by Mr. Justice Brewer in the opinion of the court in *Chicago &c. Railway Company* v. *Tompkins*, 176 U. S. 167, in which he makes the following observations:

"Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same; but the time taken by the one is greater than that taken by the other.

Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from the main to side tracks is greater; there are the wages of the employés at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true, when there are two separate trains, it is more so when the same train carries both local and through freight."

We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States, *Cincinnati &c. R. R. Co.* v. *Int. Com. Com.*, 162 U. S. 184, and that, if the power of the state commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the Commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis and St. Louis Company. It may, also, be said in this connection that in *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the Commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion, they are in favor of such

right. See, also, *Burlington, Cedar Rapids &c. Railway* v. *Dey*, 82 Iowa, 312, 338. All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line.

2. The more difficult question is that connected with the reasonableness of the rates. The presumption is that the rates fixed by the Commission are reasonable, and the burden of proof is upon the railroad companies to show the contrary. *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago &c. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 173. Indeed, the act itself provides, section three, subdivision C, "the rates established by said Commission shall go into effect within ten days, . . . and from and after that time the schedule of rates so established shall be *prima facie* evidence in all the courts of this State that such through rates are reasonable for transportation of freight and cars upon the railroads over which such schedule shall have been fixed."

In fixing the through rates for hard coal in carload lots from Duluth to interior points in Minnesota, the Commission set apart to the St. Paul and Duluth Company $1 per ton of the joint tariff, and as this was the same amount which that road had received under the prior arrangement, no question is made as to its reasonableness, and no appeal was taken by that road. The remainder of the joint tariff is paid to the Minneapolis and St. Louis Company, plaintiff in error, which was left to settle with the other roads interested in the tariff.

According to the tariff fixed by agreement between the companies prior to the action of the Commission a charge was made from Duluth to Hopkins, nine miles from Minneapolis, of $1.75, of which $1 was paid to the St. Paul and Duluth road (160 miles) and the remainder, 75 cents, to the Minneapolis and St. Louis road for a transportation of nine miles. This rate was gradually increased to stations beyond Hopkins until Norwood, forty miles from Minneapolis, was reached, where it was fixed at $2.50. The same rate was retained to Boyd, 153 miles from Minneapolis. This rate of $2.50 appears to have been a purely

arbitrary one, and indicates pretty clearly, as observed by the Supreme Court, that the defendant was either carrying coal to Boyd at a loss or was collecting too much tariff per ton on the same article transported to Norwood, although there may have been, as observed by the court, commercial conditions which made them necessary. The Commission reduced the rate to Hopkins from $1.75 to $1.32, and to Norwood from $2.50 to $1.57, gradually increasing that rate to Boyd, where it was fixed at $2.48, but two cents less than that fixed by the joint tariff theretofore agreed upon. The average rate allowed per ton per mile to the Minneapolis and St. Louis road under the tariff so fixed by the Commission was 1.115, while the old rate charged for this service was 1.784.

This rate, fixed by the Commission only upon hard coal in carload lots, was not met by any showing that at the rates fixed by the Commission there would be no profit or an insufficient profit upon the coal so transported, but by evidence that upon the hard coal received from Duluth for the year ending June 30, 1899, 2483 tons, the proportion allotted to the Minneapolis and St. Louis Company would be $3874.50, while if the Commission's rates had been in effect for the same rate this proportion would have been $2464.78, a loss of revenue for the year of $1409.72, as shown more clearly by the following table:

Total tons of hard coal received from Duluth for year ending June 30, 1899.....	2583 tons.
M. & St. L. R. R. proportion on old rate, 2583 tons @ $1.50.....	$3874 50
Had commissioners' rates been in effect for same period, M. & St. L. R. R. proportion would be.....	2464 78
Loss of revenue to M. & St. L. R. R. for year.....	$1409 72

As suggested by the Supreme Court of the State, this loss seems to be a trifling one when we consider that the total freight earnings on the divisions affected by this order were over $700,000 for that fiscal year.

The principal testimony, however, was intended to show that, if the rate fixed by the Commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses. But it also appears that if the old rate upon hard coal in carload lots agreed upon by the roads were adopted as an average rate for *all* freights, the freight earnings of the road would have been largely increased. This would indicate that the rate fixed for coal must have been above the average rate, although coal is classified as far below the average.

It is quite evident that this testimony has but a slight, if any, tendency to show that even at the rates fixed by the Commission there would not still be a reasonable profit upon coal so carried. It was not even shown that the joint tariff fixed by the roads themselves upon coal was not disproportionately high as compared with rates upon other articles or as gauged by a proper classification. The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting *all* merchandise exceeded the rate fixed by the Commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses. It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis and St. Louis Company upon their tracks at Minneapolis. Besides this, coal in carload lots was a comparatively insignificant item of the total freight carried, being but 2583 tons for an entire year. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the Commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the

companies may experience in proving that the rates are unreasonably low. The charges for the carriage of freight of different kind are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size and value of the packages and the cost of handling them.

Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smyth* v. *Ames*, 169 U. S. 466, we expressed the opinion (page 541) that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by section 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular. As we said in *Smyth* v. *Ames*, (page 547,) "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is

entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." The very fact that the Commission, while fixing the rate to Boyd at $2.48, within two cents of the amount theretofore charged by the companies themselves, gradually reduced that rate in proportion to the mileage, to Norwood, where it was fixed at $1.57, while the company charged an arbitrary rate of $2.50 to Norwood, and to all the stations between Norwood and Boyd, tends, at least, to show that the rates were fixed upon a more reasonable principle than that applied by the companies.

In exercising its power of supervising such rates the Commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the Commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be within the power of the Commission to compel such a tariff, it would not upon the other hand be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. Each case must be determined by its own considerations, and while the rule stated in *Smyth* v. *Ames* is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it.

It is sufficient, however, for the purpose of this case to say

Statement of the Case.

that the action of the Commission in fixing the rate complained of as to this particular class of freight has not been shown to be so unjust or unreasonable as to amount to a taking of property without due process of law, and we therefore conclude that the judgment of the Supreme Court must be

Affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* NEW YORK.

ERROR TO THE SUPREME COURT OF NEW YORK.

No. 234. Argued April 23, 24, 1902.—Decided June 2, 1902.

Without deciding that the briefs of counsel may be resorted to for the purpose of determining whether a Federal question was raised in the state court, it is sufficient to say that a general claim made that a particular act of the legislature is violative of the state and Federal Constitution, is not sufficient to show that a Federal right was specially set up and claimed or the validity of a statute was drawn in question in the state court, when no such question was noticed in the opinion of the state court and the case was disposed of upon a ground wholly independent of a Federal question.

THIS was a petition of the New York Central and Hudson River Railroad Company, as lessee, and the New York and Harlem Railroad Company, as owner, to vacate certain assessments for regulating and grading, setting curbstones, paving and other improvements to Vanderbilt avenue East, in the city of New York, upon the ground that the property in question had not been, would not be, and could not be, benefited in any manner by the improvements.

The successive steps towards the proposed improvements were the adoption of resolutions by the local municipal legislature, directing the improvements; the ascertainment of their cost; the making of a contract for their construction; and, finally, the assessment of the benefits upon the property, which in one case amounted to $4687.82 and in the other to $12,626.72. Peti-

tioners filed before the board of assessors objections to both assessments upon the ground that they were unfair, unequal, inequitable and unjust, and greater than the amounts assessed upon surrounding property. The two proposed assessments with these objections were transmitted by the assessors to the board of revision, which confirmed them.

Thereupon the two railway companies filed this petition, setting up the facts above stated, and alleging that their lands assessed are held and occupied only and exclusively as a roadway upon which their tracks are laid, and over which their trains are run, and that there are no buildings or other improvements upon the land except such railway tracks; that the grade of Vanderbilt avenue is from ten to eighteen feet above the level of petitioners' tracks; that there is no possible access from the land of petitioners to Vanderbilt avenue, but, on the contrary, that the roadway was constructed under a contract between petitioners and the board of public parks, and was depressed to its present grade, and solid stone retaining walls built upon and along the easterly and westerly sides of said land, in order that access to and from public streets and avenues, including that part of Park avenue or Vanderbilt avenue East, should be cut off and rendered impossible, and that no benefit could accrue to petitioners' lands by such improvements.

Petitioners prayed that the assessments might be vacated and the liens upon their lands discharged; but there is nowhere in the petition any claim of a Federal right, or a violation of the Constitution of the United States in any particular.

The case coming on to be heard before a special term of the Supreme Court, held on July 21, 1899, upon the petition, and testimony taken by consent, it was ordered that the prayer of the petition be denied. The railroad companies thereupon appealed to the appellate division of the Supreme Court, which affirmed the order of the special term. An appeal was taken to the Court of Appeals, where the order of the appellate division was affirmed, and the case remitted to the Supreme Court, which ordered the judgment of the Court of Appeals to be made the order and judgment of that court. No written opinion was filed by the Court of Appeals.

Opinion of the Court.

Whereupon the railway companies applied for and were allowed a writ of error from this court.

Mr. Ira A. Place and *Mr. Thomas Emery* for plaintiffs in error.

Mr. George L. Sterling for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Petitioners rely in this case upon the fact that the property assessed consists solely of a roadway through Park avenue or Vanderbilt avenue East, depressed from ten to eighteen feet below the grade of the street, the sides of which depression are held in place, and faced by a retaining wall, surmounted by an iron fence, whereby all access to and from the roadway to the street is rendered impossible, except at the intersection of side streets, where bridges are built for the accommodation of traffic. Their claim is that no possible benefit had, would or could inure to the benefit of the railway companies by the construction of the proposed improvements; and all the oral testimony tended to show that fact. The roadway was in fact nothing more than a tunnel through the avenue, open at the top, and differed only in that particular from an ordinary railway tunnel or subway wholly beneath the surface. The only evidence to the contrary was the order of the board of assessors and the board of revision making the assessment, presumably founded upon the opinion that some benefit must have accrued to the roads.

The only opinion delivered was that of the appellate division, which held that, under the city charter, there was no power in the court in any event to vacate an assessment for local improvements; that while the court was given power to reduce an assessment, it was deprived of the power to vacate it. "It may correct an error, but it cannot entirely wipe out the assessment itself," although it was intimated that the property owner might still "challenge the validity of the assessment, whenever his property is assessed under it, or it is made the foundation of proceedings against him."

The difficulty with the position of the railway companies in this court is that no Federal question was raised in their petition—the only pleading filed by them—and they are forced to rely upon a copy of their printed brief submitted in the Court of Appeals, and certified by the Chief Judge of that court as containing certain matters. The only allusion, however, in this brief to a possible Federal question is that contained in the following extracts:

"Legislative enactment is to be interpreted and construed upon the hypothesis that the legislature has, in its enactments, had due regard for these limitations upon its power, and that interpretation to be given to the language promulgated by it which will render it conformable to, rather than violative of, the rule of state and Federal Constitution.

"If, by prohibiting judicial review, the result of section 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional. A statute which authorizes assessments for local improvements, other than in accordance with the benefits conferred, is unconstitutional and void. *Norwood* v. *Baker*, 172 U. S. 269. That case holds that the only principle justifying the levying of assessments for local 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 improvements.'"

Manifestly, this is not such a case of setting up and claiming a Federal right as is required by Rev. Stat. section 709, to invest this court with jurisdiction of a writ of error. In the case of *Zadig* v. *Baldwin*, 166 U. S. 485, the contention that there was a Federal question raised below was contained only in an extract from the closing brief of counsel, presented to the Supreme Court of the State, in which such Federal question was discussed, and an oral assertion in the argument made to the Supreme Court of California that a claim under the Federal Constitution was presented. "But, manifestly," said the court, "the matters referred to form no part of the record, and are not adequate to create a Federal question, when no such ques-

tion was necessarily decided below, and the record does not disclose that such decisions were set up or claimed in the proper manner in the courts of the State."

But assuming, without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth. *Porter* v. *Foley*, 24 How. 415; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk &c. Bridge Co.* v. *Illinois*, 175 U. S. 626; *Chapin* v. *Fye*, 179 U. S. 126.

It is hardly necessary to say that the raising of such a question in the assignments of error in this court is insufficient. Not only was there no Federal question raised in the record, but the appellate division made no allusion to such a question, and dismissed the petition upon the ground that the charter of New York did not permit a question of benefit or no benefit to be raised in such a proceeding—a ground wholly independent of a Federal question.

The writ of error must, therefore, be

Dismissed.

HOFFELD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 318. Argued April 16, 1902.—Decided June 2, 1902.

The statute of June 16, 1880, providing that where entries of public lands have been canceled, the Secretary of the Interior shall refund the purchase money to the entryman, his heirs or assigns, is limited to such entryman, his heirs or voluntary assigns, and does not apply to one who purchased the interest of the entryman upon an execution sale against him.

THIS was a petition of J. Henrietta Hoffeld, executrix of the estate of Rudolph Hoffeld, deceased, for the repayment to her

by the United States, under the act of June 16, 1880, 21 Stat. 287, of the purchase money for one hundred and sixty acres of coal lands, the entry of which had been canceled by the Commissioner of the General Land Office on January 27, 1895, over eight years after the purchase was made, and more than seven years after Hoffeld had bought the land.

The purchase from the United States was originally made by other parties for a consideration of thirty-two hundred dollars. These parties had conveyed the lands to the Ohio Creek Anthracite Coal Company, against which company a judgment had been obtained, and a sale made November 10, 1887, to Rudolph Hoffeld, purchaser under the execution. Petitioner was his executrix. Several years after the sale the Commissioner of the General Land Office found that an error had been committed, in the allowance of the original entry upon the affidavit of an attorney, in the absence of the original entrymen. He thereupon exacted an affidavit of these entrymen, but as two out of the four were dead, and the other two could not be found, it was impossible to comply with the requirement of the Commissioner, who canceled the purchase, as above stated.

The Court of Claims made a finding of facts substantially as above stated, and decided, as a conclusion of law upon such facts, that the claimant had no right to recover, and the petition was therefore dismissed.

Mr. Robert Andrews for Hoffeld.

Mr. George Hines Gorman for the United States. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Justice Brown delivered the opinion of the court.

This case depends upon the construction given to section 2 of the act of June 16, 1880, 21 Stat. 287, which reads as follows:

"In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any

cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, *or to his heirs or assigns*, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

In the case under consideration, the entry had been made May 28, 1886, by Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri, through William Hinds, acting in their behalf under a power of attorney, paying therefor to the United States the sum of thirty-two hundred dollars. Section 32 of the Coal Land Regulations requires the entryman to certify in an affidavit that he makes the entry in his own right and for his own benefit, and not for the benefit of any other person. This affidavit was not made by the entrymen themselves, but by Hinds, as their attorney in fact. It was held to be insufficient by the General Land Office, and the local land offices were required to notify the claimants to that effect, and to require a new affidavit. Owing to the death of two of the entrymen and the impossibility of finding the two others, the affidavit could not be procured, and the entry was canceled by the Land Office, January 24, 1895. Previously thereto, and on May 29, 1886, the entrymen had conveyed the land to the Ohio Creek Anthracite Coal Company, against whom a writ of attachment was issued, a judgment obtained, and an execution issued, levied upon this tract of land, which was sold by the sheriff to Rudolph Hoffeld for the sum of seventy-five dollars, and on January 10, 1897, Hoffeld made application for repayment of the purchase money under the provisions of the above act.

The act requires that where, from any cause, the entry has been erroneously allowed and cannot be confirmed, repayment shall be made of the consideration to the entryman, or to his *heirs or assigns*, and the only question for our consideration is, whether the purchaser of the original rights of an entryman at an execution sale against him or his grantee can be said to be an "assign" within the meaning of the act.

"Assigns," or, as the word is more commonly spelled, "assignees," are of two classes, depending upon the manner of their creation: first, voluntary assigns, who are created by act of the parties; and, second, assignees created by operation of law. Whether in a given case an assignee belongs to the first or second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his powers. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property; while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a *bona fide* purchaser with respect thereto. Upon the other hand, an assignee by operation of law, as, for instance, a purchaser at a judicial sale, takes only such title as the execution debtor possessed at the time of sale. *The Monte Allegre*, 9 Wheat. 616. The doctrine of *caveat emptor* applies in all its rigor, and the buyer cannot set up the rights of a *bona fide* purchaser, even against an unrecorded deed. Thus in *Burbank* v. *Conrad*, 96 U. S. 291, it was said of property condemned and sold as enemies' property under the confiscation act, that "the United States acquired by the decree, for the life of the offender, only the estate which at the time of the seizure he actually possessed; not what he may have appeared from the public records to possess, by reasons of the omission of his vendees to record the act of sale to them; and that estate, whatever it was, for that period passed by the marshal's sale and deed; nothing more and nothing less. The registry act was not intended to protect the United States in the exercise of their power of confiscation from the consequences of previous unrecorded sales of the alleged offender." It was held in connection with the same transaction that the purchaser was not even entitled to a return of his purchase money. *Waples* v. *United States*, 110 U. S. 630.

The case of the *City of Norwich*, 118 U. S. 468, though

arising under the maritime law, is pertinent in this connection. This was a petition under the limited liability act, Rev. Stat. sec. 4285, which declares that if the owner of a vessel elect to take the benefit of the act, it shall be a sufficient compliance with the law "if he shall transfer his interest in such vessel and freight, for the benefit of the claimants, to a trustee," who becomes in reality an assignee for the benefit of creditors under the act. It was held that the word "interest" was intended to refer to the extent or amount of ownership which the party had in the vessel and freight, and that whatever the extent or character of his ownership might be, the amount or value of that interest was to be the measure of his liability. It was also held that his transfer of such interest under the law did not operate as an assignment of his insurance upon the vessel, which was a collateral contract, personal to the insured, but not conferring upon him any interest in the property; in other words, the contract of insurance does not attach itself to the thing insured or go with it when it is transferred. See cases cited 118 U. S. 494.

Upon the other hand, an assignee by operation of law may, under certain circumstances, have greater rights than a voluntary assignee. Thus in *Erwin* v. *United States*, 97 U. S. 392, it was held that the act of February 26, 1853, (Rev. Stat. sec. 3477,) nullifying and avoiding all transfers and assignments of any claim upon the United States, applied only to cases of voluntary assignments of demands against the government, and that it did not embrace cases where there had been a transfer of title by operation of law. "The passing of claims to heirs, devisees or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims."

In *Goodman* v. *Niblack*, 102 U. S. 556, this doctrine was applied to a general assignment for the benefit of creditors.

Referring now to the statute of June 16, 1880, 21 Stat. 287, we find that its requirements are, first, that the entry must have been canceled for conflict, or from some cause must have been erroneously allowed; second, that repayment must be made to the person who made the entry, or to his heirs or as-

signs; and, third, that such repayment should only be made upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to the land. The last requirement is strong evidence tending to show that voluntary assigns are only contemplated by the act, as they would naturally take the receipt with the deed of the land and be in a condition to relinquish all claims thereto, while an assign by operation of law would have no means of compelling a delivery of the receipt to him. The purchaser at an execution sale would only take the actual title of the owner to the land itself, unaccompanied by any collateral claims or rights incident to the acquisition of the land. In this respect he stands much as an assignee under the limited liability act, who, as above stated, takes the interest of the owner in the vessel and freight, but not his interest in a collateral contract of insurance. The contract evidenced by the statute is really a contract of indemnity, and provides, much like a policy of insurance, that if the owner lose his property he shall recover what he paid for it. We see no reason why the general rule above stated, that a contract of insurance does not accompany a transfer of the thing insured, does not apply to this statute.

It will be readily seen that complicated questions might arise in case the entryman should make a voluntary conveyance of the land accompanied by a surrender of his duplicate receipt, or should assign his receipt to another than the execution purchaser. The requirement that the receipt shall be surrendered is as peremptory as the requirement that the person demanding repayment shall be an heir or assign of the original entryman. The petition in this case contains no averment of petitioner's readiness to surrender the duplicate receipt, or any excuse for a failure to do so, but simply sets forth the title of Rudolph Hoffeld as purchaser under an execution sale upon the judgment against the Ohio Creek Anthracite Coal Company, although the court finds as a fact that it appeared from an affidavit that the duplicate receipt had been destroyed by fire. As bearing upon the equities of the case it is pertinent to remark that Hoffeld bought the property in question for a recited consideration of $75, but that under the statute he claims the whole

sum of $3200 which was paid to the United States at the original entry of the land. He thus by an expenditure of $75 recovers $3200, while neither the original entrymen who paid the $3200 nor their assignee, the Coal Company, recover anything. Inasmuch as, in the absence of a statute, there could be no recovery of the purchase money, *Waples* v. *United States*, 110 U. S. 630, one who seeks to take advantage of it must bring himself clearly within its equity as well as within its letter, and must show himself entitled not only to the land itself, but to everything which the statute has annexed thereto as an incident. The right to a return of the purchase money is in no sense an incident to the land, and did not pass to the purchaser upon the sale under the execution.

On the whole we are of opinion that the petitioner has not shown herself an assign of the original entryman or otherwise entitled herself to the benefit of the statute, and the judgment of the Court of Claims dismissing her petition is, therefore,

Affirmed.

PINE RIVER LOGGING COMPANY *v.* UNITED STATES.

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

No. 250. Argued May 1, 2, 1902.—Decided June 2, 1902.

By an act of Congress of February 16, 1889, the President was authorized to allow Indians residing on reservations to cut and dispose of dead timber, standing or fallen, on such reservations, for the sole benefit of such Indians. Defendants made five different contracts with individual Indians for the cutting of an aggregate of 2,750,000 feet. As a matter of fact, they cut and removed 17,000,000 feet. *Held*: That as to such excess both the Indians and the defendants were trespassers.

The objection that the several defendants were not responsible for the acts of each other is one which should be taken at the trial, and if not so taken, cannot be made available upon writ of error from this court.

In designating the number of feet to be cut under certain contracts, the use of the words "about" or "more or less" will not justify the cutting of a quantity materially and designedly greater than the amount provided for in the contract.

Statement of the Case.

The fact that the parties themselves disregarded the amount stipulated in the contract, and the further fact that the agent of the Indian Department, who personally directed what timber should be cut and supervised such cutting, assented to their construction of the contract, is no excuse for a material departure from the terms of a contract, which had been approved by the Commissioner of Indian Affairs, acting under the authority and regulations of the President.

With the contracts before them, the agents of the government had but one duty, and that was to see that they were honestly and faithfully carried out according to their spirit and letter.

Damages were properly assessed at the value of the logs as they were banked upon the streams and lakes near where they were cut.

Defendants being either wilful trespassers, or purchasers from such trespassers, were held not to be entitled to credit for the labor expended upon the timber, but were liable for its full value when seized, although if the trespass had been the result of inadvertence or mistake, and the wrong was not intentional, the stumpage value of the timber when first cut would be the proper measure of damages.

The defendants were held not to be entitled to credit for a percentage of the stipulated compensation paid to the Indian Department as trustee for the benefit of helpless Indians.

In civil cases the United States recover the same costs as if they were a private individual.

The reporter's fee for a transcript of the record used by the plaintiff in preparing its bill of exceptions on appeal should not be taxed as costs.

THIS was an action in the nature of trover begun in the Circuit Court for the District of Minnesota by the United States against the Pine River Logging and Improvement Company, a corporation, (hereinafter called The Logging Company,) Joel B. Bassett and William L. Bassett, copartners under the name of J. B. Bassett & Co., and John L. Pillsbury (for whom his administrators have since been substituted) and Charles A. Smith, copartners as C. A. Smith & Co., defendants, to recover damages for an alleged wrongful entry by the defendants upon an Indian reservation, and the cutting and removing of certain pine timber thereon.

The complaint, which contains nine counts, charges in substance that nine different parties did, with the consent and at the request of defendants, wrongfully enter upon certain lands of the United States known as the Mississippi Indian Reservation, and at the special instance and request of the defendants fell and cut into logs certain pine trees, which they

delivered to the defendants, who thereupon caused the logs to be floated down the river to the city of Minneapolis, to be there manufactured into lumber, which they had subsequently sold and appropriated the proceeds thereof to their own use.

The answers filed by the defendants, The Logging Company and the Bassetts allege in substance the following facts: That the logs referred to were cut under and by virtue of certain contracts which had been entered into with individual Chippewa Indians for the cutting of dead and down timber found on the reservation; that said contracts had been executed in pursuance of an act of Congress, approved February 16, 1889, 25 Stat. 673, in relation to the cutting of timber on Indian lands; that payment for the logs so cut and removed had been made in full to the United States, and to the proper Indian agent, in accordance with the provisions of said contracts; that said logs were so cut by the Indians and delivered to and accepted by the defendants in good faith, in the honest belief that said logs had been lawfully cut under their contracts from dead and down timber, and that defendants were entitled to the same and became owners thereof upon the delivery of the logs and upon making the aforesaid payments; that after the logs had been delivered to the defendants and before they were floated down the river to Minneapolis, the United States, through its proper officer, had seized and taken possession of the logs, claiming that they were cut from green and growing timber and not from dead and down timber; that thereafter, for the purpose of preserving said logs and realizing their full value for the party who should ultimately be determined to be the owner, a contract was entered into between the United States on the one hand and The Logging Company and J. B. Bassett on the other, which provided in substance that the defendants might drive the logs to Minneapolis without affecting the possession of the United States or the interest of any of the parties in the logs, and that after they had been driven to Minneapolis the defendants executed and delivered to the plaintiff a bond conditioned to pay any judgment that might be rendered against the defendants by the United States on account of the cutting of their logs. One of these bonds was executed by The Logging Com-

pany as principal, and the other by the firm of J. B. Bassett & Co. It was next set up in the answer of The Logging Company that the United States had accepted the bond in lieu of the logs, and that, relying upon said acts of the complainant, The Logging Company had disposed of the logs to others. It was then again specifically set up in the answer, as to the fourth, seventh and eighth counts of the complaint, that the claim of the United States was solely against J. B. Bassett & Co., and not against The Logging Company; that the claim set up in the first, second, third, fifth and sixth counts was solely against The Logging Company, and that there was therefore a misjoinder of causes of action in improperly uniting in one complaint causes affecting solely The Logging Company and other causes of action affecting solely the firm of J. B. Bassett & Co.

A separate answer was filed by the firm of C. A. Smith & Co., who admitted receiving from The Logging Company a certain amount of the pine saw logs described in the complaint, and that they manufactured the same into lumber, and disposed of it in the ordinary course of their business; that the amount of the lumber so manufactured was 15,628 feet, and that the value of the same was not greater than the sum of $132.84; that the defendants in receiving and manufacturing said logs honestly believed that The Logging Company was the owner and entitled to dispose of them. They also pleaded a misjoinder and non-liability for the acts of the other defendants.

The answer of The Logging Company admitted in substance that, under and by virtue of the three contracts between itself and the Indians, it had received into its possession, converted into lumber, and ultimately sold pine saw logs, cut upon Indian reservations, which had yielded in the aggregate 13,463,400 feet. The defendants, J. B. Bassett & Co., likewise admitted that under two contracts with the Indians they had received saw logs which had yielded in the aggregate 4,136,860 feet of lumber.

The United States demurred to parts of these answers, and replied to other parts, admitting that The Logging Company and Bassett & Co. had each entered into contracts with certain Indians, but averred that all the logs cut under some of the

contracts and a large portion of the logs cut under other contracts were cut from pine trees that were alive and standing, while the contracts authorized only the cutting of dead and down timber.

The case being at issue upon these pleadings, The Logging Company and Bassett & Co. moved for a judgment against the government upon the pleadings for the sole reason, as stated in the motion, that on the facts admitted the plaintiff was not entitled to maintain an action of trover or conversion against these defendants, or either of them, for the matters and things set out in said cause of action; but that the remedy of the government was upon the bonds given when the logs were surrendered to the defendants. This motion was sustained by the Circuit Court and a judgment entered against the United States, which, however, was reversed by the Court of Appeals, holding that neither of the bonds became available to the United States until a judgment had been obtained in its favor. The case was remanded for a new trial. 78 Fed. Rep. 319.

Upon the case being sent back to the Circuit Court there was a second trial, which also resulted in a judgment in favor of the defendants. The Court of Appeals reversed this judgment upon exceptions taken by the United States at the trial. 89 Fed. Rep. 907.

A third trial of the case resulted in a verdict, by direction of the court, in favor of the United States for $88,269.94. This judgment was affirmed by the Circuit Court of Appeals. Whereupon a writ of error was sued out from this court.

Mr. A. S. Worthington for plaintiffs in error.

Mr. John E. Stryker for the United States. *Mr. Robert A. Howard* and *Mr. Solicitor General Richards* were on his brief.

Mr. Justice Brown delivered the opinion of the court.

This case was tried before a jury upon the theory that the defendants went far beyond the terms of their contracts with the Indians, and cut not only a large excess in quantity, but

selected a quality of timber wholly unauthorized by the contracts, or by the acts of Congress, or the regulations of the President in connection therewith. The questions to be considered arise upon objections to the testimony and the instruction of the court to the jury to return a verdict for the plaintiffs.

It is conceded that the fee to the lands comprised within Indian reservations is in the United States, subject to a right of occupancy on the part of the Indians, and that the unauthorized cutting of timber upon Indian reservations is not only unlawful, *United States* v. *Cook*, 19 Wall. 591; *Northern Pacific Railroad* v. *Lewis*, 162 U. S. 366, but is made a criminal offence by the act of June 4, 1888. 25 Stat. 166. But by an act of Congress passed February 16, 1889, 25 Stat. 673, it is provided: "That the President of the United States may from year to year in his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment, for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled or otherwise injured for the purpose of securing its sale under this act, then in that case such authority shall not be granted."

It will be observed that by this statute no general authority is given to Indians to cut timber upon their reservations. The act contemplates that the authority shall be temporary only, "from year to year," and it is further limited to "dead timber standing or fallen," and that it shall be disposed of solely for the benefit of the Indian or Indians to whom the authority is given.

Pursuant to this act certain regulations were prepared by the Secretary of the Interior, approved by the President, and extended to the Indians of the Chippewa reservation in the State of Minnesota. These regulations provided that each Indian who engaged in the work should provide his own logging outfit and supplies; that no Indian should be allowed to log who has children of school age, but not attending school, unless in

the opinion of his agent some good reason existed in special cases which were sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation, not well employed, should be permitted and encouraged to engage in the work; that all cutting should be done under the superintendence and direction of a competent white man, who should go into the woods with the Indians, "to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner, so as to cause them to die; . . . and to inspect the scaling of the logs;" that with the exception of a superintendent and of foremen and blacksmiths, all white labor was to be excluded from the reservation; that the logs cut should be sold at public sale to the highest bidder, either by auction or by calling for sealed proposals, at the discretion of the Secretary of the Interior, after at least two weeks' notice by publication in the newspapers, and no sale of the logs should be valid until approved by the Commissioner of Indian Affairs; and that ten per cent of the gross proceeds derived from such sale of the logs should go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless might be supported.

The timber in this case was cut under five different contracts made between individual Indians and the defendants, all of which were limited to dead and down timber, to be cut during the season of 1891 and 1892. The first provided for 250,000 feet; the second for 500,000 feet; the third for 500,000 feet; the fourth for 1,000,000 feet, and the fifth for 500,000 feet. The whole amounted to 2,750,000 feet. These contracts were approved by the Commissioner of Indian Affairs, and, although in some of their provisions, they differed from the general regulations above stated, which provided for a public sale of logs at auction or under sealed proposals, they must be regarded as superseding those regulations in that particular, and as constituting new regulations approved by the President and Commissioner of Indian Affairs.

The object of the statute, as interpreted by these regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited

quantity of dead and down timber under the superintendence of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that ten per cent of the gross proceeds should go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless might be supported. The rights of the government to the unimpaired value of the land and to the standing timber were carefully guarded by the proviso that no green or growing timber should be cut, and no live trees damaged, so as to cause them to die, that they might be marketed under the provisions of the act. Nothing can be plainer than that there was no intention on the part of Congress or the President to authorize promiscuous logging operations, or the felling of live standing timber, or that a few Indians should be permitted to monopolize the proceeds, but that they should be divided among the individuals of the tribe in proportion to the scale of the logs banked by each.

1. The first assignment of error takes exception to the action of the Circuit Court in instructing the jury to return a verdict for the United States, because it required The Logging Company to become responsible for, and pay the obligations of, Bassett & Co., and required that firm to pay the obligations of The Logging Company, and also required the firm of C. A. Smith & Co. to pay the obligations both of The Logging Company and Bassett & Co., when there was no evidence in the case to justify the court in holding any of the parties liable for the obligations of the others; or if such evidence existed at all, it was a question of fact for the jury.

The difficulty with this assignment is, that no such point appears to have been taken upon the trial of the case in the Circuit Court. The bill of exceptions shows that when the plaintiff rested, defendants moved the court that the plaintiff "elect as to the time and place of the conversation (conversion) upon which it relies," and that plaintiff thereupon elected to take the value of the logs in the spring of 1892 as they were at the time of the seizure. Upon the conclusion of the entire testimony plaintiff moved the court to strike out all the evidence offered by the defendants with reference to their good faith in the trans-

actions, which the court denied, and plaintiff excepted; and thereupon the court instructed the jury to return its verdict in favor of the plaintiff, to which an exception was also taken. No such objection upon the ground of misjoinder was taken in the assignment of errors filed in the Circuit Court of Appeals to review that judgment, or in the original assignment of errors filed in this court and incorporated in the record. It would appear that the objection was made on behalf of the defendants in the first trial of the case, inasmuch as it is mentioned in the first opinion of the Circuit Court of Appeals. 78 Fed. Rep. 320. It will be remembered that upon this first trial the case was submitted upon the pleadings alone, defendants taking an objection in the nature of a demurrer that, upon the facts admitted by the pleadings, the government could not recover, but was relegated to an action upon the bonds given when the logs were surrendered to the defendants. The Circuit Court of Appeals held that the complaint did not disclose a misjoinder of causes of action, and also that the judgment rendered by the Circuit Court was in such form that, if sustained, it would bar a subsequent suit against either of the defendants for a wrongful conversion of the property. The point was therefore held not to be well taken, and from that time seems to have been waived or abandoned, as it does not appear to have been raised upon the second or third trials.

This clearly precludes the defendants from raising the question at this stage of the case. It is well settled in this court that an objection that the evidence does not support a joint action against all of the defendants—in other words, a variance betweeen the pleadings and proofs—is one which should be taken at the trial, and cannot be raised for the first time in the appellate court. In *Roberts* v. *Graham*, 6 Wall. 578, it was said that an objection of variance between the allegations and proofs must be taken when the evidence is offered, and will not even be available upon motion for new trial. See also *O'Reilly* v. *Campbell*, 116 U. S. 418; *Patrick* v. *Graham*, 132 U. S. 627; *Boston & Albany R. R. Co.* v. *O'Reilly*, 158 U. S. 334.

But, in addition to this, the record is by no means barren of evidence of a joint responsibility. While the contracts with the

Indians were separately made by each defendant, and their accounts of logs cut and money paid were kept distinct from each other, and each averred that it had nothing to do with the contracts of the other, two of the defendants testified that the logs cut under the five contracts were equally divided between C. A. Smith & Co. and J. B. Bassett & Co., and not according to the amounts named in the contracts; that The Logging Company was practically controlled by C. A. Smith & Co., and that the logging operations were conducted under the supervision of three men who were acting as agents of these firms. We do not undertake to say that there was not evidence upon this point which, if the attention of the court had been called to it, should not have been submitted to the jury; but as the question was not made in the Circuit Court or in the Court of Appeals it is too late to raise it upon a writ of error from this court.

2. By the second assignment it is insisted that the court should either have instructed the jury, or left to them to determine, that under the contracts between The Logging Company and Bassett & Co. respectively on the one hand, and the Indians on the other, as those contracts had been construed and acted upon by all parties in interest, including the United States, these companies respectively had a good title to all the dead and down timber delivered to them by the Indians under the contracts, without regard to the specific quantity of timber mentioned therein.

In two of the contracts the designation of the quantity of timber to be cut is preceded by the word "about," and in the other three is followed by the words "more or less." It is contended that by the use of these words the contracts were susceptible of a wide latitude of construction, and if the parties themselves disregarded the limitations, the court, in interpreting those contracts, will adopt the construction given them by the parties interested.

There is no doubt whatever of the general proposition that where the words "about" or "more or less" are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of

wood or coal, or the cargo of a particular ship, or a certain parcel of land, the words "more or less," used in connection with the estimated quantity, are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified. This doctrine is well illustrated in the case of *Brawley* v. *United States*, 96 U. S. 168, where the contract was to deliver to a military post 880 cords of wood, "more or less, as shall be determined to be necessary by the post commander, for the regular supply, in accordance with army regulations and the troops and employés of the garrison of said post." It was held that the latter were the determinative words of the contract, and the quantity, designated at 880 cords, was to be regarded merely as an estimate of what the officer making the contract at the time might suppose would be required; and that the government was not liable for more than forty cords of wood which was accepted by the officers. So in *Watts* v. *Camors*, 115 U. S. 353, it was held that where a ship was described in a charter party as of the burden of 1100 tons, "or thereabouts," registered measurement, the charterer was bound to accept her, although her registered measurement, unknown to both parties, was 1203 tons.

But, upon the other hand, if the agreement be to manufacture, furnish or deliver certain property not then in existence, or to be taken from a larger quantity, the addition of the words "more or less" will be given a narrow construction, and held to apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction. *Norrington* v. *Wright*, 115 U. S. 188.

The contracts in this case unquestionably belong to the latter class. They were contracts to cut and deliver a certain quantity of dead and down timber, and if construed, as is claimed, to authorize the cutting of six times that amount, the quantity might as well have been omitted altogether. The argument of the defendants in that connection is virtually an insistence that the specification of the quantity to be cut should be discarded, and as the payment was stipulated at a certain price per thousand feet, the contract should be interpreted as

authorizing the cutting of an unlimited quantity, so long as the price paid was that stipulated in the contract.

Defendants' main reliance, however, is upon the construction of these contracts by the parties themselves, including the United States, and in support of their position they invoke the general rule that where both parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction; and that the statutes under which the cutting was done, the correspondence between the Secretary of the Interior, and the President upon the subject, the regulations which the latter adopted for carrying the act into effect, and the conduct of the parties to the contracts, tend to show that they were intended to authorize the removal of all the dead and down timber on the public land described in them. Undoubtedly there is some support for the proposition in the disregard by the parties to the contract of the limitations of quantity to be cut; but upon the statute and regulations we put, as before stated, an entirely different interpretation. The argument overlooks the fact that the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land, *United States* v. *Cook*, 19 Wall. 591, except so far as Congress chose to extend such right; that they had no right even to contract for the cutting of dead and down timber, unless such contracts were approved by the Commissioner of Indian Affairs; that the Indians in fact were not treated as *sui juris*, but every movement made by them, either in the execution or the performance of the contract, was subject to government supervision for the express purpose of securing the latter against the abuse of the right given by the statute. It is true that, as a matter of fact, the work was done under these contracts under the superintendence of a government agent, who personally directed what timber should be cut, and when the timber had been cut and a final settlement was made with the Indians, the amounts found to be due them were paid to the Indian agent, who, with the contracts before him, must have known when he received his payments the quantity of timber which had been cut under the different contracts.

It is unnecessary to inquire what excuses may be made by these officers for thus indirectly approving the construction put upon the contracts by the parties interested, since they could not bind the government in this particular. With the contracts before them they had but one duty, and that was to see that they were honestly and faithfully carried out according to their spirit and letter. No authority had been given them to extend the contracts either as to the quantity or quality of timber to be cut. In fact, they were placed in charge of the operations for the express purpose of seeing that there should be no violation of the contracts in these particulars. They, as well as the parties thereto, were equally bound by its provisions. No discretion had been given them to waive or alter the contracts in any particular. No conduct of theirs can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract. *Lee* v. *Monroe*, 7 Cranch, 366; *The Floyd Acceptances*, 7 Wall. 666; *Whiteside* v. *United States*, 93 U. S. 247. We are therefore of opinion that the defendants cannot take refuge under the consent or acquiescence of the government agent in the disregard of these contracts.

To give to them the construction claimed by defendants is not only inconsistent with their language, but with the regulations of the President, the design of which was to permit every Indian on the reservation to engage in the work of cutting dead and down timber, and that no one should obtain more than his fair share of such privilege. The timber in question, if allowed to lie upon the land, would simply rot and go to waste, and its removal and sale were no detriment to the land or the government; and this right, if judicially exercised, would give support to a good many Indians who had no other means of earning a living. The regulations, however, properly limited the right to Indians "not well employed," and provided that no favoritism should be shown by the agent in the management of the business, and that no Indian should be permitted to monopolize the business for his own profit. In short, the object of these regulations was to prevent exactly what was done in this case, that is, the appropriation to a few Indians of the benefits

of the act to the exclusion of the many. It will be observed that while the defendants were interested in all these contracts, care was taken that one contract should not be made for the delivering of the gross amount of logs, but that five different contracts should be entered into with different Indians, undoubtedly for the very purpose of preventing a monopoly by a single person, the largest of these contracts being only for a million feet.

3. The third assignment of error is directed to the proper measure of damages, which were assessed at the value of the logs as they were banked upon the streams and lakes in the neighborhood of where they were cut. It is insisted that the proper measure was the value to the government of the timber before the Indians or the contractors had, by their labors, added to that value.

To determine the proper measure of damages, it is necessary to consider the exact relation of the defendants to this timber. They were certainly not innocent purchasers for value of the logs that were cut. All the logs were cut under contracts with individual Indians, by which the latter had agreed to cut, haul and deliver to the defendant, upon the Mississippi River, or waters tributary thereto, an aggregate of 2,750,000 feet of dead and down timber, defendants agreeing to pay to the Indian Department ten per cent of the purchase price as stumpage for such timber, which should be deducted from the price of $4 per thousand agreed to be paid. As a matter of fact, there were delivered on these contracts over 17,000,000 instead of 2,750,000 feet contracted for, a large proportion of which seems to have been cut from green and growing timber, though the quality of the timber is not in issue here. Defendants could not have failed to know that they were paying for a very much larger amount than they had agreed to buy, or than the Indians had any power to sell. They knew that their contracts had been approved by the Commissioner of Indian Affairs upon the basis of a certain quantity of dead and down timber, and that if the agent of the Indian Department had acquiesced in the amount and quality of timber actually cut, he had exceeded his authority, and his acts were not binding upon the government.

Granting that the question that what constituted "dead and down" timber might be the subject of a *bona fide* dispute, there was no question but that the amount of timber received grossly exceeded the amount contracted for, and that an agreement to cut 2,750,000 feet could not be glossed over by the words "about" or "more or less" in any such way as to cover 17,000,000 feet.

The case of *Woodenware Co.* v. *United States*, 106 U. S. 432, is decisive of the law in this connection. That was also an action of trover brought by the United States for the value of 242 cords of ash timber cut from the Oneida reservation in the State of Wisconsin. The timber was knowingly and wrongfully taken from the reservation by Indians, and carried to a distant town, where it was sold to the Woodenware Company, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth twenty-five cents per cord, and at the town where the defendant bought it, $3.50 per cord. The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it was cut, or at the town where it was delivered. It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. "This right" (of the recovery of the property), said the court, "at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer, defendant did not acquire any better title to the

property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff."

The cases involving this distinction and in line with the *Woodenware* case are abundant, both in the Federal and state courts, and are too numerous even for citation. We do not see that the defendants are in any better position by the fact that the contracts were approved by the Commissioner of Indian Affairs, since it was not what was done in pursuance of these contracts but what was done in disregard of them, which lies at the basis of plaintiff's action. Had the contracts been adhered to, clearly there could have been no recovery. We are not called upon to explain the conduct of the government agent who superintended the cutting of this timber. It is sufficient to say, as already stated, that his acts in excess of his authority, which must have been well known to the defendants, afford them no protection. To say that all parties, including the Indians, the government agent and the defendants, may have honestly supposed that their right extended to all dead and down timber upon the lands described in the contracts, is to impute to them an ignorance of the English language. This might be ascribed to the Indians but not to the other parties. It is unnecessary to say that the defendants do not stand in a position of innocent purchasers in good faith.

It may admit of some question whether their advances of money and supplies to the Indians to carry on the logging operations was not a violation of the regulation that "each Indian shall provide his own logging outfit and supplies," but however this may be, it gives no color to the assertion that the defendants acted in good faith, since they could hardly have failed to know that their advances must have been greatly in excess of what was needed for preparing for market less than three million feet of logs.

We regard the rule laid down in the *Woodenware* case, that an intentional trespasser, or a purchaser from him, shall have

no credit for the labor he may have expended upon the property at the time of its conversion, as an eminently proper and wholesome one. It is, and has for many years been, notorious that under the various guises of Indian contracts, purchases of timber entries, or cutting timber for railway, mining or agricultural purposes, the timber lands of the United States are being denuded of all their substantial value by logging concerns gradually gathering to themselves all the valuable timber of the country, which Congress intended to reserve for the benefit of homestead entrymen, or the purchasers of land in small parcels. If trespassers under these circumstances were permitted to escape by the payment of the mere stumpage value of the standing timber, there would be a strong inducement upon the part of these operators to avail themselves of every opportunity of seizing this timber, since they would incur no greater liability than the payment of a nominal sum. It is only by denying them a credit for their labor expended upon it that the government can obtain an adequate reparation for this constantly growing evil, and trespassers be made to suffer some punishment for their depredations.

4. The fourth assignment is based upon the proposition that the contractors should have been allowed credit for the amount paid to the United States for stumpage on account of the 14,850,260 feet included in the verdict. The stumpage representing this quantity of timber would be $6400.

This payment was not made to the United States in reimbursement of their claim for timber, but under regulations of the President, and under their contracts with the Indians that they would pay ten per cent of the stipulated compensation of $4 per thousand feet to the Indian Department as stumpage, which should be deducted from the price of $4 per thousand feet, and under the condition that such stumpage should go to the poor fund of the tribe, from which its helpless members might be supported. This payment was not made to the government as vendor, but to be held by the Indian Department as trustee for the benefit of helpless Indians, and was as much a part of the stipulated price to be paid for the timber as the other ninety per cent of the $4 per thousand feet.

5. The fifth objection assigns as error the exclusion by the trial court of a telegram of March 16, 1898, from the Acting Commissioner of the Land Office to The Logging Company, stating simply that the Commissioner had accepted the bond of the defendants in lieu of the logs, and that the government agent had been directed to release the logs. A like exception was taken to a letter from the special agent of the Land Office to The Logging Company, repeating the telegrams, and stating that the logs had been released. We do not see the materiality of these papers. There is no doubt that the bonds were accepted in lieu of the logs themselves, and as security for any judgment that might be obtained. Neither the telegram nor the letter add anything to the inferences to be derived from the face of the instruments.

6. The same remark may be made as to the exclusion of certain conversations of Charles A. Smith with Indians in the fall of 1891, wherein the Indians informed him that there was a large amount of dead and down timber on the reservation which could be cut. Of course, there was, or the contract would not have been made. We fail to see that these conversations had any bearing upon the question of the good faith of the defendants. The seventh, eighth and ninth assignments of error need no comment.

7. In the tenth assignment it is insisted that the court erred in taxing costs against the defendants. While the rule is well settled that costs cannot be taxed against the United States, the rule is believed to be universal, in civil cases at least, that the United States recover the same costs as if they were a private individual. We know of no case in this court directly adjudicating the liability of unsuccessful defendants for costs in actions brought by the United States, although it was assumed in *United States* v. *Sanborn*, 135 U. S. 271, 281, where the question arose as to particular fees included in a general bill. Throughout the elaborate opinion of Mr. Justice Harlan the liability of the defendant for costs was assumed, and such has been the ruling generally in the lower courts, although the reported cases upon the subject are rare. *United States* v. *Davis*, 54 Fed. Rep. 147. It has been assumed rather than decided.

8. The item of $353.69, reporter's fees for a transcript of the record used by the plaintiff in preparing its bill of exceptions on the former appeal, was improperly allowed.

By Rev. Stat. section 983, "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by the judge or clerk of the court;" and by rule 31, subdivision 3, of the Circuit Court of Appeals, "the cost of the transcript of the record from the court below shall be taxable in that court as costs in the case." It has been held in a number of cases that section 983 did not include a transcript of the evidence for the personal use of counsel in preparing a case for an appellate court. *Wooster* v. *Handy*, 23 Fed. Rep. 49, 60, by Judge Blatchford, who says the language implies that the copies must have been actually used on or in the trial or final hearing, or at least obtained for such use. In *The William Branfoot*, 52 Fed. Rep. 390, 395, it was held by Mr. Chief Justice Fuller that a copy of the official stenographer's notes, obtained for libellant by his counsel, was simply for convenience, and not a copy necessarily used on the trial, and the charge therefor was properly rejected. To the same effect are *Gunther* v. *Liverpool &c. Insurance Co.*, 10 Fed. Rep. 830; *Kelly* v. *Springfield Railway Co.*, 83 Fed. Rep. 183, and *Monahan* v. *Godkin*, 100 Fed. Rep. 196. This error, however, does not render it necessary to reverse the judgment of the court below. The amount of the reporter's fees, $356.69, may be deducted from the judgment.

In conclusion, we are of opinion that there was no error committed upon the last trial. The case was an aggravated one, the conduct of the companies wholly indefensible, and the right of the government to recover is entirely clear.

The judgment of the Court of Appeals, subject to the above deduction, is right, and it is, therefore,

Affirmed.

Counsel for Parties.

UNITED STATES *v.* NICHOLS.

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

No. 249. Submitted May 2, 1902. — Decided June 2, 1902.

Section 19 of the customs administrative act of 1890, requiring that whenever imported merchandise is subject to an *ad valorem* duty, the duty shall be assessed upon the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, has no application to glass bottles filled with *ad valorem* goods. Such bottles are not "coverings" in the ordinary sense of the word, and are specially provided for in the tariff acts.

THIS case came before the Court of Appeals upon appeal from a decision of the Circuit Court for the Southern District of New York, reversing a decision of the board of general appraisers, which affirmed the action of the collector of the port of New York regarding the assessment of duty upon certain imported merchandise. The Circuit Court of Appeals, being in doubt with regard to a certain question of law arising therein, desired the instruction of the Supreme Court for its proper decision.

The importation was made under the tariff act of 1894, and consisted of glass bottles, holding not more than one pint, and filled with goods dutiable at *ad valorem* rates. Upon these facts the question of law concerning which the instruction of this court was desired was this:

"Should the value of the bottles filled with *ad valorem* goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to made up the dutiable value of the imported merchandise?"

Mr. Assistant Attorney General Hoyt for appellant.

No appearance for appellees.

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

Opinion of the Court.

This case involves the dutiable classification of certain glass bottles either under the customs administrative act of 1890, or the tariff act of 1894. The statement of facts shows that the bottles in question held not more than one pint, and were imported filled with merchandise, which was liable to *ad valorem* duties, and that they were assessed for duty at the respective *ad valorem* rates applicable to their contents as a part of their value. The protest (referred to by counsel, though no part of the record) claimed that the articles were free from duty, or, failing that, were dutiable at 40 per cent *ad valorem* under paragraphs 88, 89 or 90 of the tariff act of 1894.

Section 19 of the customs administrative act, (26 Stat. 131, 139,) provides that "whenever imported merchandise is subject to an *ad valorem* rate of duty . . . the duty shall be assessed upon the actual market price or wholesale price of such merchandise, . . . including the value of all cartons, cases, crates, boxes, sacks and *coverings* of any kind, and all other costs, charges and expenses," etc.

At the time this act was passed the following provisions of the tariff act of 1883 were in force, 22 Stat. 488, 495:

"Green and colored glass bottles . . . not specially enumerated or provided for in this act, one cent per pound; if filled, and not otherwise in this act provided for, said articles shall pay thirty per cent *ad valorem* in addition to the duty on the contents."

By the same act "flint and lime glass bottles and vials, . . . not specially enumerated or provided for in this act," were taxed at forty per centum *ad valorem*. "If filled, and not otherwise in this act provided for, . . . forty per centum *ad valorem* in addition to the duty on the contents."

Though the tariff act of 1883 is not directly in issue in this case, it is pertinent to inquire whether the sections above cited respecting duties upon glass bottles were repealed by section 19 of the customs administrative act. We are of opinion that they were not. The customs administrative act was not a tariff act, but, as its title indicates, was intended "to simplify the laws in connection with the collection of the revenues," and to provide certain rules and regulations with respect to the assessment and

collection of duties, and the remedies of importers, and not to interfere with any duties theretofore specifically imposed or thereafter to be imposed, upon merchandise imported. Section 19 was intended to provide a general method for the assessment of *ad valorem* duties, and to require the value of all cartons, cases, crates, boxes, sacks and coverings of any kind to be included in such valuation. We think the rule *ejusdem generis* applies to the words "coverings of any kind," and that glass bottles, which are never in ordinary parlance spoken of as coverings for the liquor contained in them, is such a clear departure from the preceding words as to exempt them from the operation of the section, provided at least they are taxed under a different designation. It is very singular that if Congress intended to include under the words "coverings of any kind" vessels used for containing liquors, it should not have made use of the words casks, barrels, hogsheads, bottles, demijohns, carboys, or words of similar signification. The inference is irresistible that by the words "coverings" it only intended to include those previously enumerated and others of similar character used for the carriage of solids and not of liquids. Webster defines a covering as "anything which covers or conceals, as a roof, a screen, a wrapper, clothing," etc.; but to speak of a liquid as being *covered* by the bottle which contains it, is such an extraordinary use of the English language that nothing but the most explicit words of a statute could justify that construction.

So, too, by cartons, cases, crates, boxes and sacks, we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents. Indeed, it is quite possible that they were made taxable in a general way by the customs administrative act, in order that, if they were so made as to be of further use after their contents were removed, they might not escape taxation. The ordinary cartons, cases, crates, boxes and sacks are of no value after their contents are removed, but in order that they should not escape taxation altogether, if they were of permanent value, they were included in the general terms of the customs administrative act.

The subsequent legislation upon the same subject tends to show that Congress intended to preserve the distinction between bottles and ordinary coverings, and to make a special provision for them. Thus, by the tariff act of October 1, 1890, 26 Stat. 567, par. 103, "green and colored, molded or pressed, and flint and lime glass bottles, *holding more than one pint*, . . . and other molded or pressed green or colored and flint or lime bottled glassware not specially provided for in this act, one cent per pound," while those *not holding more than one pint* were taxed at fifty cents per gross, and by paragraph 104, "if filled, and not otherwise provided for in this act, and the contents are subject to an *ad valorem* rate of duty, the value of such bottles . . . shall be added to the value of the contents for the ascertainment of the dutiable value of the latter; but if filled . . . and the contents are not subject to an *ad valorem* rate of duty . . . they shall pay, in addition to the duties on their contents, the duties prescribed in the preceding paragraph." It will be noticed that by this act there was a division, theretofore unrecognized, between bottles holding *more* than one pint and those holding *less* than one pint, but both classes were specifically taxed, whether filled or unfilled; consequently the question arising in this case as to the rate of duty payable, if the administrative act were not applied, would not arise under the act of October 1, 1890.

In 1894, the tariff was again revised, 28 Stat. 508, and by paragraph 88 "green and colored, molded and pressed, and flint and lime glass bottles holding *more* than one pint, . . . *whether filled or unfilled*, and whether their contents be dutiable or free," "were taxed at three fourths of one cent per pound, and vials, holding *not more* than one pint and not less than one quarter of a pint, forty cents per gross; all other plain, green and colored, molded or pressed, and flint and lime glassware, forty per cent *ad valorem*." By paragraph 248 of the same act ginger ale or ginger beer was taxed at twenty per centum *ad valorem*, but no separate or additional duty was assessed on the bottles. By paragraph 244, imposing duties upon still wines, there was a proviso that "no separate or additional duty shall be assessed on the bottles;" and by paragraph 245

a like provision was made with regard to ale, porter and beer in bottles.

It will be observed that by paragraph 88 a duty was imposed upon bottles holding more than one pint, whether *filled or unfilled*, but upon vials holding less than one pint there was, probably by mistake, no provision that they should pay duty *if filled;* hence arises the contention of the defendants in this case, that if filled, they are either free of duty, or fall under the last clause of paragraph 88, and are dutiable at only forty per centum *ad valorem*.

The construction of these paragraphs in connection with the administrative act of 1890 has been considered in several of the lower courts, and a conclusion generally reached that where a special provision was made for a particular kind of covering, the administrative act did not apply. Thus in *United States* v. *Dickson*, 73 Fed. Rep. 195, it was held that in assessing duty on ginger ale in bottles under paragraph 249 above cited, the provision that no additional duty shall be assessed on the bottles prevented the collector from adding the value of the bottles to the value of the ale, upon the ground that they were coverings. The case was put upon the ground that Congress had legislated for bottles, *eo nomine*, as a separate subject of duty. The decision was by the Court of Appeals of the Second Circuit, and affirmed the decision of Judge Townsend, 68 Fed. Rep. 534, and also a decision by Judge McKennan in *Lelar* v. *Hartranft*, 33 Fed. Rep. 242, which, however, was decided before the customs administrative act. As bearing upon the same subject, see *United States* v. *Leggett*, 66 Fed. Rep. 300. In *United States* v. *Ross*, 91 Fed. Rep. 108, it was held that glass soda bottles holding less than one pint, and which constitute the usual and necessary coverings of soda water imported therein, are not dutiable under the act of 1894. In *Merck* v. *United States*, 99 Fed. Rep. 432, it was held that bottles holding not more than one pint of free goods and those subject to a specified duty were free; and that bottles holding (not?) more than one pint of merchandise subject to an *ad valorem* duty are not themselves subject to duty. The customs

administrative act seems to have been regarded by Judge Townsend as having nothing really to do with the question.

The question certified does not require us to determine whether the bottles in question are subject to a duty under section 88 of the tariff act of 1894, or any other section, but merely whether the value of the bottles, filled with *ad valorem* goods, should be added to the dutiable value of the contents under section 19 of the customs administrative act. The large number of cases which have arisen under the tariff acts with respect to the proper classification of glass bottles show that in the mass of legislation upon that subject it is difficult to evolve a construction appliable to all such cases, or to determine what particular provision of the glassware sections shall be applied; but it is sufficient to say that where such elaborate provisions are made for a specific tax on glass bottles, whether filled or unfilled, and whether their contents be subject to *ad valorem* or specific duties, it was not intended that the general word "coverings," used in the customs administrative act, which, as before observed, is not a tariff act at all, was intended to supply any deficiency that might exist in the tariff act with respect to those articles.

We have no doubt that the customs administrative act applies to coverings generally, but we think that in view of the several sections of the act of 1894 upon the subject of glass bottles Congress must have intended the words "coverings of any kind" should not apply to them, but that the other sections must be looked to exclusively to determine their rates of duty.

As we are not called upon to determine that rate in this case, but only to instruct the court whether the administrative act applies to this case, we answer the question certified in the negative.

KENNARD *v.* NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 261. Submitted May 2, 1902.—Decided June 2, 1902.

There was no dispute as to the facts out of which this controversy arose. The right of the plaintiff to recover under his contract with the State is not for this court to determine, unless the record discloses that he has been deprived of some title, right, privilege or immunity secured to him by the Constitution of the United States, which was specially set up or claimed in the state court.

The decision by the Supreme Court of the State of Nebraska, that the Pawnee reservation lands in that State were public lands, within the meaning of the twelfth section of the enabling act, did not bring into question the validity of that section; and there is nothing on which to rest a right to review the judgment of the Supreme Court of Nebraska.

THE case is stated in the opinion of the court.

Mr. A. S. Tibbets for plaintiff in error.

Mr. F. N. Prout for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

In May, 1897, in the District Court of Lancaster County, State of Nebraska, Thomas P. Kennard brought an action against the State of Nebraska, seeking to recover the sum of $13,521.99—being fifty per centum of a certain sum paid by the United States to the State of Nebraska, and which plaintiff alleged had been so paid by reason of his services, as a duly appointed agent of the State, in procuring the allowance of the claim of the State. The petition further stated that, in pursuance of an act of the legislature of the State, the governor had contracted with the plaintiff to promote the claim of the State, and had agreed that plaintiff was to receive fifty per centum of the amount recovered. It also alleged that by a resolution of the legislature he was authorized to prosecute his claim in the courts of the State of Nebraska.

The cause was put at issue, and came to trial, a jury being waived, and on March 11, 1898, upon the pleading and evidence, the court found for the plaintiff the sum of $13,521.99, and entered judgment accordingly. The cause was taken to the Supreme Court of Nebraska, where, on October 5, 1898, the judgment of the trial court was reversed, *State* v. *Kennard*, 56 Neb. 254; and again, on February 9, 1899, upon a rehearing, the same conclusion was reached. A writ of error was allowed, January 17, 1901, and the cause brought to this court.

The facts of this case appear, sufficiently for our purposes, in the following extract from the opinion of the Supreme Court of Nebraska, filed upon a rehearing of the case in that court:

"This is a rehearing of *State* v. *Kennard*, 56 Neb. 254; 57 Neb. 112. By section 12 of the enabling act passed by Congress, April 19, 1864, 13 U. S. Statutes at Large, 47, the United States donated to the State of Nebraska five per centum of the proceeds of sale of all public lands lying within the State of Nebraska which had prior to that time been sold, or which should subsequently be sold, by the United States, after deducting expenses incident to such sale. At the time the State was admitted into the Union a tribe of Indians, known as the 'Pawnees,' occupied in common a tract of lands in this State known as the 'Pawnee Indian reservation.' After the State was admitted into the Union the United States took such steps as resulted in the extinguishment of the rights of these Indians to the lands in this reservation, sold the lands, and, it seems, used the proceeds of the sale to defray the expenses incident thereto in procuring other lands for the Indians elsewhere, and placed the remaining proceeds of the sale of these lands in the United States Treasury to the credit of the Indians. By an act passed by the legislature of the State of Nebraska in February, 1873, (see General Statutes, 1873, ch. 59,) it seems that the legislature was of opinion that by reason of section 12 of the enabling act the United States was indebted to it for five per cent of the value of the lands lying within the State used as Indian reservations, and five per cent of the value of all lands on which private parties had located military land warrants and land scrip issued for military service in the wars of the United

States, and five per cent of the value of all such as had been donated by the United States to railroads.

"It is also recited in said act that the United States had donated to other States swamp and overflowed lands lying within their borders, but that no such donation or allowance of swamp and overflowed lands had been made to this State, and it seems to have been the opinion of the legislature that all the swamp and overflowed lands lying within the State belonging to the United States should by it be donated to the State. The act under consideration authorized the governor to employ an agent in behalf of the State, to prosecute to final decision before Congress or in the courts, the claim of the State of Nebraska against the United States for the five per cent of the value of the lands disposed of by the United States for any of the purposes already mentioned and for the purpose of procuring from the United States a donation of the swamp and overflowed lands within its borders. The act left the compensation of the agent to be agreed upon by the governor and the agent, but provided, in effect, that the agent should not be entitled to any compensation for collecting from the United States any part of the five per cent cash school fund which had been donated to the State by the United States by section 12 of the enabling act aforesaid. The governor of the State entered into a contract with Kennard in pursuance of the act of the legislature just mentioned, in and by which he authorized Kennard to prosecute and collect the claims of the State against the nation in conformity with the act of the legislature, and that the State should pay him one half of all moneys, except such cash school fund, he should collect for the State as such agent. Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the Secretary of the Interior to acknowledge that the United States were indebted to the State of Nebraska in the sum of five per centum of the proceeds of the sale of the 'Pawnee Indian reservation' lands made by the United States subsequent to the admission of the State into the Union; and, in pursuance of this decision of the Secretary of the Interior, the United States paid into the treasury of this State $27,000. Mr. Kennard, by permission

of the legislature, then brought this suit to recover one half of that sum. He had judgment in the District Court for Lancaster County, and the State brought the same here for review, and the judgment of the District Court was reversed. We based our judgment of reversal of this judgment upon the proposition that the lands of the 'Pawnee Indian reservation' were public lands within the meaning of section 12 of the enabling act, and that the only money collected by Mr. Kennard was the five per cent of the proceeds of the sale made of these lands by the United States, and, by the terms of his contract, he was not to have any compensation for collecting these moneys."

Upon this statement of the facts, does this court have jurisdiction to review the judgment of the Supreme Court of the State of Nebraska?

There was no dispute as to the facts out of which the controversy arose. The right of the plaintiff to recover under his contract with the State is not for us to determine, unless the record discloses that he has been deprived of some title, right, privilege or immunity secured to him by the Constitution of the United States, and unless it appears that such title, right, privilege or immunity was specially set up or claimed in the state court. *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648; *Water Power Co.* v. *Street Rwy. Co.*, 172 U. S. 475.

Looking into the record, we do not find in the pleadings, or in the petition for a hearing any specific statement or claim by the plaintiff in error of any right, title, privilege or immunity secured to him by any provision of the Constitution of the United States. This, indeed, is admitted in the brief of the plaintiff in error, but it was claimed in the petition for allowance of a writ of error from this court, "that in the rendition of the judgment by the Supreme Court of the State there was drawn in question the construction of the statutes of the United States with reference to the lands of the Pawnee Indian reservation located in the State of Nebraska, and the act of Congress authorizing the admission of the State of Nebraska into the Union, passed April, 1864, 13 Stat. 97, and that the decision of said Supreme Court was against the plaintiff in error in such construction," and that "said decision was necessary to the judg-

ment given by the said Supreme Court, and without such decision and construction the said judgment could not have been given." And it is now contended that the plaintiff's right to recover was defeated solely by the construction the state court placed upon the Congressional acts, and that thus a Federal question appears in the record, giving this court power to review the decision of the state court.

But the validity of the acts of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the state court rests upon section 709 of the Revised Statutes. It has often been held that the validity of a statute or treaty of the United States is not "drawn in question" within the meaning of section 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Cook County* v. *Calumet &c. Canal Company*, 138 U. S. 635, 653; *Borgmeyer* v. *Idler*, 159 U. S. 408; *Blackburn* v. *Portland Mining Company*, 175 U. S. 571; *Florida Central Railroad Company* v. *Bell*, 176 U. S. 321, 328; *Water Power Company* v. *Street Railway Company*, 172 U. S. 488.

The decision by the Supreme Court of the State, that the Pawnee reservation lands in Nebraska were public lands within the meaning of the twelfth section of the enabling act, did not bring into question the validity of that section—much less was it a decision *against* its validity. As, then, the plaintiff in error specially set up or claimed no Federal right, and as the judgment of the Supreme Court of Nebraska did not impugn the validity of any statute of the United States, we find nothing on which to rest a right to review that judgment, and the writ of error is accordingly

Dismissed.

UNITED STATES *v.* FREEL.

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

No. 224. Argued April 17, 1902.—Decided June 2, 1902.

A surety on a contractor's bond, conditioned for the performance of a contract to construct a dry dock, is released by subsequent changes in the work, made by the principals without his consent.

The obligation of a surety does not extend beyond the terms of his undertaking, and when this undertaking is to secure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished.

If the government's pleader had evidence of facts showing such knowledge and consent, he should have asked leave to amend the declaration by adding the averment necessary to state it.

THE case is stated in the opinion of the court.

Mr. James Russell Soley for Freel.

Mr. George Hines Gorman for the United States.

MR. JUSTICE SHIRAS delivered the opinion of the court.

In September, 1898, the United States of America brought an action in the Circuit Court of the United States for the Eastern District of New York against John Gillies, Henry Hamilton and Hugh McRoberts, Catharine Freel, Edward J. Freel and Frank J. Freel, as executors of Edward Freel, deceased.

The complaint alleged that theretofore, and on the 17th of November, 1892, the defendant John Gillies entered into a contract in writing with the plaintiff to construct a timber dry dock, to be located at the United States Navy Yard, Brooklyn, New York, according to certain plans and specifications attached to and made part of said contract; that on said 17th of November, 1892, the said John Gillies, as principal, and Henry

Hamilton and Hugh McRoberts, and Edward Freel, as sureties, executed their joint and several bond to the United States in the penal sum of $120,600, conditioned for the faithful performance by the said Gillies of his contract to construct said dry dock; that Gillies entered upon the performance of said contract; that subsequently, on June 16, 1893, Gillies and the United States agreed in writing to change and modify the plans and specifications so as to increase the length of said dry dock from six hundred to six hundred and seventy feet; that on August 17, 1893, Gillies and the United States further agreed in writing to change and modify the contract in certain particulars; that Gillies proceeded with the work under said original and supplemental contracts so slowly, negligently and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the said contract forfeited on the part of said Gillies; that thereupon, by a board duly appointed, the market value of the work done and of the materials on hand was appraised at the sum of $170,175.40; that thereafter, under the provisions of said contract, the Secretary of the Navy proceeded to complete said dry dock and appurtenances in accordance with the said contracts, plans and specifications, at a cost to the United States of the sum of $370,000; that the sum of $72,414.16 represented the damages sustained by the plaintiff by reason of said Gillies' breach of contract; that Edward Freel died on the 24th day of December, 1896, leaving a last will appointing Catharine Freel, Edward J. Freel and Frank J. Freel executors thereof; that the said defendant John Gillies neglected and refused to perform the terms and conditions of said contract on his part, and that the plaintiff has performed, fully and completely, all the terms and conditions of said contract on its part. Wherefore the plaintiff demanded judgment against the said defendants in the said sum of $72,414.16 with interest from April 1, 1897.

On November 26, 1898, Edward J. Freel, as executor of Edward Freel, deceased, appeared and demurred to the complaint upon the ground that it appeared upon the face thereof that said complaint did not state facts sufficient to constitute a

cause of action. On May 24, 1899, after hearing the counsel of the respective parties, the Circuit Court sustained the demurrer, and dismissed the complaint as to said Edward J. Freel as executor. 92 Fed. Rep. 299. The case was taken to the Circuit Court of Appeals for the Second Circuit, and on January 5, 1900, that court affirmed the judgment of the Circuit Court. 99 Fed. Rep. 237. On December 22, 1900, a writ of error was allowed, and the cause was brought to this court.

The question in this case is whether a surety on a contractor's bond, conditioned for performance of a contract to construct a dry dock, was released by subsequent changes in the work made by the principals without his consent.

As the question is presented to us on a general demurrer to the complaint, it is necessary to set forth, with some particularity, portions of the original and of the supplemental contracts, which form parts of the complaint.

The original contract, dated November 17, 1892, contained, after alleging that proposals had been made and accepted for the construction by contract of a timber dry dock, to be located at the United States Navy Yard, Brooklyn, New York, the following provisions:

"First. The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the party of the second part, which possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part, commence, and within twenty-seven calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

* * * * * * * *

"Seventh. The construction of said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed and shall be deemed and taken as forming a part of this contract

with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any: *Provided*, That whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose; and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: *Provided further*, That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: *And provided also*, That no further payment shall be made unless such supplemental or modi-

fied agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: *And further provided*, That no change herein provided for shall in any manner affect the validity of this contract."

The supplemental contract of June 16, 1893, contained, among other things, the following:

"This agreement, entered into this 16th day of June, 1893, between John Gillies, contractor, for the construction of a dry dock at the U. S. Navy Yard, Brooklyn, New York, party of the first part, and Norman H. Farquhar, Chief of the Bureau of Yards and Docks of the Navy Department, for and in behalf of the United States, party of the second part,

"Witnesseth: That, whereas, the Navy Department has decided to lengthen the said dry dock from six hundred (600) feet, as called for in the specifications forming a part of the contract for the construction of a dry dock at the above-mentioned location, entered into by the above-mentioned parties of the first and second parts on the 17th of November, 1892, to six hundred and seventy (670) feet from the outer gate sill to the coping at the head of the dock.

"And, whereas, a board of naval officers, consisting of Captain J. N. Miller, U. S. N., Civil Engineer P. C. Asserson, U. S. N., and Civil Engineer, F. C. Prindle, U. S. N., was ordered by, and did convene, by order of the Secretary of the Navy, in compliance with the requirements of paragraph 7, page 2, of the contract, to fix this additional compensation to be allowed to said party of the first part for the additional labor and material required for said extension.

"And, whereas, said board of naval officers, after careful and mature deliberation, did fix the additional compensation to be paid said party of the first part for the said extension of the said dry dock at forty-five thousand five hundred and fifty-six ($45,556) dollars, and did allow an extension of three (3) months' time on account of said extension of said dry dock:

"Now, therefore, the party of the first part does hereby agree to extend the said dry dock to a length of six hundred and seventy (670) feet, measuring from the outer gate sill to

the coping at the head of the dock, in the same manner and under the same conditions as though said extension had been included in the original contract.

"And it is further agreed by the party of the first part to accept from the United States, as a just compensation for said work of extension, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars, in full therefor, payment to be made under the same conditions and requirements as exacted by the original contract.

"And it is further agreed by the party of the second part that, in full and just compensation to the party of the first part, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars shall be paid for the additional labor and material necessary to extend the said dry dock, as heretofore agreed to, payments to be made under the same conditions and requirements as exacted in the original contract.

"And it is therefore agreed that the time fixed in the original contract for the completion of the said dry dock shall be extended three (3) months, on account of the extra labor necessary to carry out the extension of the said dry dock as called for by this agreement."

The supplemental contract of August 17, 1893, contained the following:

"This agreement, made and concluded this seventeenth day of August, A. D. 1893, by and between John Gillies, of the city of Brooklyn, in the State of New York, party of the first part, and the United States, represented by N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

"Witnesseth: That whereas it has been deemed desirable to change the location of the dry dock now being constructed at the U. S. Navy Yard at Brooklyn, New York, under contract with the said John Gillies, party of the first part, dated November 17th, A. D. 1892:

"Now, therefore, this agreement witnesseth that in consideration of the premises and for and in consideration of the payment to be made as hereinafter provided for, the party of the

first part, for himself, his heirs and assigns, and his legal and personal representatives, agrees to and with the United States that he will, in the construction of the said dry dock, change its location to one sixty-four (164) feet further inland than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping, round piles, sheet piles, timber, iron work, excavation and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor.

"And this agreement further witnesseth that the United States, party of the second part, in consideration of the stipulations, agrees that for the faithful performance of this agreement by the party of the first part there shall be paid to the said party of the first part the sum of five thousand and sixty-three dollars and eighteen cents ($5063.18), United States currency, as full compensation. Said payment to be made in accordance with all the terms and conditions of payments as provided in the said contract and specifications.

"And the United States further agrees that the time limited by the said contract for the completion of the dry dock shall be extended for a period of eight (8) weeks on account of the said change in the position of the dry dock.

"It is also agreed that the provisions and conditions contained in the said contract and the specifications thereto attached, in regard to the character and quality of the materials and workmanship, shall apply to the work as herein modified.

"This agreement is made under the provisions of and in accordance with article 'seventh' of the said contract."

Before addressing ourselves directly to the question before us, it may be well to briefly examine some of the decisions of this court on the subject of the alteration of contracts without the assent of the surety.

Miller v. *Stewart*, 9 Wheat. 680, was an action on a bond conditioned for the faithful performance of the duties of the office

of deputy collector of direct taxes for eight certain townships in the fifth collection district of New Jersey, and it appeared that the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties. It was *held* that the surety was discharged from his responsibility for moneys subsequently collected by his principal, the court saying, per Mr. Justice Story: "That the liability of a surety is not to be extended by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded upon this ground." *Miller* v. *Stewart* was followed and approved in *Leggett* v. *Humphrey*, 21 How. 76; *Smith* v. *United States*, 2 Wall. 219.

In *United States* v. *Bocker*, 21 Wall. 652, in the case of a distiller's bond, which recited that the person is about to be the distiller at one place, to wit, at the corner of Hudson street and East avenue, situated in the town of Canton, it was held that his sureties were not liable for taxes in respect of business carried on by him at another place, to wit, at the corner of Hudson and Third streets in the same town, even though he had no distillery whatever at the first named place.

However, the proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and Federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. 92 Fed. Rep. 299.

At the trial in the Circuit Court, it was contended, on behalf of the surety, that this proposition was applicable, and exonorated him by reason of the changes made in the original contract by the supplemental contracts of June 16 and August 17, 1893. It was claimed on behalf of the United States that the changes made in the original contract by the supplemental agreements were within contemplation of that contract, and

must be deemed to have been assented to in advance by the surety.

It was held by the learned trial judge, that the government's position was well taken in respect to the supplemental agreement of June 16, 1893, which he regarded as fairly within the meaning of the provisions in the seventh section of the contract, which refers to and provides for changes, alterations or modifications in the plans and specifications, and, therefore, within the undertaking of the surety. But his view was otherwise in respect to the alterations made by the supplemental contract of August 17, which, as respects the change of the site of the dock and the extension of the time of completion of the contract, he held to be changes not within the scope of the seventh section, but to be such as to exonerate the surety from liability for the subsequent dereliction of his principal.

We agree with the Circuit Court of Appeals in thinking that if the learned judge's opinion was sound in respect to the agreement of August 17, 1893, it is not necessary to determine whether the seventh section warranted so wide a departure from the plans and specifications of the original contract as was made by the agreement of June 16, 1893.

Coming, then, to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The seventh section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance.

A few cases, illustrating the principles involved, may be properly cited, and reference is made to the opinion of the Circuit Court, in which many more are cited.

In *Mundy* v. *Stevens*, 61 Fed. Rep. 77, it was held by the

Circuit Court of Appeals of the Third Circuit that sureties for the payment by a contractor to a sub-contractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement whereby the right secured to the original contractors to deduct from the monthly payments three cents per yard for material dredged, subsequently was modified so that payments of two and a half cents per cubic yard should be made monthly; and it was also held that, as the plaintiff had set forth the supplementary agreement in his statement of claim, he thereby made it part of his case, and the burden of proof that the change was consented to by the sureties was upon the plaintiff.

Rowan v. *Sharpe's Rifle Man. Co.*, 33 Conn. 1, is an important case. There it was held by the Supreme Court of Connecticut that where a contract provided that the guns contracted for should be made "with all possible dispatch," and a supplemental contract, made before performance, provided that three hundred guns per week should be delivered for a certain period, and six hundred per week afterwards, the surety was discharged, the court saying: "But it appears to us very clear that a contract to manufacture and deliver a large quantity of any description of goods in a reasonable time, and a contract to manufacture and deliver the same quantity either at a specified time for the whole or a specific quantity from time to time, monthly or weekly, as the case may be, are materially variant."

The Supreme Court of Indiana, in *Zimmerman* v. *Judah*, 13 Ind. 286, held that a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

Whitcher v. *Hall*, 5 B. & C. 269, is cited in the opinion of the Circuit Court. There it was held by the Court of King's Bench that a surety engaged for another to the plaintiff for the milking of thirty cows, at a given price each per annum, was released by a subsequent agreement without his consent, whereby the hirer was to have twenty-eight cows for one half the year and thirty-two for the remainder.

A further contention is made in the government's brief that, even if such substantial changes were made in the contract as would release the surety if made without his assent, the fact of such changes should have been set up by the defendant as an affirmative defence by answer or plea, and not by demurrer.

The declaration set out, by attaching them as exhibits, the original and the two supplemental contracts, and it alleged that the changes effected by the latter were made "pursuant to, and in conformity with, paragraph 'seventh' of the first contract." If, upon the face of the agreement of August 17, 1893, it appeared that substantial changes were made in the location of the proposed structure, requiring additional excavations and connections at an increased expense, and extending the time limited by the contract for the completion of the dry dock for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost and time necessary for the completion of the work operated to release the surety if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the latter had knowledge of the changes and consented thereto. If the government's pleader had evidence of facts showing such knowledge and consent, and was surprised by the action of the trial judge in sustaining the demurrer, it was open to him to ask leave to amend the declaration by adding the necessary averment. This was not done, and we think it is too late to urge this objection in this court.

The judgment of the Circuit Court of Appeals is

Affirmed.

Mr. Justice Gray took no part in the disposition of this case.

INTERSTATE COMMERCE COMMISSION *v.* CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

APPEAL FROM THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 154. Argued November 7, 8, 1901.—Decided June 2, 1902.

This record requires the court to determine whether the court below rightly refused to enforce an order of the Interstate Commerce Commission by which it was found that an alleged terminal charge, made by the defendants in error, for the delivery of live stock to the stock yards in Chicago, was unjust and unreasonable, and hence a violation of the act to regulate commerce.

As the right of the defendant carriers to divide their rates was conceded by the Commission, and upheld, no contention on this subject arises.

The through rate existing prior to June 1, 1894, is presumed to have provided compensation for services in making delivery at the stock yards.

The proposed conclusion that the rates were unjust and unreasonable cannot be sustained.

The decree of the Circuit Court of Appeals was right and must be affirmed; but nothing therein is to be construed as preventing that body from commencing proceedings to correct unreasonableness in the rates as to territory to which the reduction did not apply.

THE case is stated in the opinion of the court.

Mr. William A. Day, *Mr. S. H. Cowan* and *Mr. David Willcox* for appellant. *Mr. James M. Beck* was on their brief.

Mr. Lloyd Bowers for appellees. *Mr. Frank B. Kellogg* and *Mr. Robert Dunlap* were on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

This record requires us to determine whether the court below rightly refused to enforce an order of the Interstate Commerce Commission, by which it was found that an alleged terminal charge, made by the defendants in error, for the delivery of live stock to the stock yards in Chicago, was unjust and un-

reasonable, and hence violative of the act to regulate commerce. To avoid the confusion which must be engendered by considering a number of irrelevant issues and to reach the single question to which the controversy is reducible, it is essential to state the facts, which are uncontroverted, concerning the making of the charge in question, and to bear in mind the results of a controversy relating to such exaction, which arose when it was first imposed by the railroad companies.

Prior to 1865 there were four different places in the city of Chicago at which live stock shipped to that city was delivered and marketed. The railroads by which such live stock was brought into Chicago were accustomed to deliver at any one of these four points as directed by the shipper, and no distinct terminal charge was made, the charge, if any, for the terminal services being embraced in the through rate exacted for carriage from the point of shipment to the place of delivery. In 1865 a corporation was formed, called the Union Stock Yards and Transit Company, which will be hereafter referred to as the Stock Yards Company. Under its charter this corporation was given the right to construct the necessary buildings and conveniences for the receipt, keeping and marketing of live stock. The corporation was given power to construct tracks connecting its facilities with the different lines of railway entering Chicago, and it was provided that when such tracks were constructed the Stock Yards Company might engage in the business of transporting stock and other freight over these tracks on its own account, or it might lease the privilege to do so upon such terms as might be deemed best. The facilities and the tracks were constructed, and it consequently came to pass that the general market for live stock in Chicago was transferred from the places at which such business had been previously carried on to the establishment of the Stock Yards Company. Leaving aside all question of charges on freight, other than live stock, from the incipiency of the opening of the stock yards in 1865 down to June, 1894, the railroads bringing in live stock to Chicago were accustomed to use the tracks of the Stock Yards Company for the purpose of delivering carloads of cattle, and for the use of these tracks by the various companies, for the

purpose above stated, no charge for trackage or otherwise was made against the railroads by the Stock Yards Company, except a small sum for the unloading of the cattle. During these thirty years the railroads did not divide their rates by separately charging for carriage from the point of shipment to Chicago and for terminal services rendered at Chicago, but asked one rate from the place of shipment to delivery at the stock yards.

In June, 1894, the Stock Yards Company imposed a trackage charge for carrying in carloads of cattle to the stock yards and in bringing the empty cars out. The railroads, therefore, became subject to an additional burden, the amount of which depended upon the distance which each road was obliged to carry its carloads of stock in going in and coming out over the tracks belonging to the Stock Yards Company. The situation of the various roads was such that no one of them in consequence of this new exaction paid less than 80 cents per car, that is, 40 cents each way, and none paid more than $1.50, that is, 75 cents each way. The railroad officials thereupon entered into an agreement that each road would impose a terminal charge of $2 upon each car of cattle taken into the stock yards. A joint circular was issued on behalf of the railroads, informing shippers on the subject, the circular being as follows:

"On and after June the 1st, 1894, a terminal charge of $2 per car will be made in addition to the Chicago rates as shown in the tariffs of the Western Freight Association on live stock and other freight received from or delivered to the stock yards or industries located on the tracks of the Union Stock Yards Railway, the Indiana Line Railway and the Northern Indiana Railroad."

The provisions of this circular were besides separately reiterated by the various railroads concerned in the agreement, and in their posted tariffs, as in those filed with the Interstate Commerce Commission, a memorandum was made showing the additional charge substantially in the form above stated. In other words, because the Stock Yards Company imposed on the railroads a charge for the use of its tracks, varying between a minimum of 80 cents per car of cattle to a maximum of $1.50 per

car, the railroads immediately exacted a terminal charge on each car of $2.

One of the roads which imposed this terminal charge was the Atchison, Topeka and Santa Fé. It was in the hands of a receiver appointed by the Circuit Court of the United States for the Northern District of Illinois. Keenan, a shipper, who carried on his business at the stock yards, refused to pay the added charge, and the receiver consequently declined to deliver to him a consignment of cattle. Keenan thereupon petitioned the court to instruct its receiver to make delivery of the cattle without the payment of the charge in question. Several persons interested in the receipt of cattle at the stock yards intervened, and prayed the court to make an order forbidding the receiver from exacting the additional $2. The Circuit Court granted the relief prayed for. It held that it had been settled in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, that a carrier could not lawfully divide his charge so as to separate the sum to be paid for terminal services from that exacted for the through carriage, unless the terminal services embraced some character of service not by operation of law included in the contract of carriage. 64 Fed. Rep. 992.

The case was taken to the Circuit Court of Appeals, where the decree of the Circuit Court was reversed. That court thought that the Circuit Court had misapplied the case of *Covington Stock Yards Co.* v. *Keith*, and, interpreting that case, held that it was not authority for the proposition that a carrier in a case like the one before the court could not divide its rate so as to separate the terminal charge from that for carriage from the point of shipment to the place of delivery. 73 Fed. Rep. 753, 760. The court held that it was disclosed by the record that Keenan was engaged in business at the stock yards, that the cattle shipped to him were intended for delivery there, and hence the contract contemplated such delivery beyond the rails of the final carrier; that it was therefore immaterial whether such carrier had facilities of its own for delivering cattle at any other place than the stock yards, because even if such other facilities had existed they would not have been used under the contract, since it contemplated that the

cattle were to be delivered at the stock yards and at no other place.

The court concluded its opinion as follows:

"It is not suggested, assuming any such charge as is here in question to be legal at all, that the amount is unreasonable. The contention that the carriers must move cattle from their lines of road over the track of the Stock Yards Company to the stock yards, without compensation other than as contained in their charges for hauling to points on their respective lines in Chicago (and this is what the claim of these appellees amounts to), is invalid."

Some months after the decision of the Circuit Court of Appeals the Cattle Raisers' Association of Texas, an organization composed of owners and raisers of cattle in Kansas, Montana, North and South Dakota, Texas and the Indian Territory, filed a petition before the Interstate Commerce Commission against the Fort Worth and Denver City Railway Company and its receiver, and various other railroad companies, and against the Stock Yards Company. The petition in substance complained that the terminal charge of $2 per each car of stock carried to the stock yards was unjust and unreasonable, was a discrimination against Chicago and in favor of other points to which cattle were shipped from the same territory, because at such other points no such terminal charge was exacted. In view of the method of charging adopted by the Stock Yards Company as to dead freight passing over its lines from the lines of many railroads entering Chicago the terminal charge above referred to was, moreover, alleged to be a discrimination against live stock as a species of traffic and in favor of dead freight. Subsequently the Chicago Live Stock Exchange, an association of commission men and raisers and owners of cattle, intervened, and attacked the terminal rate on substantially the grounds set out in the petition just referred to. The defendant railways answered. It suffices to say that the answers asserted that the terminal rate complained of was just and reasonable, and the discrimination alleged was denied. It was averred that for years previous to the imposing of the terminal rate complained of the carriers, under their contracts to carry and deliver cattle

in Chicago, had delivered such cattle to the stock yards without making any charge therefor, as in effect the rate asked for the carriage and delivery to Chicago of cattle *did not include any terminal charge whatever*, and such service was hence rendered gratuitously; that owing to the imposition in 1894 by the Stock Yards Company of the charge for trackage the carriers had exacted the $2 per car, which was only a just and reasonable equivalent for the cost incurred and service rendered in delivering the cattle to the stock yards. It was further alleged that at the time the terminal charge was imposed the rate to Chicago for cattle from the various points referred to in the complaint was unreasonably low and the addition of the terminal charge complained of was, in any event, but a just and reasonable addition to the through rate. It was, besides, alleged that such increase had not only been notified to the public by the circular issued in the name of the various railroads previously referred to, but had also been included in the rate sheets of the various railroads filed with the Interstate Commerce Commission in accordance with law. The Atchison, Topeka and Santa Fé Railroad, moreover, pleaded the decree rendered in the *Keenan* case, and averred in effect that such decree conclusively established the right to make the terminal charge in question. The various defendants, moreover, moved to dismiss the Chicago Live Stock Exchange from the proceedings for reasons not necessary to be stated.

After hearing the Commission filed its report. The motion to dismiss the intervention of the Chicago Live Stock Exchange was denied. The Stock Yards Company was dismissed from the cause on the ground that it was not a common carrier subject to the act to regulate commerce. The facts as found by the Commission concerning the terminal charge have been in substance given in the previous statement, and omitting for the moment reference to a finding of the Commission as to a reduction made by the carriers in the through rate after the terminal charge in controversy had been imposed, the conclusions reached by the Commission are embodied in the following summary:

First. Although the decree of the Circuit Court of Appeals in the *Keenan* case was held not to constitute *res adjudicata*

because of a want of identity of the parties concerned in the *Keenan* case and those involved in the case before it, the Commission, nevertheless, declared that it was its duty to follow and apply to the case before it the legal principles announced in the *Keenan* case. The Commission, therefore, announced that it recognized that each and all of the defendant carriers were entitled to divide their rates by making one separate and distinct charge for the carriage from the point of shipment to Chicago, and another separate and distinct charge for terminal services in Chicago beyond their own lines. This principle, however, the Commission found not to be decisive of the case before it, since, even although the right to divide the rate was fully recognized, the question remained whether the defendant carriers had in fact divided their rates and whether the charge complained of was just and reasonable.

Second. Coming to consider the two questions just stated, the Commission held that the action of the carriers in giving notice to the public of the imposition of the $2 terminal charge and the filing of the rate sheets with the Commission as required by law, did not constitute a division of the rates so as to separate the charge for carriage to Chicago from the charge for terminal services at that point, but amounted simply to a retention of the aggregated through rate existing before the $2 terminal charge was asked, and the adding of this $2 charge to the previous rate. It was found as a matter of fact that there was no evidence tending to show that the previous through rate was either unreasonably high or unreasonably low, and therefore the presumption was that the through rate prevailing prior to the imposition of the $2 charge was just and reasonable.

Third. Considering the cost of delivery to the stock yards over the rails of the Stock Yards Company, including the sum paid for trackage and all other expenses, the Commission found as a matter of fact that $2 per car would be just and reasonable. A reference to this subject, found in the report of the Commission, is excerpted in the margin.[1] To remove all possi-

[1] The intervenor conceded upon the trial, and the complainants did not

ble doubt as to the fact the Commission, in its opinion, on a rehearing, to which opinion we shall hereafter advert, said:

"The defendants were proceeding to show by testimony in each case that the actual cost to them of transporting these carloads of live stock, including the trackage charge and the cost of unloading, was equal to or in excess of $2. Thereupon it was suggested by the Commission, admitted by the intervenor, and at first partly admitted by the complainant, that the cost of service, including the trackage charge and the cost of unloading, was sufficient to justify the imposition of this terminal charge, provided, *under the circumstances of the case*, it could properly be imposed. We understand that the defendants are given the full benefit of this in the report and opinion already filed. To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge is reason-

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seriously question, that the amount of this charge was reasonable, if under the circumstances, the charge should be imposed. Before the close of the testimony the several defendants were requested by the Commission to furnish statements showing the actual or estimated expense to them in each case of making delivery from their several tracks to the Union Stock Yards.

Such statements have been filed, and they make the following showing:

Illinois Central Railroad, via 75-cent trackage route	$2 23	
Via 40-cent trackage route	1 65	
Average		$1 94
Chicago, Burlington and Quincy Railroad		2 25
Chicago and Alton Railroad		2 05
Chicago, Milwaukee and St. Paul Railway, via one route	2 67	
Via other route	2 25	
Average		2 46
Atchison, Topeka and Santa Fé Railway		2 28
Chicago Great Western Railway (average of 10 cars to train)		2 20
Chicago and North-Western Railway		3 34
Wabash Railroad		1 86
Chicago, Rock Island and Pacific Railway		1 65
Total via nine lines		$20 03
Average		2 22

able. If any modification of the present findings is necessary, they are hereby modified to that extent."

The fact, however, that the terminal charge of $2 was intrinsically just and reasonable, was held by the Commission not to show that such charge was just and reasonable "under the circumstances of the case," for the following reasons: As for many years the carriers had delivered to the stock yards for the through rate prevailing from the point of shipment to the point of delivery, they could not be assumed to have gratuitously performed the service of delivery. It was, therefore, held that pay for such service must be presumed to have been embraced in the through rate. The through and reasonable rate previously existing having been thus found to have embraced the cost of the terminal service, the Commission decided that it was unjust and unreasonable to add to the charge for terminal services, thus previously exacted, the arbitrary sum of $2 per car, because the Stock Yards Company had imposed for the first time, in 1894, an average charge of $1 per car. In other words, the $2 terminal charge, although it was intrinsically reasonable when considered alone, became unreasonable because it was an addition to the terminal charge necessarily embraced in the pay for terminal services which had been included in the through rate existing for so many years.

The opinion of the Commission leaves no room for doubt that such were its views on the subject. Thus stating the question which required to be decided, it was said: "Whether they (the carriers) ought to make the charge they do, or any charge, or whether the charge for delivery is already fairly included in the rate, is a proposition of fact for consideration." Again, referring to the matter, the Commission said: "We do not believe that these carriers should be allowed to add an arbitrary charge to the Chicago rate, for doing a thing which they for thirty years have said was included in that rate, and which we believe, considering the manner in which rates are made up and in which this rate has been made up, ought to be included in the rate;" and the following excerpts make the same thought more clearly manifest: "We think and find that the Chicago rate on May 31, 1894, included, as it had included for the last

thirty years, a delivery and unloading of the stock at the Union Stock Yards, and that rate, upon the record in this case, was a just and reasonable one." Further, in calling attention to the fact that the $2 terminal charge for the service of delivery at the stock yards would be just and reasonable, "if that service were performed by some independent agency," the Commission pointed out that the charge was not just and reasonable when made by the defendants, "because they were already receiving compensation for this service, they ought not to charge for it the second time." Further, it was said: "It is unreasonable to impose this terminal charge for the reason that the rate to Chicago already includes that charge;" and the conclusion is pointedly summed up by the observation: "Surely the fact that the railroad company is already receiving pay for this service is good ground for holding that a second charge is unreasonable."

The finding of the Commission was that the $2 additional terminal charge was unjust and unreasonable, in so far as that charge exceeded the sum which the carriers were actually obliged to pay in consequence of the trackage charge imposed by the Stock Yards Company. In other words, the Commission held that the average sum which the defendants were obliged to pay for the trackage charge was $1, and that this sum might be added without causing the existing rate to become unreasonable.

A reargument of the case was permitted. The Commission adhered to its original conclusions, and in addition held that as the terminal charge violated the statute, because it was unreasonable, it therefore operated a discrimination against Chicago, and hence was repugnant to the act to regulate commerce in this additional respect. The reasons by which the Commission was controlled were reiterated in an opinion which so clearly expresses the views entertained by it, which we have previously summarized, that an extract from the report of the Commission on the rehearing is excerpted in the margin.[1]

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[1] "The Commission, itself did, however, state upon the hearing at various times, in terms upon which the defendants were justified in relying,

An order was issued by the Commission to carry out its conclusions. In substance the order commanded the defendants

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that no question could be successfully made as to the reasonableness of this charge (the terminal charge in question) in certain aspects. Just exactly the scope of that intimation can be understood by referring to the circumstances under which it was given. The defendants were proceeding to show by testimony in each case that the actual cost to them of transporting these carloads of live stock, including the trackage charge and the cost of unloading, was equal to or in excess of $2. Thereupon it was suggested by the Commission, admitted by the intervenor, and at first partly admitted by the complainant, that the cost of service, including the trackage charge and the cost of unloading, was sufficient to justify the imposition of this terminal charge, provided, under the circumstances of this case, it could be properly imposed. We understand that the defendants are given the full benefits of this in the report and opinion already filed. To remove all doubt upon that subject, however, if it is not clearly found we now find that, looking entirely to the cost of service and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable. If any modification of the present findings is necessary they are hereby modified to that extent. That finding must, however, be carefully read in connection with the other facts in the case, and the conclusion of the Commission that the imposition of this terminal charge is reasonable. The defendants say it was admitted that this charge was reasonable, 'provided any charge could be legally made for the terminal service.' The intimation of the Commission was as indicated in the above extract from the record, 'that if this charge was proper to be imposed, it was a reasonable charge.' The reason for the conclusion of the Commission is to be found in the distinction between these two statements. What the Commission passed upon finally was, not whether a terminal charge of this sort could be legally made—that had been already determined by the courts—but whether this particular charge could be properly imposed under the circumstances of this case. To avoid misapprehension, we will restate here the grounds for our decision, and for that purpose we confine attention to this rate as it existed on May the 31st and June the 1st, 1894. On May the 31st there was in effect a certain rate on live stock from various points to Chicago, and that rate, upon the record in this case, must be taken to be a just and reasonable one. The defendants intimate in their answer that this rate has been forced down until it was too low, and something was said in the proof looking in the same direction. Upon the other hand, the complainants started in to prove that the rate at that time was too high, but as is found by the case both these claims were virtually abandoned. There is nothing in the record before us to show that the rate was other than a right one, and we assume that on May the 31st the rate in effect was just and

whose lines of railway entered the city of Chicago to desist, on and before a named date, from charging, demanding, collecting

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reasonable. Now, just what did this live stock rate to Chicago include? The defendants insisted on the reargument of this case that it covered the transportation of that live stock to the point where, on its way to the Union Stock Yards, it left the tracks of these several defendants, and nothing more. The complainant insisted that that rate covered a delivery of the stock at the stock yards. We are unable to see any ground whatever for the contention of the defendants. As a matter of law, the undertaking to transport live stock from one place to another includes a delivery of the stock. Originally live stock brought to Chicago by these defendants must be delivered at any one of four different points. This was necessitated by the actual competitive conditions at that market. The railway companies for the purpose of avoiding the expense and inconvenience of this kind of delivery created the present stock yards.

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"It was entirely at their suggestion and entirely for their benefit at the outset. From the time the stock yards were constructed down to June 1, 1894, the various defendants had, by arrangement with the Stock Yards Company, the right to use the tracks of that company for the delivery of this stock at the Union Stock Yards. By the action of the various carriers that became the only place in Chicago at which live stock could ordinarily be delivered. Whenever a carload of live stock was shipped to Chicago, in the absence of special directions, it was taken to the Union Stock Yards. This was understood both by the carrier and by the shipper. No defendant had any facilities previous to June 1 for delivering live stock in any quantity at any other point than at the Union Stock Yards. Now, in view of the legal liability resting upon the carrier to make a delivery somewhere, in view of the fact that this delivery must be made at the stock yards and was habitually made there, it seems impossible that the defendants, in making this rate from the point of shipment to Chicago, did not include in that rate and contemplate as a part of the service covered by that rate a delivery at the Union Stock Yards. It is absurd to say that the Chicago rate paid for the transportation of that stock up to some switch in the field, or in the city where there was no facility for a delivery, and that the transportation beyond that point was a gratuity. We think and find that the Chicago rate on May 31, 1894, included, as it had included for the last thirty years, a delivery and unloading of the stock at the Union Stock Yards, and that rate, upon the record in this case, was a just and reasonable one.

"June 1, 1894, these defendants, by concerted agreement among themselves, increased this rate to $2.00 per car. If the rate on May 31 was a just and reasonable one, the rate on June 1 was an unjust and unreasonable one, unless some new condition justified the imposition of that additional charge. We have found that to the extent of $1.00 a new condition did justify the additional charge, for the reason that then, for the first time,

or receiving, in addition to their regular published transportation charges, the sum of $2 per carload of live stock, as compensation for terminal services rendered in making delivery thereof at the yards of the Union Stock Yards and Transit Company in the city of Chicago. Embodied in the order was the following recommendation:

"That said defendants be, and they severally are, hereby recommended not to charge, demand, collect or receive in excess of $1 per carload as compensation for terminal or switching services rendered in the delivery of live stock at the yards of the Union Stock Yards and Transit Company in said city of Chicago, which said sum of $1 per carload as compensation for such terminal or switching services is found and declared in and by said report and opinion to be just, reasonable and lawful."

In its opinion on the rehearing the Commission pointed out the reasons which caused it to recommend that each railroad exact only $1 for the additional terminal charge instead of the actual sum which the railroads were obliged to disburse for the trackage charge. The passage from the opinion referring to this subject is excerpted in the margin.[1]

It is to be observed that the Commission in the course of its opinion expressly recognized the right of the defendant car-

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the Stock Yards Company exacted this trackage charge. In other words, the cost of service to the defendants was increased by just $1.00 on that day. It must follow, therefore, as a necessary conclusion, that of the increase which the defendants made, $1.00 was justifiable and $1.00 was unjustifiable. This is not, however, because $2.00 is an unreasonable charge for transporting a car to the stock yards, if that service was performed by some independent agency, but because, since the defendants were already receiving compensation for this service, they ought not to charge for it the second time. Of this proposition we have no doubt. Upon the assumption that the rate May 31 was a just one, we regard the imposition of anything above what the defendants were then compelled for the first time to pay as an unwarranted exaction and a violation of the first section of the act to regulate commerce, if it is possible to violate that section."

[1] "The original opinion intimates that the only logical conclusion from the reasoning there stated would be to allow each carrier to retain whatever that particular carrier is obliged to pay the Union Stock Yards and Transit Company by way of this trackage charge. That would, however,

riers to increase their rates if they were unreasonably low. It is also to be borne in mind that by necessary implication arising from the opinion of the Commission it is also clear that that body likewise recognized the right of the defendant carriers under the circumstances of the particular case to segregate their rates by separating the charge made for carriage from the point of shipment to Chicago from the terminal services at that point.

The defendants, refusing to comply with the order of the Commission, that body filed a petition in the Circuit Court of the United States for the Northern District of Illinois to compel compliance. The defendants annexed and made part of their answers the responses which they had filed in the proceedings before the Commission. All the answers in effect averred the reasonableness of the charge of $2, denied the discrimination and expressly alleged that the charge in question constituted a separate terminal charge, embracing compensation for all the terminal services, and alleged that the effect of the filing of the rate sheets with the Interstate Commerce Commission and the notice given to the public concerning the charge of $2 had been to segregate the rates so as to distinguish the entire terminal charge from the through rate. It was, moreover, expressly averred that at the time the terminal charge was imposed the rates to Chicago on cattle from the points covered by the proceedings before the Interstate Commerce Commission were unreasonably low, and, in view of the outlay

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result in compelling all companies to retain the smallest amount paid, since the terminal by all routes must be the same. We understood that in allowing $1 to be retained we were virtually giving to the carriers 20 cents upon each car, but in view of the fact that many of the defendants were compelled to pay $1.50 by way of trackage charge, this seemed, on the whole, reasonable. Upon the reargument the defendants were inquired of whether they desired a modification of this order so that each one be allowed to retain the amount actually paid, and without exception they stated that they did not ask such a modification. Attention is called to this fact at this time for the purpose of showing that what is apparently an inconsistency in the conclusion of the Commission is really in favor of the defendants, and that the defendants do not for that reason desire to have that inconsistency removed."

occasioned at Chicago in the rendering of the terminal services, the terminal charge of $2 was in any event a just and reasonable increase of the then existing unreasonably low rate.

Before the Circuit Court the Commission contented itself with introducing in evidence certified copies of the proceedings had before it, other than the evidence taken by the Commission, and with offering such evidence as competent proof in the case. Although, on objection, the court excluded the evidence in question, it was subsequently stipulated that the transcript thereof need not be incorporated in the certificate of evidence signed by the district judge, and that, notwithstanding the objections interposed, the transcript might be produced to and inspected by the Circuit Court of Appeals for any proper purpose in case such inspection was deemed allowable. The evidence introduced on behalf of the railroad companies consisted only of the circulars and tariff sheets which had been issued and filed with the Commission, promulgating the charge in question. After hearing, the Circuit Court found that such charge was just and reasonable, and entered a decree dismissing the petition. 98 Fed. Rep. 173. On appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed the decree of the Circuit Court. 103 Fed. Rep. 249.

The court held, as to the right of the carrier to make a terminal charge, under the circumstances disclosed by the record, that the case was controlled by the ruling of the Circuit Court of Appeals in the case to which we have previously referred, *Walker* v. *Keenan*, 73 Fed. Rep. 755, and the reasoning in that case was expressly approved. Coming to consider the question of the reasonableness of the terminal charge, the court held as that rate, abstractedly considered, was just and reasonable, it was in the concrete also just and reasonable, because the through rate which had prevailed for thirty years, and under which the carriers had delivered to the stock yards, embraced no charge for terminal services, such service having been performed during all the years in question gratuitously. Besides, the court considered that the filing of the schedules in 1894 with a memorandum as to the terminal charge of $2 had operated the segregation of the two rates. The views of the court

on this subject were thus stated in its opinion, 103 Fed. Rep. 249, p. 251:

"Prior to June 1, 1894, the railway companies seem to have assumed this burden themselves, but at this time a trackage was imposed by the stock yards of from 40 to 75 cents each way upon every car going and returning from the tracks of the railway company to the stock yards. It is insisted that, as this is the only extra expense then occasioned, any charge beyond that was unreasonable and improper. I do not think that necessarily follows. While the imposition of this trackage charge by the Union Stock Yards was doubtless the immediate occasion for a reformation of its tariff, the railway companies were then at liberty to adopt a new schedule with relation to these terminal facilities and charge what they actually cost them."

We are thus brought to consider the issue involved, that is, the reasonableness of the rate.

As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the Circuit Court of Appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be filed by carriers shall "state separately the terminal charges and any rules or regulations which could in anywise change, affect or determine any part of the aggregate of said aforesaid rates and fares and charges." Whether the rule which we approve as applied to the facts in this case would be applicable to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper, is a question which does not arise on this record, and as to which we are, therefore, called upon to express no opinion.

We come, then, to consider whether there was a separation of the charge for carriage and the charge for the terminal services, and whether the rate—separated or aggregated, as may be found to be the case—was just and reasonable. To determine these questions, it is essential to fix the situation prior to June, 1894, at which time the increased terminal charge was first imposed. Undoubtedly prior to that date the published rate sheets of the defendants embraced only a rate from the point of shipment to Chicago, the place of delivery. There is room, even, for no pretence that there was in such schedules a setting apart of the terminal charge from the through rate. There is also no room for question that during the many years these rate sheets were in force the carriers, under their contracts to carry to Chicago, delivered carloads of cattle to the stock yards without making any charge other than that which was specified in the through rate. Under these circumstances, in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuitously performing the terminal services? That such assumption may not be indulged in results from the ruling in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, where it was decided that, as for a through to a given point, the carrier contracted to deliver at that point, the presumption was that the through rate included adequate compensation for the services rendered at the point of delivery. Applying this principle, it results that the through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stock yards. Did the carriers, in June, 1894, when they imposed the alleged terminal charge of $2, separate in their schedules this charge from the through rate? That is, did they divide their charges by setting apart the terminal charge embraced in their previous through rate so as to segregate it from the through rate, thus making one distinct terminal charge and another distinct through rate? The mere inspection of the schedules demonstrates that such division was not made. This is the convincing result, since the schedules did not purport to draw out from the previous through rate the sum of compensation contained therein for

terminal services. On the contrary, the entire previous through rate was retained, and a memorandum was placed upon the schedules to the effect that thereafter an additional charge of $2 for delivery at the stock yards would be exacted. This was a mere addition to the sum of the terminal charge embraced in the prior through rate. We think that it cannot be said that to add an additional amount to a former charge was necessarily to divide such former charge, without holding that to add one sum to another is necessarily to divide the other. The act to regulate commerce exacts that the schedules to be printed and filed by carriers must plainly state "the places upon the railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, was to exact that when the rates were changed the change should be so stated as not to mislead and confuse, all of which would be frustrated if the schedules relied upon were given the effect which the defendants now claim for them. And the reasons just given dispose of the contention that because it was found that the terminal charge of $2, abstractly considered, would be just and reasonable, therefore it should have been held to have been just and reasonable as applied to the case in hand. This obscures the fact that compensation for the terminal service was presumptively included in the through rate existing for so many years, and therefore, the $2 did not constitute the terminal rate, but that such rate after the $2 was imposed consisted of that sum plus the amount of compensation for the terminal service which had always been contained in, and which continued to be embraced in, the through rate.

Under the foregoing conditions, was the imposition by the railroads of the additional charge of $2 just and reasonable, measured by the criterion which the Commission adopted, that is, "under the circumstances of the case?" It needs no reasoning to demonstrate that the Commission correctly held that the

mere imposition by the Stock Yards Company of a new burden, averaging $1 per car, did not justify an additional charge by the carriers of $2 per car. It is likewise equally plain that if the prior rate was just and reasonable, as the Commission found it to be, that the addition, without reason, of $2 per car, caused the rate to become unjust and unreasonable to the extent of the $1 extra.

It follows that the order of the Commission was right if its correctness depends upon the considerations previously stated. But such is not the case. In the report on the original hearing the Commission said:

"If the through rate were what was really aimed at by the complaint, then all ground of complaint has been removed since the complaint itself was filed. About October the 1st, 1896, rates on live stock from points embraced in the territory covered by this complaint to all western markets, including Chicago, were reduced five cents per one hundred pounds. This would amount to from ten to fifteen dollars per car. Therefore the Texas shipper would actually deliver his stock in Chicago for from eight to thirteen dollars per carload cheaper than he could before the $2 rate was imposed, and all the complaint asks for is the abolishment of that terminal charge. This charge is imposed by the terminal carriers at Chicago, and those carriers receive and retain the amount of that charge. The complaint is that this charge is an unlawful one; that no matter what the Chicago rate may be the addition of this particular sum to that rate is in violation of the act to regulate commerce."

In other words, it was held that the rate, which was unjust and unreasonable solely because of the $1 excess, continued to be unjust and unreasonable after this rate had been reduced by from ten to fifteen dollars. This was based, not upon a finding of fact—as of course it could not have been so based—but rested alone on the ruling by the Commission that it could not consider the reduction in the through rate, but must confine its attention to the $2 terminal rate, since that alone was the subject-matter of the complaint. But, as we have previously shown, the Commission, in considering the terminal rate, had expressly found that it was less than the cost of service, and was there-

fore intrinsically just and reasonable, and could only be treated as unjust and unreasonable by considering "the circumstances of the case;" that is, the through rate and the fact that a terminal charge was included in it, which, when added to the two dollar charge, caused the terminal charge as a whole to be unreasonable. Having therefore decided that the $2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of the Commission were well founded. It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its reasonableness is to be determined by considering the through rate and the terminal charge contained in it, and yet when the reasonableness of the rate is demonstrated, by considering the through rate as reduced, it be then held that the through rate should not be considered. In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of $2 and the through rate as reduced when separately considered were just and reasonable, and as the further finding was that as a consequence of the reduction of from ten to fifteen dollars per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained.

These views dispose of the case, but before concluding we advert to a statement made by the Commission in its opinion delivered on the reargument. The expression referred to is as follows:

"It is also said that since the imposition of this terminal charge the Chicago rate has been reduced so that the total amount to-day, including the terminal charge, is much less than it was in 1894, when the charge was imposed. The case finds that such a reduction was made about October 1, 1896. The reduction did not, however, apply to all the territory to which the terminal charge applies, but only to certain limited portions of that territory, and the purpose of it was to equalize the rate

from those sections as compared with other sections. There is no claim that this reduction was made on account of the imposition of the terminal charge, or that it would not have been made had no terminal charge been imposed, nor that if the Chicago rate, June 1, 1894, ought to have carried with it a delivery at the stock yards the present rate should not likewise do so."

It is apparent that there is an irreconcilable conflict between the statement thus made and the facts as recited by the Commission in its first report, for therein it was declared that the reduction applied "to live stock from points embraced in the territory covered by this complaint to all western markets including Chicago. . . ." The report deduced from this premise of fact the conclusion that if the through rate could be considered "all ground of complaint has been removed" by the reduction. We find it in reason difficult to treat the statements made after the reargument as substantive findings of fact, overthrowing the facts stated in the first report, for this reason: In the passage which we have already excerpted from the report of the Commission announced after the reargument, it will be seen that it is declared that the previous findings are modified to the extent necessary to make it clearly appear that the terminal rate of $2 independently considered had been found unquestionably to be reasonable, and there is no expression in the report on the reargument tending to show that it was the purpose to modify in other particulars the findings as previously made. The case, therefore, reduces itself to this: The finding in the first report is that the reduction applied to the whole territory and removed all ground of complaint if the through rate could be considered, whilst the statement in the report after the reargument is that the reduction in the through rate did not apply to the whole territory, but was only partial. Aside from this difficulty another confronts us. The first finding of the Commission was that both the through rate and the terminal rate, separately considered as distinct charges, were in and of themselves just and reasonable at the time the complaint was filed, and this is expressly reiterated in the report delivered after the reargument. Now the passage which we

have just previously excerpted from the report after the reargument states that the reduction of the through rate was partial, and applied only to portions of the territory, and that it was made in order to "equalize the rates from those sections as compared with other sections." But it is impossible in reason to accept this conclusion, even if it be treated as a finding of fact, if the finding made originally and reiterated after the reargument is to be applied, that is, that the rates when separately considered were just and reasonable. This is necessarily the case, since in consonance with reason it cannot at the same time be declared that the rates separately considered were just and reasonable at the time the complaint was filed, and yet it be found that some of the just and reasonable rates were unequal, and hence unjust, and required to be changed in order to remove the inequality, and therefore the unreasonableness which existed in them. If, however, the conflicts to which we have referred be put out of view and the statement in the report after the reargument, to which we have adverted, be treated as a substantive finding and as overthrowing by implication the findings expressly made in the first report and some of those expressly reiterated in the second report, we find ourselves nevertheless unable to reverse the court below and direct the execution of the order entered by the Commission. That order was general and operated upon all the carriers in the whole territory covered by the complaint. But if the statement on the rehearing which we are considering be taken as a finding and given, *arguendo*, the force previously stated, then it follows that the rate from the points in the territory to which the reduction applied were just and reasonable, and as to those points the order should not have been rendered, and there is no finding establishing the points to which the reduction applied which would enable us to separate the reasonable from the unreasonable rates. It results that the findings do not afford the basis of even sustaining the order in part. Whether or not, in making the reduction, the terminal charge entered into the minds of the carriers is a matter of no concern. The question is, was the rate as reduced just and reasonable?

Being then constrained to the conclusion that the order of

the Commission was not sustained by the facts upon which it was predicated, we cannot enter into an independent investigation of the facts, even if it be conceded the record is in a condition to enable us to do so, in order that new and substantive findings of fact may be evolved, upon which the order of the Commission may be sustained. *Louisville &c. R. R. Co.* v. *Behlmer*, 175 U. S. 648–675.

It follows that the decree of the Circuit Court of Appeals, which affirmed the decree of the Circuit Court, refusing to command compliance with the order of the Commission, was right, and it must, therefore, be affirmed. We think, however, in view of what has been said, and in order to prevent all possible misconception, that it should be stated that nothing in the decree refusing to execute the order of the Commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to in the opinion, if any such there be, did not apply.

The decree of the Court of Appeals is therefore affirmed without prejudice to the right of the Commission to hereafter proceed in accordance with the reservation expressed in the opinion just announced.

MR. JUSTICE BROWN took no part in the decision of this cause.

FIDELITY AND DEPOSIT COMPANY *v.* COURTNEY.

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

No. 178. Argued March 3, 4, 1902.—Decided June 2, 1902.

In an action brought by the receiver of a national bank appointed by the Comptroller of the Currency upon a bond of indemnity given to hold the bank harmless against fraud of a specified officer, it was contended that the court erred in admitting in evidence a notice of the default of the

Statement of the Case.

officer, given to the surety company by the receiver within from ten to seventeen days after the discovery of the default, and in instructing the jury that the requirement in the bond that immediate notice should be given of a default was fulfilled by giving notice as soon as reasonably practicable and with promptness, or within a reasonable time. *Held* that the trial court did not err in refusing to instruct, as a matter of law, that the notice was not given as soon as reasonably practicable, under the circumstances of the case, or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice.

The court points out an error in excluding evidence, but further holds that as the very question which the jury would have been called upon to determine if the evidence had been received, was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the evidence.

If the court below in anywise erred, it was in giving instructions which were more favorable to the defendant than was justified by the principles of law applicable to the case.

To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally, they should find for the defendant, could only have served to mislead.

THE action below was brought, on February 5, 1898, by Courtney, as receiver of the German National Bank of Louisville, appointed by the Comptroller of the Currency on January 22, 1897, four days after the closing of the bank. Recovery was sought upon a bond of indemnity for ten thousand dollars and renewals thereof, taking effect respectively on June 1, 1894, June 1, 1895, and June 1, 1896. The condition of the bond was to hold the bank harmless against any loss which it might sustain by reason of any fraud committed by Jacob M. McKnight, originally as vice president and later as president of the bank. The sum of $18,742.74 was alleged to have been dishonestly and fraudulently embezzled, and misapplied out of the funds of the bank from July 1, 1894, to January 4, 1897, by McKnight, either as vice president or president, and a statement of the items was embodied in the petition. Due proof of the claim was averred to have been made on July 2, 1897. By answer and amendments thereto the defendant took issue as to the happening of each of the alleged defaults; it averred that McKnight, prior to January 21, 1896, had indulged in speculations in whisky and tobacco and in disreputable and unlawful

habits and pursuits; it further averred that the cashier and teller (one and the same individual), or the vice president of the bank, who became such when McKnight became the president, or the directors thereof, at or about the time of the happening of the defaults, had knowledge of the same, and that the bank condoned the defaults of McKnight for which recovery was sought. In effect, also, it was alleged that there had been a violation of each of the other conditions and stipulations of the bond. The amended answer concluded with the following averment:

"When said bond of June 1, 1894, given by defendant to said bank for the fidelity of said McKnight, as set out in the petition, was renewed for another year on June 1, 1895, to cover the period from that date to June 1, 1896, and was again renewed and continued on June 1, 1896, to cover the period from that date to June 1, 1897, said bank, through an officer other than said McKnight, represented and asserted and certified, with the knowledge of the directors of the said bank, that the books and accounts of said McKnight had been examined by said bank and were then found to be correct in every respect, and that all moneys handled by him had been accounted for up to that time, and that he had performed his duties in an acceptable and satisfactory manner, and that said bank knew of no reason why the guaranty bond executed by this defendant should not be continued; but defendant says that, in fact, said statements, assertions, and certificates were, and each of them was, false and fraudulent, and known by said bank to be false and fraudulent, but the defendant did not know the same to be false or fraudulent, and, on the contrary, the defendant believed and relied on said statements and each of them, and but for said statements, assertions, and certificates, the defendant would not have renewed or continued said bond on June 1, 1895, or June 1, 1896, and the defendant would immediately have canceled and revoked said bond, as it had a right to do, and as the said bank knew it had a right to do. The said bank purposely withheld from the defendant the proper information as to the acts and conduct and accounts of said McKnight, and thus misled and deceived the defendant."

A reply was filed controverting the affirmative allegations

of the answer, and the cause was tried to a jury. Various exceptions were taken by the defendant to the exclusion of offered evidence and to instructions to the jury. A verdict was returned for plaintiff, and from the judgment entered thereon an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. That court affirmed the judgment. 103 Fed. Rep. 599.

A writ of certiorari was then allowed.

Mr. Thomas A. Whelan and *Mr. Edward J. McDermott* for petitioner. *Mr. St. John Boyle* was on their brief.

Mr. W. M. Smith for defendant in error.

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

We shall consider under separate headings the several propositions upon which reliance is placed to demonstrate that error was committed by the trial court.

1. The court erred in admitting in evidence a notice of the default of McKnight given to the surety company by the receiver on February 18, 1897, and in instructing the jury that the requirements in the bond, that immediate notice should be given of a default, were fulfilled by giving notice "as soon as reasonably practicable and with promptness" or "within a reasonable time."

The bank was closed by the Comptroller on January 18, 1897, and the receiver was appointed four days afterwards. The experts employed by the receiver to examine the books of the bank began to discover the defaults of McKnight "about two or three weeks after the bank was closed." The notice by the receiver to the surety company that McKnight was a defaulter was given on February 18, 1897. It follows that the notice was given within ten to seventeen days after the first discovery of a default. Both the trial court and the Circuit Court of Appeals, reviewing numerous authorities, held that the requirement in the bond "that the employer shall im-

mediately give the company notice in writing of the discovery of any default or loss" ought not to receive the construction that it was intended by the parties that notice of a default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case. In so deciding we think the court did not err. Indeed, this construction of the word "immediate" would seem to be applied in practice, as is illustrated by the bond of indemnity considered in the case of the *Guarantee Co.* v. *Mechanics' &c. Co.*, 183 U. S. 402, where one of the conditions was "that the company shall be notified in writing of any act on the part of said employé which may involve a loss for which the company is responsible hereunder to the employé *immediately or without unreasonable delay.*"

A quite recent case, decided by the Supreme Court of New Hampshire, *Ward* v. *Maryland Casualty Co.*, 51 Atlantic Reporter, 900, so lucidly states the true construction of the word immediate as employed in a bond cognate to the one under consideration, that we excerpt a passage from the opinion (p. 902):

"The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them 'immediate' notice in writing of O'Connell's accident, the claim made on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word 'immediate' as used in the policy. The word, when relating to time, is defined in the Century Dictionary as follows: 'Without any time intervening: without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires,—as an immediate answer.' It is evident that the word was not used in this contract in its literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As 'immediate' was understood by them, it allowed the intervention of a period of time between the occurrence of the

fact and the giving of notice more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employé's suit might not prejudice the defendants in preparing for a defence of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that, in view of all the circumstances, it would be reasonably immediate. If a notice is given 'with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay,' it will answer the requirements of the contract. *Chamberlain* v. *Insurance Co.*, 55 N. H. 249, 265, 268; May, Ins. (1st ed.) § 462; Id. (14th ed.) § 1089; *Donahue* v. *Insurance Co.*, 56 Vt. 375; *Lookwood* v. *Assurance Co.*, 47 Conn. 553, 568. Whether the notices were reasonably immediate,—like the kindred question of what is a reasonable time,—are questions of fact that must be determined in the superior court. *Tyler* v. *Webster*, 43 N. H. 147, 151; *State* v. *Plaisted*, Id. 413; *Chamberlain* v. *Insurance Co.*, 55 N. H. 265; *Austin* v. *Ricker*, 61 N. H. 97; *Ela* v. *Ela*, 70 N. H. 163, 165; 46 Atl. 414."

We think the trial court was right in refusing to instruct, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances of the case, or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice.

2. The court erred in instructing the jury that the proof of claim sent to the surety company by the receiver on July 2,

1897, was made "as soon as practicable" after the giving of notice of the default of McKnight.

This objection is also without merit. The requirement of the bond was that the employer "shall file with the company his or her claim hereunder, with full particulars thereof, as soon as practicable" after the giving of written notice of a default or loss. What was required was not a partial, but a full statement of all the items of claimed misappropriations on which the right to recover upon the bond was based. The investigation to ascertain the various defaults of McKnight continued after the giving of the preliminary notice of default, and the evidence in the record fails to give any support to the contention that the proof of claim was unreasonably delayed, and was not made as soon as practicable after the full particulars thereof were ascertained.

3. The court erred in instructing the jury that the averments contained in the petition filed by the receiver in an action in attachment against McKnight, brought in a state court of Kentucky, on March 6, 1897, to recover various items of alleged indebtedness of McKnight to the bank, should be given no effect in their deliberations, as but one of said items was embraced in the present action.

The petition referred to was presumably introduced in evidence on behalf of the defendant, as tending to establish that the proof of claim was not made by the receiver as soon as practicable after the giving of notice that McKnight had been guilty of a default. While the trial judge did not state the reasons which led him to instruct the jury to disregard the statements in the petition, the reason for such action was manifest. The petition counted upon various items, a portion only of which were embraced in the petition in the action on trial, and the fact that the petition in the attachment action showed that when filed the receiver knew of some of the misappropriations of McKnight, did not tend to prove that he then had knowledge of all of the defaults of McKnight.

4. The court erred in refusing to permit the defendant to read as evidence to the jury a letter of Edwin Warfield, president of the defendant, and dated May 15, 1896, and addressed

to the German National Bank of Louisville, Kentucky, and also the reply of R. E. Reutlinger, the cashier of the said bank, written on May 29, 1896, addressed to the defendant, said letter having been an inquiry by the president of the defendant as to the renewal of the bond of McKnight, and the response being an assurance by the cashier of the bank that McKnight had up to that time performed his duties in an acceptable and satisfactory manner, and he, the cashier, knew of no reason why the bond should not be continued. These letters, it being contended, were erroneously excluded on the ground that it had not appeared from the evidence that there was special authority from the board of directors to the cashier to write the letter of response of May 29, 1896. Further, the court also, it is asserted, erroneously refused to allow the defendant to prove by circumstantial evidence that the board of directors selected the bondsman of McKnight and paid for the bond, and that the said cashier was acting in this matter with the knowledge and for the benefit and with the approval of the board of directors.

We are constrained to the conclusion that error was committed in rejecting the evidence referred to in the foregoing contention. It was competent for the defendant to show that the bank had concerned itself in and about the obtaining of the bond and renewals in such manner as to cause the transaction to become in effect the business of the bank. The bank had notice from the terms of the original bond that it was issued in reliance upon statements and representations made on its behalf to the surety company, and that, in the ordinary course, renewals, which were to be optional with the surety company, might also be based upon further statements to be made on behalf of the bank. Thus, in the original bond, it was recited that "The said employer has delivered to the company a certain statement, it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed." It was a reasonable and proper precaution, in anticipation of a desired renewal, to propound the inquiries which were submitted by the surety company. The inquiry was contained in a written communication, addressed *to the bank*, it was received by the bank, and it was proper to presume that it was

delivered to the official who made reply thereto, by authority of the bank, he being the executive officer who was charged with conducting the correspondence of the bank. We think the making of the certificate was an act done in the course of the business of the bank, by an agent dealing with the surety company for and on behalf of the bank. It did not purport to be, nor was it designed to be, the mere personal representation of the individual who filled the office of cashier, but it was an official act, performed on behalf of the bank. The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulations agreed to be performed by the surety, to deny the authority of its officer to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment. *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371. In *Guarantee Co.* v. *Mechanics' &c. Co.*, 183 U. S. 402, this court recognized as binding upon the bank a certificate given by one of its officers embodying replies to questions asked by the guarantee company respecting one of the employés of the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in *American Surety Company* v. *Pauly*, 170 U. S. 156, warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the *Pauly* case, it was not agreed that the statement of the president, upon which the bond was obtained, should be the basis of the bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendations by one individual of another individual, at a time when, as said by the court, "no relations existed between the bank and the surety company." Again, in the *Pauly* case, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter, whose contents in the *Pauly* case was claimed to be

binding on the bank, was written by one who was not charged with the duty of conducting the correspondence of the bank. As held in *Xenia Bank* v. *Stewart*, 114 U. S. 224, a communication which on its face evidences that it was written by the cashier of a bank, should not be excluded from the jury as not being an act of the bank, where "it appears with reasonable certainty to have regard to the business of the bank." In the case at bar it is manifest these elements were present, and the exclusion of the certificate, as also of the evidence designed to establish that the giving of the certificate was an act done in the course of the business of the bank, was erroneous.

But the fact that error was committed in the particulars just stated does not necessarily lead to a reversal, since the settled doctrine is that even if error has been committed, yet if it appears clearly from the record that such error was not prejudicial, the judgment cannot be disturbed. *Origet* v. *Hedden*, 155 U. S. 228, 235; *Fidelity Association of Philadelphia* v. *Mettler*, 185 U. S. 261. In order to determine whether prejudice resulted from the rulings referred to, it becomes essential to state the facts as portrayed in the bill of exceptions.

McKnight was for a period of time vice president and subsequently the president of the German National Bank. Any and all claims which may have been asserted in the petition as to misconduct or default on the part of McKnight prior to the 1st of January, 1896, were abandoned at the trial, and there is nothing in the record to support the contention that anything took place prior to that date which affected the truth of the statement made in the certificate given by the cashier on May 29, 1896. In January, 1896, McKnight was president and a director; Adolph Reutlinger was vice president and a director, and R. E. Reutlinger was cashier and teller of the bank.

On January 14, 1896, the mayor of the city of Louisville died. The vacancy occasioned was to be filled by the municipal council of the city, and McKnight became a candidate for the office. There was an active contest, and the incidents connected with the election became the subject of discussion in the public press and of consequent notoriety in the community. One Edmunds, who was a business partner of McKnight, was

a prominent factor in said contest, as representing the interest of McKnight, and Edmunds frequently visited the bank and conferred with McKnight in respect to the contest. Edmunds, on his visits to the bank, "was often seen by and had conversations with the vice president and other directors of the bank, who knew the purpose of his visits." The firm of S. E. Edmunds & Co., composed of McKnight and Edmunds, had an account on the books of the bank. Edmunds, however, had no individual account with the bank.

On January 18, 1896, Edmunds came to the bank and there drew his personal check on the bank for the sum of $1000. McKnight directed this check to be cashed, and, as Edmunds wished ten one hundred dollar bills for the check, McKnight, in the hearing of the vice president, told the cashier to take one thousand dollars and go to a neighboring bank and get the denomination of bills desired, which he did, and they were handed over to Edmunds. The check of Edmunds which had been thus cashed, although he had no individual account with the bank, was, by the direction of McKnight, carried by the cashier as a cash item until March 12 following. On the date last named, by the direction of McKnight, the amount was charged to the account of S. E. Edmunds & Co., it not appearing that the effect of this debit was to overdraw this latter account.

It was shown that at the time Edmunds drew this check there was an understanding between himself and McKnight that he, McKnight, should be responsible for the check and see that it was paid. The money which Edmunds received it was proven was used by him in bribing four members of the city council to vote for McKnight for mayor, and in consideration of the payment, the parties, on receiving the money, signed the following agreement:

"I hereby pledge myself to vote for J. M. McKnight for mayor of the city of Louisville, first, last, and all the time, until elected or defeated before the general council."

There was no proof introduced to show that the officers or directors of the bank, other than McKnight, had any knowledge of the purpose for which the check was drawn or the use which

was made of it, unless it be that the fact that they knew that McKnight was a candidate for mayor had a tendency to show that he was engaged in unlawful practices.

On January 21, 1896, to pay his own debt, McKnight drew his individual check (he having an individual account with the bank), for $1253, to the order of a person to whom he was personally indebted. This check was paid. McKnight instructed the cashier not to have this check charged up but to carry it as cash, and it was so carried until March 12, 1896, when McKnight directed that the check be debited to the account of S. E. Edmunds & Co., which was done. Subsequently, and prior to the 12th of March, 1896, another check was drawn by McKnight, on his individual account, for $1650, and was paid and carried by the cashier, by McKnight's direction, as cash, until March 12, 1896, when it was charged up to the Louisville Deposit Collateral account. This latter was an account on the books of the bank of which McKnight had the management and control as president of the bank, but in which he had no personal interest. It was shown that the carrying of these checks by the cashier in his cash as money was called to the attention of the vice president of the bank, who made inquiry on the subject as to why it was done and was informed that it was done at the request of McKnight, the latter presumably directing the checks to be charged as above stated, in consequence of such inquiry.

McKnight was defeated for mayor. It was matter of common knowledge in Louisville that there was great dissension between the elected mayor and members of the boards of aldermen and councilmen and that members of the board of aldermen were endeavoring to block legislation proposed by the new mayor. There was proof tending to show that McKnight fomented this discord, and drew up a paper, which was signed by five aldermen, pledging themselves to be controlled in the performance of their duties by McKnight. Two other signatures, however, were required to get control of the board. McKnight was informed by Edmunds that two aldermen were wavering, and that to obtain their signatures to the agreement it would be necessary to pay each of them $1000. On Febru-

ary 6, 1896, McKnight requested the cashier to remain at the bank and keep the vault open after the regular time for closing, and said to him that he "had a big scheme on hand, and that it was a big thing." The bank was kept open, and at about half-past six Edmunds brought to the bank the two aldermen in question. Thereupon, in the presence of these two men and the cashier, Edmunds prepared a note, which was then signed by the two aldermen, as follows:

"$2000.00. LOUISVILLE, KY., February 6, 1897.

"One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at German National Bank."

After signing the note, the two aldermen went upstairs, later returned to the bank office, and then received from the cashier, who acted under the instructions of McKnight, the sum of $2000 in currency.

It was shown that, while upstairs in the bank building, the two aldermen affixed their signatures to the following paper, which had already been signed by five other of the aldermen:

"LOUISVILLE, KY., February 5th, 1896.

"We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the board of aldermen of the city of Louisville; that we will so caucus with our friend J. M. McKnight, and act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the upper board, will not allow the mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of a meeting on any proposition sent in by the mayor, but will take one week for consideration and caucus.

"Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, February 5th, 1896, in the presence of one and the other."

There was no testimony tending to show knowledge on the part of the bank, or any of its officers and directors, other than McKnight, of the purpose for which this $2000 was paid, or of the relations which existed between McKnight and the men to whom it was paid, unless such knowledge was lawfully inferable from the circumstances above stated and those hereafter mentioned.

On the night of the occurrences above detailed the cashier of the bank went to the residence of his father, the vice president, and told him of the keeping open of the bank that evening and the cashing of the note. The next morning the vice president asked McKnight for an explanation of the matter, and the latter responded that the transaction was all right and that the note was good, and that it would be guaranteed by men of credit, whom he named. McKnight also said that he would guarantee the payment of the note; that the parties were obliged to have the money that night, and he kept the bank open to let them have it. When this conversation was had McKnight had a long, yellow envelope in his hand, and he told the vice president that "he had a document there in his pocket which was signed by those fellows;" that "he had a meeting upstairs and that paper was signed, and he would not sign it for the city of Louisville;" but McKnight did not mention the names of the persons who had signed it. The vice president noticed that the bank was to get no interest on the loan. He informed other members of the board of directors, and shortly afterwards the matter was brought before the board for its consideration. The vice president reported to the board that he had made some investigation and could not find that two aldermen who had signed the note had any property, and he was unable to say whether or not they were good. McKnight made the same statement to the board that he had made to the vice president, though to neither the vice president nor the bank was any explanation made about the interest feature of the transaction. He assured the directors that the note was good. This explanation satisfied the board, and they passed the note. One Jacob Reisch, a director at the time, testified on the witness stand, however, that some short time after the execution

of this note the vice president told him what he had learned about the matter, and said to him that the money was used in the mayor's race. This latter statement the vice president denied having made. We quote from the bill of exceptions the following statement:

"There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of them had any knowledge that any act of his, in the management of said bank, was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation, sometimes twice a month, of the affairs of said bank, and required the president to go through same with them and make a full report thereon; that some of the directors were in the bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge of them."

Now, with this state of the record in mind, we come to consider the statements in the certificate signed by the cashier, on May 29, 1896, in answer to the letter of the surety company, shortly before the bond was renewed, to determine whether prejudicial error arose from rejecting the certificate. The certificate stated that the president "has performed his duties in

an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued." There was certainly proof showing that the action of the president as to the three checks, and the charging them to accounts on the books of the bank, deceived the officers of the bank and caused them to be satisfied with the transactions. Certainly also there was uncontradicted evidence establishing that the explanation given by McKnight of the discount of the two thousand dollar note satisfied the directors. There was no justification in the evidence on these subjects to take the case from the jury and instruct a verdict for the defendant upon the theory that in and of themselves the transactions were of such a character as to preclude the possibility of a belief in the sufficiency of the explanation made by the president, however apparently reasonable those explanations may have been and however honest may have been the belief in their truth. This being so, it follows that the only basis upon which it could have been found that the bank was dissatisfied was the deduction from the facts and circumstances that the bank knew of the fraud which the transactions were intended to effectuate. And this latter view was stated by the court to the jury. Referring to the alleged fraudulent checks and drafts of the president, the court said:

"The mere fact of drawing for more than you have got in the bank without any fraudulent intent in that mere transaction would hardly be a fraudulent act within the meaning of this bond.

"Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own personal debts; if the bank had known that and consented to it, there would not have been a fraudulent act of McKnight for which the bank could recover against this company.

"But if you believe from the evidence that the bank did not know of the fraudulent purposes for which the overdrafts were made, if the overdrafts were made in connection with this matter—if you believe the bank did not know the fraudulent

purposes, then that changes the result; because if the bank did not know it and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view this case—you must remember, however, that you are the sole judges of the evidence in this case, its credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part, limiting my observations now to the overdrafts, there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it which was concealed from the bank."

Again, the court—referring to the Britt and Reeder transaction—said:

"If you believe from the evidence that the bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's, in getting these two thousand dollars, was known to the bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by the bank at the time, before these other transactions occurred, then the defendant in this case is not liable."

In other words, reiterating in a somewhat different form the proposition previously stated if the certificate transmitted by the cashier to the surety company had been received in evidence it would not alone have availed as a defence, because further proof would have been required showing the falsity of the statements contained in the certificate. In view, however, of the uncontradicted testimony tending showing that in the course of the transactions relied upon the president had, either by conduct or explanation, produced the impression on the bank that the transactions were *bona fide*, and therefore relieved the bank from any dissatisfaction as to the transactions, it must follow that the falsity of the certificate could alone have been inferred by concluding either that the transactions in and of themselves were of such a character that as a matter of law no explanations made of them by the president could have justified the bank in being satisfied on the subject, or that the surrounding

circumstances were such as to authorize the jury to infer that the bank must have known of the fraud, and therefore to find that the bank could not possibly have been satisfied with the conduct of the president. But the first hypothesis, we have pointed out, was inadmissible. The second was left to the jury to determine, since the charge of the court was that if the jury could deduce from the proof knowledge on the part of the bank of the fraud of the president, the surety company would not be liable on the bond. As, therefore, the very question which the jury would have been called upon to determine if the certificate had been received in evidence was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the certificate.

5. The trial court erred in not instructing the jury that the knowledge possessed by an officer or director of the bank, of the fraudulent purposes of McKnight, though such knowledge had not been communicated to the bank, should be treated as the knowledge of the bank; and also erred in not instructing the jury that the knowledge which any officer or director of the bank might have acquired of the fraudulent conduct of McKnight, if such officer or director had exercised customary supervision, should be imputed to the bank.

The questions which these propositions embrace were raised by the exceptions taken to certain portions of the charge to the jury, referred to in the record as instructions Nos. 5, 6 and 7. In instruction No. 5 the court told the jury, in general terms, that the bank, under the stipulations contained in the bond, owed to the surety the duty of exercising due and customary supervision over McKnight to prevent the commission by him of fraudulent acts, and further instructed that if the bank knew of the fraudulent purposes of McKnight in connection with the drafts and checks upon which recovery was sought, the surety would not be liable. Exception was taken to this instruction, on the ground that it "did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the bank other than McKnight, which they had, or would have had, if customary supervision

had been exercised." Instruction No. 6, and the objection made to it, reads as follows:

"I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger, in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall anything that he knew, so far as the proof shows that would in anywise affect the liability of the defendant in this case."

Objection was made to the foregoing portion of the charge, on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts, his transactions in connection with the $2000 note signed by the two aldermen and with the checks to Edmunds, and the several checks for McKnight's individual account, was the knowledge of the bank, and that the jury should have been so told.

Instruction No. 7 dealt with the $2000 note transaction. In effect, the jury were instructed that the knowledge of the cashier acquired in the performance of his duties might be imputed to the bank, but that the vice president or an individual director did not hold such an official relation to the bank as that his knowledge of wrongdoing by McKnight, if not communicated to the bank, could be treated as the knowledge of the bank.

We do not deem it necessary to analyze the instructions given by the court for the purpose of determining whether they were in all respects accurate, because we are of the opinion that if the court in anywise erred it was in giving instructions which were more favorable to the defendant surety than was justified by the principles of law applicable to the case.

It is well settled that, in the absence of express agreement, the surety on a bond given to a corporation, conditioned for the faithful performance by an employé of his duties, is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors,

not amounting to fraud or bad faith, and that the acts of ordinary agents or employés of the indemnified corporation, conniving at or coöperating with the wrongful act of the bonded employé, will not be imputed to the corporation. *United States* v. *Kirkpatrick*, (1824) 9 Wheat. 720, 736; *Minor* v. *Mechanics' Bank*, (1828) 1 Pet. 46; *Taylor* v. *Bank of Kentucky*, (1829) 2 J. J. Marshall (Ky.), 564; *Amherst Bank* v. *Root*, (1841) 2 Metcalf, 522; *Louisiana State Bank* v. *Ledoux*, (1848) 3 La. Ann. 674; *Pittsburg, Fort Wayne & Chicago Ry. Co.* v. *Shaeffer*, (1868) 59 Penn. St. 350, 356; *Atlas Bank* v. *Brownell*, (1869) 9 Rhode Island, 168. The doctrine of these cases is thus epitomized in 59 Penn. St. 357:

"Corporations can act only by officers and agents. They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defence. *Taylor* v. *Bank of Kentucky*, 2 J. J. Marsh. 564."

So, also, in 3 La. Ann. 674, the court, after suggesting the distinction between the knowledge of the governing body of a bank, the board of directors, of the default of a bonded em-

ployé, and the knowledge of such default by another officer or employé, not communicated to the board, thus tersely stated the applicable doctrine (p. 684):

"It cannot be said that if one servant of a bank neglects his duty, and by his carelessness permits another servant of the bank to commit a fraud, the surety of the fraudulent servant shall be thereby discharged."

And see *American Surety Co.* v. *Pauly*, 170 U. S. 156, 157, and cases cited. In other words, the principle of law discussed in the case of *The Distilled Spirits*, 11 Wall. 356, viz., that the knowledge of an agent is in law the knowledge of his principal, is intended for the protection of the other party (actually or constructively) to a transaction for and on account of the principal had with such agent. In the very nature of things, such a principle does not obtain in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employé subsequent to the execution of the bond, (and from negligence or wrongful motives, not disclosed to the corporation,) of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express provision of the contract of suretyship. Was there such a provision in the bond now under consideration?

Now the clause of the bond sued on, and as to which the court was instructing the jury in the portions of the charge under consideration, is as follows:

"'That the employer shall observe, or cause to be observed, due and customary supervision over the employé for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned.'"

Manifestly, this stipulation is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the bank should be treated as the neglect or omission of the bank. The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employé or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. This in reason imports that the things forbidden to be done or agreed to be done were to be either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out. To hold to the contrary would imply that the bond forbade the doing of an act by a person who had not power to perform or commanded performance by one who could not perform. Assuredly, therefore, the conditions embodied in the stipulation to which we have referred, both as to doing and nondoing, contemplated in the reason of things the execution of the duties which the contract imposed on the bank, either by the governing body of the bank, its board of directors, or by a superior officer, such as the president of the bank, having a general power of supervision over the business of the corporation, and vested with the authority to condone the wrongdoing or to discharge a faithless employé. That is to say, the stipulation in all its aspects undoubtedly related to the bank, acting through its board of directors or through an official who, from the nature of his duties, was in effect the vice principal of the bank. The decision in *Guarantee Co.* v. *Mechanics' &c. Co.*, 183 U. S. 402, it may be remarked, in passing, is not antagonistic to the views we have just expressed, because in that case all the information which was held imputable to the bank had been communicated to the president of the bank.

Now, applying the principles previously expounded to the case in hand, it is evident that the court rightly refused to instruct the jury that the mere knowledge of one or more direct-

ors, less than a majority of the board, and of the vice president of the bank, of the default of the president, was imputable to the bank. Indeed, as we have previously said, when the charge which the court gave is considered, it is apparent that the court went quite as far as the law warranted, in favor of the defendant, since the court instructed that knowledge acquired by the cashier in the course of the business of the bank, and not communicated by him to the board of directors, should be regarded as the knowledge of the bank.

6. The Court of Appeals erred in affirming the action of the trial court in instructing the jury that the carelessness of the directors in the management of the bank was not an issue for them to consider.

In considering the clause of the charge to the jury which provided that "due and customary supervision over the employé" should be observed "for the prevention of default," the trial court told the jury that it imported "a reasonable vigilance upon the part of the bank to prevent defaults," that is, to prevent the commission of fraudulent acts by McKnight. To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally they should find for the defendant, could only have served to mislead. The court did not err in refusing the requested instruction.

Judgment affirmed.

MR. JUSTICE GRAY and MR. JUSTICE BREWER did not hear the argument and took no part in the decision of this case.

WARNER *v.* GODFREY.

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

No. 191. Argued April 25, 1902.—Decided June 2, 1902.

This was a bill, filed by the appellee to establish her title to land in the city of Washington, of which she claimed to have been defrauded. The main asserted badges of fraud were a gross inadequacy of consideration, and other matters stated in the opinion of the court. Both the trial and the appellate courts concurred in holding that the proof vindicated the defendants, and it is held by this court that the entire want of foundation for the charges of wrongdoing urged against the defendants, and upon which the long litigation proceeded, may be taken as conclusively established.

The complainant, having expressly declined to put an end to the litigation on the theory that the proof showed that she was entitled to an unconditional recovery of the property, she is not to be allowed to reform her pleadings, and change her attitude towards the defendants, in order to obtain that which she had elected not to seek, and had declined to accept.

On September 1, 1896, Lily Alys Godfrey, appellee herein, filed a bill in the Supreme Court of the District of Columbia, sitting in equity, to establish her title to five lots of land situated in the city of Washington, of which it was asserted she had been defrauded by one Stephen A. Dutton.

The defendants to the bill were Dutton and wife, Louis W. Richardson, Fred M. Czaki and Mary Alice Godfrey (mother of complainant). Omitting averments relating to real estate other than that now in controversy, it suffices to say that the bill detailed grossly fraudulent and criminal practices, by which Dutton, without consideration, on or about March 26, 1896, obtained the title to a large amount of real estate, the property of the complainant, including that now in controversy, that is, lots 1, 2, 3 and 66, in a subdivision of block 134, in the city of Washington. It was averred that by a deed recorded April 13, 1896, Dutton and his wife conveyed, without consideration and fraudulently, the lots in question to the defendant Richardson. The latter answered the bill on December 1, 1896, and averred that he was a *bona fide* purchaser of the property, without no-

tice, actual or constructive, of any equity of the complainant; that, through his brokers or agents, B. H. Warner & Co., he had paid full consideration to Dutton for the property, and he annexed to the answer, as a part thereof, the contract of purchase from Dutton, a copy of which is in the margin.[1]

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[1] "Brainard H. Warner. Louis D. Wine.
Geo. W. F. Swartzell. Clarence B. Rheem.

"Office of B. H. Warner & Co., 916 F. St. N. W., Washington, D. C.

"Articles of agreement, made and entered into this 10th day of April, A. D. one thousand eight hundred and ninety-six, by and between———, party of the first part, and Louis W. Richardson, party of the second part, in manner and form following: The said party of the first part in consideration of the sum of five hundred (500) dollars to his agents, B. H. Warner & Co., duly paid as a deposit, the receipt whereof is hereby acknowledged, hereby agrees to sell unto the party of the second part, the following-described real estate in the city of Washington and District of Columbia: Lots 66, 1, 2 and 3, square 134, Washington, D. C.

"For the sum of twenty-five thousand (25,000) dollars, which the said party of the second part agrees to pay to the said party of the first part as follows:

"Seventy-five hundred (7500) cash, balance seventeen thousand five hundred (17,500) to be assumed, secured by deed of trust on the said described property, with interest at the rate of six per cent per annum, payable ——, which amount is now upon the property and secured by a trust or trusts, and the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall execute, acknowledge and deliver to the said party of the second part, or to his heirs as assigns, a special warranty deed and conveyance, assuring to them the fee simple of the said premises free from all incumbrances, except as to the trust referred to above, which deed shall contain the usual full covenants. The terms of sale to be complied with in five days from the date hereof, and said deposit to be applied in part payment of the purchase of the said described real estate. Title to be good and marketable or deposit returned.

"And it is understood that the stipulations aforesaid shall apply to and bind the heirs, executors, administrators and assigns of the respective parties.

"In witness whereof the parties to these presents have hereunto set their hands and seals the above day and date.

(Signed) "S. A. Dutton. [Seal.]
(Signed) "L. W. Richardson. [Seal.]

"Signed, sealed, and delivered in the presence of—
(Signed) "Ellen S. Mussey,
"As to S. A. Dutton.
(Signed) "C. B. Rheem,
"As to L. W. Richardson."

Statement of the Case.

On March 28, 1897, a decree *pro confesso* was entered as to one of the lots of land affected by the bill, which is not involved in this controversy, and title to which remained in Dutton. By the decree the legal title to said lot was established in the complainant.

By an amended bill filed on May 1, 1897, Warner and Wine were made defendants to the cause. The amendment added to the clause in the original bill, which charged that the conveyance to Richardson was without consideration, the following:

"That the said Richardson was only a nominal party to the said transaction; the real parties were the said Dutton, on the one part, and Brainard H. Warner and Louis D. Wine, on the other; that the said Wine and Warner pretend that they advanced or furnished to the said Dutton the sum of six thousand five hundred and eighty-six and $\frac{33}{100}$ ($6586.33) dollars, and took from the said Dutton the said conveyance to the said Richardson to secure the repayment of the said sum so claimed to have been advanced. Whether said Warner and Wine actually furnished said Dutton such sum or any sum whatsoever the complainant cannot affirm or deny, and demands strict proof in that behalf, and she avers that the said Warner and Wine had such notice of the frauds of the said Dutton as herein set forth, and of such facts and circumstances as put them on inquiry as to the conveyance to said Dutton, that in equity they should have no benefit from said conveyance to said Richardson, but the same should be decreed to be cancelled and held for naught."

On July 17, 1897, before any pleading by Warner and Wine, an amended and supplemental bill was filed, accompanied with numerous interrogatories required to be answered by the defendants Warner and Wine. The averments of the original bill as to the fraudulent practices by which Dutton had obtained the property of complainant were reiterated. As respects the defendants Warner and Wine, it was charged that Dutton, on March 29, 1896, with the object of consummating the fraud which he had practiced upon the complainant, "entered into negotiations with said B. H. Warner & Co., or said defendants, Warner and Wine, through one Ellen S. Mussey, a lawyer of said city, to whom he applied for a loan on the security of this

complainant's said property, and on information and belief this complainant charges that said Ellen S. Mussey, after bringing the matter to the attention of the said B. H. Warner & Co., or said Warner and Wine, reported to the said Dutton that a loan of from twenty-five to thirty thousand dollars could readily be negotiated on the security of said property, and stated that if he would return the following week she would have everything in readiness to complete the transaction. Accordingly the said Dutton came again to the said city of Washington on or about the 10th day of April, then next, and, going to the office of said B. H. Warner & Co., then and there signed a paper-writing or contract agreeing to sell all of said lots in square one hundred and thirty-four at and for the grossly inadequate price of twenty-five thousand dollars, said sum being less than one half the price or consideration at which the said B. H. Warner & Co., had been authorized to sell the said lots by said Mary Alice Godfrey."

After averring that, by reason of the circumstances referred to, the defendants were put upon notice as to whether Dutton had honestly acquired the property, it was charged that it was the duty of defendants to have notified the complainant of the proposition of Dutton, but that no notice, in fact, was given. It was averred, moreover, that the said firm and the defendants Warner and Wine " purposely and intentionally concealed the fact that the said Dutton had signed the aforesaid contract to sell said lots at and for the grossly inadequate sum of $25,000, and that he was eager and anxious to dispose immediately of said lots so soon after acquiring the same." And further it was averred that " the said defendants, Warner and Wine, immediately set about the acquisition of said lots for their own benefit, and, with a view to, and for the purpose of, concealing their connection with said transaction, caused the title to the said lots to be conveyed to defendant Richardson by a pretended deed, bearing date the 13th day of April, 1896," and that said Richardson, because of his youth and inexperience and his relationship to the defendant Wine, and his connection in business with the firm of B. H. Warner & Co., " was chosen as the instrument or tool of the said defendants Warner and Wine,

for the consummation of their schemes to get possession of this complainant's said property for the said grossly inadequate sum of twenty-five thousand dollars."

A joint and several answer was filed on behalf of Warner and Wine, and therein it was averred that the lots in question were bought by them in good faith for an adequate consideration, and that the title was taken in the name of Richardson merely for the purpose of convenience in making subsequent conveyances.

Issue having been joined, testimony was taken, and in all about one hundred and forty witnesses were examined. But a portion only of the evidence, embodied in 600 printed pages, has been submitted for the inspection of this court. The court below, however, referred to the record as an "immense" one, and it was stated that the greater part of the evidence consisted of the testimony of witnesses introduced to contradict on the one hand or to support on the other the denial of the defendant Warner, made under oath in his answer to the amended bill and in answers to special interrogatories, that he had had any acquaintance with Dutton or ever had any business relations with him of any description until the transaction of April, 1896. This latter testimony is not contained in the printed record filed in this court.

The trial court decreed in favor of the defendants. In the opinion by it delivered the evidence respecting the different circumstances relied upon by the complainant to establish her case was reviewed, and it was held that the evidence was inadequate to support the charge of either actual or constructive fraud on the part of the defendants Warner and Wine.

Respecting one of the alleged circumstances charged to constitute a badge of fraud, viz., that Warner and Dutton were acquainted and had business dealings together prior to the sale in question, the court upheld the contention of Warner that he had had no acquaintance or dealings with Dutton prior to said purchase. Referring to the evidence on this branch of the case, the court said:

"A most careful examination has satisfied me beyond doubt that the entire testimony adduced in behalf of the complainant

designed to show that Warner was ever in the company of Stephen A. Dutton on either of the occasions as described is absolutely untrue, and that by far the greater part of it consists of unfounded falsehoods, uttered from bad motives and attempted to be sustained by deliberate perjury."

The appellate court coincided with the opinion of the trial court, that the evidence introduced at the hearing failed to sustain the claim that there had been either actual or constructive fraud, as alleged in the bill, on the part of Warner and Wine, and that on the contrary the proof showed there was no ground for awarding the relief prayed in the bill. It was, however, held that "from another point of view, made clear by the testimony, though it may not be specifically presented by the pleadings," the complainant, standing in the stead of Dutton, was entitled to disaffirm the sale and recover the property from Warner and Wine on repaying to said defendants the price actually paid by them to Dutton for the property and such further sums as might have been paid by them in the discharge of taxes and encumbrances. The ground for this conclusion was as follows: That the testimony showed that the firm of B. H. Warner & Co. were the agents of Dutton in negotiating the sale; and as it was further shown that Richardson, the purchaser named in the contract, was only an ostensible buyer, and that Warner and Wine, members of the firm of B. H. Warner & Co., were the real purchasers, and as it appeared that the fact of the purchase by Warner and Wine was not made known to Dutton, the latter would have had a right, by a "timely bill filed for that purpose," to set aside the sale on the ground that his agents had been unfaithful to their trust by buying the property of their principal for their own account without the knowledge and consent of their principal; that this right, thus existing in Dutton might be availed of in equity by the complainant, as the equitable owner of the property. As, however, the court found that the act of Warner and Wine in buying the property through their firm, as agents of Dutton, involved no intentional wrong, but constituted a mere legal or constructive fraud, it was held that the complainant in order to obtain equity must do equity, and that she could not avail of her right to dis-

affirm the purchase by Warner and Wine without reimbursing them for the money actually paid by them to Dutton, and such other sums, if any, paid by them in the discharge of taxes and encumbrances, less such sums as had been received, or ought in the exercise of due diligence to have been received, as rents and profits of the property. After deciding that upon such payment the defendants should be decreed to reconvey the property to the complainant, the court said (16 App. D. C. 117):

"It may be that, to obtain this relief, the bill will have to be amended to some extent. If so, it can be done without reopening the case for further testimony. Doubtless, too, a reference to the auditor will be necessary for a statement of the account between the parties before a final decree can be entered.

"It follows that the decree dismissing the bill must be reversed, and the cause remanded, with directions to vacate the said decree, and take such further proceedings in accordance with this opinion as may be expedient and proper.

"The costs of this appeal will be divided equally between the parties."

Upon the filing of the mandate of the Court of Appeals in the Supreme Court of the District, the complainant prepared an amendment to the bill, in which it was averred that the defendants Warner and Wine, as members of the firm of B. H. Warner & Co., were agents of the defendant Dutton to find a purchaser for the lots in question; that said defendants did not inform Dutton that they were the real purchasers of the lots; that in consequence of such fact the purchase was fraudulent at law and voidable at the election of Dutton or of the complainant, for whom Dutton held title under a constructive trust, by reason of his fraudulent conduct in the premises. The amendment also contained an averment of a willingness, upon reconveyance of the title, to repay such sums as had been expended by the defendants for and on account of the property.

This proposed amendment to the bill was served upon the defendants accompanied with a notice that it was the intention of the complainant to apply to the court for leave to file the amendment and at the same time to ask a reference of the cause to an auditor to state the account without affording the defend-

ants the opportunity of taking testimony to disprove the allegation of the amendment that the firm of B. H. Warner & Co. were agents of Stephen A. Dutton. The defendants at once filed an answer to the amendment, in which the following averments were contained:

"1. They deny that the firm of B. H. Warner & Co. were agents for the defendant Stephen A. Dutton, to find a purchaser for the real estate in controversy, as alleged by said amendment, or that the said firm or any of its members ever were the agents of the said Stephen A. Dutton for any purpose whatsoever. It is true that in Exhibit L. W. R. No. 1, filed as an exhibit to the answer of the defendant Louis W. Richardson, to the original bill in this cause, 'B. H. Warner & Co.,' are mentioned as agents of unnamed parties of the first part, but they aver that this circumstance grew out of the fact that a printed form of memorandum of sale belonging to the said firm, in which their names were printed as agents of the vendor, was used in the transaction, the same being the said Exhibit L. W. R. No. 1, and by a purely clerical omission the name of the said firm was not struck out and that of Mrs. Ellen S. Mussey, who was the only agent of the said Stephen A. Dutton in the matter, inserted instead. So far from being the agents of Stephen A. Dutton, neither of these defendants nor any member of the firm of B. H. Warner & Co. was aware at the time the said memorandum of sale was prepared who was the owner of the property described in it, agency for which owner is now sought to be charged upon them, and the name of the vendor was accordingly left blank in the said memorandum for that reason. Both the said Ellen S. Mussey, who was the agent of the said Stephen A. Dutton, and the said Stephen A. Dutton himself well knew throughout the entire transaction that the firm of B. H. Warner & Co. represented the purchaser of the said property, and in no way represented or claimed to represent the said Stephen A. Dutton."

The answer further averred that, in the beginning of the controversy, the defendants had offered to convey to complainant the property in dispute upon being reimbursed simply the money which they had actually expended, and that this offer

was rejected; that the complainant having thus rejected said offer, and having subjected the defendant to the expense of a long and costly lawsuit to disprove the charges of fraud and wrong made against them, which they had successfully done, and the defendants, in doing this, having been compelled to pay out more than $6000 in costs and expenses, it was inequitable to allow the complainant to amend her bill by substituting a new and distinct ground of relief, and upon such ground to allow her to recover the property on simply reimbursing the defendants the amount of the purchase price and their actual outlay in the care of the property, without any allowance of interest or repayment of the expenses of the litigation. It was insisted, moreover, in the answer that, if the amendment was allowed, the defendants were entitled to be heard, in order to show that the averments contained in it were untrue, as specially set up in the answer. The court allowed the proposed amendment to be filed, and, doubtless conforming to the opinion of the Court of Appeals, where it was stated that the bill could be amended "without reopening the case for further testimony," in effect denied the right of the defendant to offer any testimony to disprove the truth of the averments contained in the amendment by ordering a reference to the auditor with directions simply to ascertain and report to the court "the amount of the money actually paid by Warner and Wine to the defendant Dutton, and of other sums which they had paid in discharge of the taxes and encumbrances, less such sums as had been received, or ought, in the exercise of due diligence, to be received, as rents and profits of the property from the commencement of their possession."

The auditor reported that the disbursements by Warner and Wine, for and on account of the property, for taxes, interest on trust indebtedness, water rents and repairs, exceeded the rents and profits by $3868.95, which sum added to $6586.33—the sum paid for the property by Warner and Wine less the commission—made a total of $10,455.28, and was the sum which the complainant should pay to the defendants, as a condition of divesting them of their interest in the property. It will be observed that no interest was allowed upon the outlays of War-

ner and Wine, nor was any allowance made for the costs and disbursements occasioned in making their defence in the protracted litigation. These costs and disbursements were stated to aggregate $6918.85, of which $1626.00 was for examiner's fees.

Exceptions were filed to the report of the auditor, but the same were overruled, and a final decree was entered ordering the defendants to convey the lots to the complainant upon the payment within ninety days of $10,455.28 and any further expenditure on account of the property made after the close of the account embraced in the report of the auditor. It was further provided that in the event of non-payment within the time specified the bill of complaint should stand dismissed, with costs; and in the event of payment the respective parties should pay their own costs. On appeal the decree just referred to was affirmed, and, the Court of Appeals, in its opinion, stated that "the action of the court was in strict conformity with the mandate of this court and the accompanying opinion." This appeal was then taken.

Mr. J. J. Darlington and *Mr. William F. Mattingly* for appellants.

Mr. John G. Johnson for appellees.

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

The main asserted badges of fraud upon which the complainant based her contention that the conveyance by Dutton to Richardson on April 13, 1896, should be treated, so far as the complainant was concerned, as a nullity, were: 1. The gross inadequacy of a consideration; 2. A prior agency of the firm of B. H. Warner & Co., for the sale of the lots on behalf of the complainant; 3. The haste with which the negotiations for the sale were had and the sale was completed; and, 4. The execution of title to Richardson for the benefit of Warner and Wine and the concealment of the interest of the last-named defendants in the purchase.

Opinion of the Court.

To sustain and disprove these contentions voluminous evidence was introduced, which was elaborately and carefully reviewed in the opinions delivered by the courts below. Both the trial and appellate court concurred in holding that the proof absolutely vindicated the defendants from the charges of wrongdoing made against them and clearly established the want of merit in the contentions. As no appeal was taken by the complainant from the first decree of the Court of Appeals, and as the relief asked by the last amendment to the bill in effect abandoned the claim that the defendants had committed a fraud upon the complainant, by basing the claim for relief solely upon the hypothesis of a constructive fraud having been practiced upon Dutton, the entire want of foundation for the charges of wrongdoing urged against the defendants and upon which the long litigation proceeded may be taken as conclusively established.

Whatever may be said of the failure of Richardson in his answer to the original bill to fully and fairly disclose the actual transaction, certainly his not doing so did not long mislead the complainant or conceal from her the real facts. There is no question possible on this subject, since the complainant testified that shortly after the filing of the answer of Richardson to the original bill, statements of the defendant Warner made to the attorney of the complainant in the city of New York, disclosing the actual transaction, were communicated to her, and it also appears that the attorney for the defendants, in company with the defendant Wine, called upon the attorney of the complainant in the city of Washington and stated the facts of the transaction to him. With full knowledge, then, of the facts, and because of such knowledge, the amended and supplemental bill was filed making Warner and Wine defendants as the real purchasers.

The closest inspection of the bill, as originally filed or as amended, discloses no averment which can be construed as predicating relief upon the theory that Warner and Wine had practiced a constructive fraud upon Dutton by purchasing, without his knowledge and consent, property which had been placed by him in the hands of the firm of B. H. Warner & Co. for sale.

On the contrary, the sole ground of relief was the claim that Warner and Wine had in effect conspired with Dutton to defraud the complainant, and because thereof the complainant was entitled to recover the property from the said defendants without in anywise reimbursing them for their expenditures in the matter. The answer of Warner and Wine, whilst conceding that they were the real purchasers, took issue upon the charges of wrong and fraud alleged against them.

Looking into the record, we repeat, nothing is found conveying even an intimation that the parties considered during the proceedings leading up to the joinder of issue and trial which ensued that any issue existed between them than the one made by the pleadings as above stated. Indeed, the record makes clear the fact that both parties, in taking testimony, acted upon the assumption that it was a fact beyond dispute that the firm of B. H. Warner & Co. at the time of the sale represented the purchasers, Warner and Wine, and not the seller, Dutton. Thus, in interrogating the witness Mussey, who was at the time of the sale the attorney of Dutton, and who was called for the defendants, the following question was asked by counsel for complainant:

"Q. So that at the time of this transaction, in April, 1896, when you agreed with Mr. Warner and Mr. Wine to share with them the commission, they to have two thirds, or $500, and you to have one third, or $250, so far as any knowledge that you had on the subject is concerned, you were treating with them *as the brokers of Louis W. Richardson, or whoever the purchaser was.* Is that so?

"A. I treated with them as the brokers, and had no interest in who purchased it, so long as the money was paid for it."

Again, in cross-examining the defendant Wine, the following question was asked by the complainant:

"Q. Why did you conceal from Mrs. Mussey, at the time of the purchase of said property in April, 1896, your true connection with the said transaction as purchaser, and *hold yourself out as the broker or representative of the dummy in whose name you took title to the property*, taking two thirds of the commission for selling the property to yourself?"

Opinion of the Court.

Under the circumstances which we have stated, the first question which arises is, Was the Court of Appeals justified, after concluding every issue actually litigated, in favor of the defendants, in remanding the case for the purpose of allowing the complainant to amend the bill in order to assert a new and distinct ground of relief constituting a complete departure from the theory upon which the bill had been framed and upon which the case had been tried? And if it was so justified, was it authorized, whilst thus remanding the case for the purpose of allowing the amendment, to provide that the case should not be reopened; in other words, that the amendment could be made and relief granted on it and the defendants be deprived of all opportunity of interposing any defence? Inverting the order in which the questions have been just stated, and under the assumption that the court was justified on the record before it in remanding the case for the purpose of allowing the amendment, we think it was error to reopen the case in order to allow the amendment asserting the new and distinct ground of relief, and at the same time to treat the case as not reopened and the record as closed, the result being to deprive the defendants of all opportunity of a hearing on the new ground of relief permitted to be asserted against them. *Hovey* v. *Elliot*, 167 U. S. 409.

This conclusion would necessitate, in any event, a reversal, in order that a trial be had of the new and distinct issue raised by the amendment made under the sanction of the court. This does not, however, relieve us from the necessity of determining whether the court was justified in allowing the amendment, since, if it be found that error was committed in that particular, the appellants would be entitled to a decree of reversal, finally disposing of the controversy.

Obviously, the defendants Warner and Wine did not on the trial introduce any evidence to rebut a claim which was not made and which was in substance at war with the theory of the case propounded against them. As observed by the Court of Appeals, if the right existed in Dutton to disaffirm the sale to Richardson, as having been, in fact, made to his agents, it would have been incumbent upon Dutton, if he desired such re-

lief, to have filed "a *timely* bill for that purpose." The same obligation necessarily rested upon the complainant of distinctly and promptly asserting a right to relief of like character, if she desired such relief. This, however, was not done.

It cannot be said that the complainant failed in this particular because of ignorance on her part of the ground of relief in question, for, as we have already shown, the contract formed a part of the answer of Richardson, and the facts as to Warner and Wine being the real purchasers were known to the complainant at the time of the filing of the amended and supplemental bill. Indeed, certain also it is that every fact in the record from which the Court of Appeals deduced the conclusion that B. H. Warner & Co. were the agents of Dutton is shown to have been known to the complainant before the filing of the amended and supplemental bill. It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defence thereto, and then, after the submission of the cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground of relief. This is especially applicable when the facts upon which such amendment rests were known at the incipiency of the litigation and the character of the relief was such as called for promptness in asserting a right thereto. Cogency is added to these considerations when it is borne in mind that if the facts had been embodied in the bill, so as to have allowed issue to be taken thereon, they might have been fully met and disproved by the defendants. Even if these general equitable considerations might, under exceptional circumstances, be not controlling, they are certainly so when the special facts in the case in hand are borne in mind. Thus it is shown that soon after the filing of the answer of Richardson, when Warner and Wine, through their attorneys, called the attention of the counsel of complainant to the fact that Warner and Wine were the real purchasers, the defendants named expressed a willingness to

treat the purchase by them from Dutton as a loan, and to convey the property to the complainant upon being reimbursed their advances and expenses. This was declined. Again, in open court, in February, 1898, the proposition was distinctly made by counsel for the defendants to treat the transaction as a loan, "and to make conveyance of the property to the complainant on being reimbursed their actual advances." The response to this proposition was couched in the following language:

"Mr. Keane: Counsel for complainant desires to say that an offer of this kind made after the suit has been commenced and after it has been in litigation since September, 1896, and after a number of witnesses have been examined upon the part of the complainant, and after the complainant has been obliged to incur heavy expenses of retaining counsel, and of incurring the further expenses necessarily incident to the preparation of the trial of the case, such a proposition comes too late, and the complainant declines such a proposition for the reasons stated, and for the further reasons that the defendants were not at the time of the alleged purchase of such property *bona fide* purchasers thereof, but had knowledge of such facts and circumstances as put them upon inquiry and deprived them of the standing in a court of equity of *bona fide* purchasers."

Thus the defendants were distinctly notified that no adjustment was possible, but that the intention was to divest them of the property without reimbursement in whole or in part.

The complainant thus having expressly declined to put an end to the litigation, upon the theory that because of the *mala fides* of Warner and Wine she was entitled to an unconditional recovery of the property, she ought not, in equity, upon the collapse of her efforts to establish fraud and bad faith on the part of the defendants, to be allowed to reform her pleadings and change her attitude towards the defendants in order to obtain that which she had expressly elected not to seek and had persistently declined to accept.

The decrees of the Court of Appeals of the District of Columbia should be

Reversed, and the cause remanded to that court with instruc-

tions to reverse the decree of the Supreme Court of the District of Columbia, passed on June 13, 1900, *ordering a conveyance to the complainant on compliance with certain conditions, and to affirm and reinstate the decree of the Supreme Court of the District of Columbia, passed January* 24, 1899, *dismissing the bill and amended bills as against certain of the defendants; and it is so ordered.*

MR. JUSTICE HARLAN and MR. JUSTICE GRAY did not hear the argument and took no part in the decision of this case.

COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR *v.* LOUISIANA STATE BOARD OF HEALTH.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 4. Argued October 29, 30, 1900.—Affirmed June 2, 1902.

The law of Louisiana under which the Board of Health exerted the authority complained of in this case, is found in section 8 of Act 192 of 1898. The Supreme Court of Louisiana, interpreting this statute held that it empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, and that this power was intended to apply as well to persons seeking to enter the infected place, whether they came from without or within the State. *Held:* That this empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, and that the power was intended to apply as well to persons seeking to enter the infected place, whether they came from without or within the State.

THIS action was commenced in the state court against the Board of Health of the State of Louisiana and three persons who were members of said board, and whom it was sought to hold individually responsible for damages alleged to have been suffered from the enforcement of a resolution adopted by the board upon the theory that the resolution referred to was *ultra vires* and hence the members of the board who voted for it

were personally liable for any damages occasioned by the enforcement of the resolution. The board was thus described in the petition:

"That the defendant The State Board of Health was a body created by Act No. 192 of the General Assembly of the State of Louisiana of the year 1898, with power to sue and be sued, domiciled in this city, (the city of New Orleans,) and composed of seven members, whose duty it was, by the provisions of said act, to protect and preserve the public health by preparing and promulgating a sanitary code for the State of Louisiana, by providing for the general sanitation of the State, and with authority to regulate infectious and contagious diseases and to prescribe a maritime and land quarantine against places infected with such diseases."

It was asserted that the plaintiff, a corporation created by and existing under the laws of the Republic of France and a citizen of said republic, on or about September 2, 1898, caused its steamship Britannia to be cleared from the ports of Marseilles, France, and Palermo, Italy, for New Orleans with a cargo of merchandise and with about 408 passengers, some of whom were citizens of the United States returning home, and others who were seeking homes in the United States, and who intended to settle in the State of Louisiana or adjoining States, and that all the passengers referred to at the time of their sailing were free from infectious or contagious diseases. It was further averred that on September 29, 1898, the vessel arrived at the quarantine station some distance below the city of New Orleans, was there regularly inspected, and was found both as to the passengers and cargo to be free from any infectious or contagious disease, and accordingly was given a clean bill of health, whereby the ship became entitled to proceed to New Orleans and land her passengers and discharge her cargo. This, however, it was asserted she was not permitted to do, because, on the date last mentioned, at a meeting held by the Board of Health, the following resolution was adopted:

"*Resolved*, That hereafter in the case of any town, city or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers or others shall be allowed

to enter said town, city or parish so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

It was charged that in order to enforce this resolution the president of the Board of Health, who was one of the individual defendants, instructed the quarantine officer to detain the Britannia at the quarantine station, and the president of the board addressed to the agent of the steamship the following communciation explanatory of the detention of the vessel:

"Referring to the detention of the SS. Britannia at the Mississippi River quarantine station, with 408 Italian immigrants on board, I have to inform you that under the provisions of the new state Board of Health law, section 8, of which I enclose a marked copy, this board has adopted a resolution forbidding the landing of any body of people in any town, city or parish in quarantine. Under this resolution the immigrants now on board the Britannia cannot be landed in any of the following parishes of Louisiana, namely: Orleans, St. Bernard, Jefferson (right bank), St. Tammany, Plaquemines, St. Charles or St. John. You will therefore govern yourselves accordingly."

The president of the Board of Health, it was alleged, moreover notified the agent of the ship that if an attempt was made to land the passengers at any place contiguous to New Orleans, such place not being in quarantine, a quarantine against such place would be declared, and thus the landing be prevented.

It was averred that whilst the resolution of the Board of Health purported on its face to be general in its operation, in truth it was passed with the sole object of preventing the landing of the passengers from the Britannia, and this was demonstrated because no attempt was made by the Board of Health to enforce the provisions of the resolution against immigrants from Italy coming into the United States via the port of New York and thence reaching New Orleans by rail, and that after the promulgation of said resolution "more than 200 such persons, varying in groups of 30 to 100 in number, have from time to time been permitted to enter said city." It was averred that the action of the board was not authorized by the state

law, and if it was, such law was void because repugnant to the provision of the Constitution of the United States conferring upon Congress power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." Averring that damage had been already entailed to the extent of $2500, for which not only the board but its members who voted for the resolution were liable, and reserving the right to claim such future damage as might be entailed by the further enforcement of the resolution, the petition asked for an injunction restraining the enforcement of the resolution in question, and prayed judgment against the board and the members named for $2500 *in solido.*

The court declined to allow a preliminary restraining order, and upon a hearing on a rule to show cause, the injunction was refused. The order of the Board of Health, which was complained of, continued, therefore, to be enforced against the ship. Subsequently the plaintiff filed a supplemental and amended petition. It was reiterated that the immigrant passengers on board the Britannia were free from disease when they shipped and at the time of their arrival, and, in addition, it was alleged that the steamer with the immigrants on board had sailed from her port of departure "prior to the declaration by said Board of Health of the existence of any infectious disease in the city of New Orleans." It was alleged that, in consequence of the insistence of the Board of Health and its members, in enforcing the illegal order refusing to allow the landing of the immigrant passengers, the steamer had been obliged to proceed to Pensacola, Florida, where they were landed, and then the steamer returned to New Orleans for the purpose of discharging cargo. The damage resulting was averred to be $8500, besides the $2500 previously claimed, and a judgment for this amount, in addition to the previous sum, was also asked *in solido* against the board and the members thereof, who were individually made defendants. It was, moreover, averred that the action of the board was "in violation of the laws of the United States, and the rules and regulations made in pursuance thereof, relating to quarantine and immigration from foreign countries into ports of the United States, and especially acts of Congress ap-

proved February 15, 1893, and acts of Congress of March the 3d, 1893, August the 3d, 1872, and June the 26th, 1884, and the rules and regulations made in pursuance thereof, and of the treaties now existing between the United States, on the one part, and the Kingdom of Italy and the Republic of France on the other part."

The defendants filed a peremptory exception of no cause of action, which was sustained by the trial court, and the suit was therefore dismissed. On appeal to the Supreme Court of the State of Louisiana the judgment of the trial court was affirmed. 51 La. Ann. 645.

Mr. W. B. Spencer for plaintiff in error. *Mr. W. W. Howe* was on his brief.

Mr. F. C. Zacharie for defendant in error.

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

The law of Louisiana, under which the Board of Health exerted the authority which is complained of, is found in section 8 of Act No. 192, enacted in 1898. The portion of the section which is essential is as follows, the provision which is more directly pertinent to the case in hand being italicized:

"In case that any parish, town or city, or any portion thereof, shall become infected with any contagious or infectious disease, to such an extent as to threaten the spread of such disease to the other portions of the State, the state Board of Health shall issue its proclamation declaring the facts and ordering it in quarantine, and shall order the local boards of health in other parishes, towns and cities to quarantine against said locality, and shall establish and promulgate the rules and regulations, terms and conditions on which intercourse with said infected locality shall be permitted, and shall issue to the other local sanitary authorities instructions as to the measures adopted in quarantining against persons, goods or other property coming from said infected localities, and these rules and regulations,

terms and conditions shall be observed and obeyed by all other health authorities, provided that should any other of the non-infected portion of the State desire to add to the regulations and rules, terms and conditions already imposed by the state board, they do so on the approval of the state Board of Health. *The state Board of Health may, in its discretion, prohibit the introduction into any infected portion of the State, persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease.* The state Board of Health shall render the local boards of health all the assistance in their power and which the condition of their finances will permit."

The Supreme Court of the State of Louisiana, interpreting this statute, held that it empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, and that this power was intended to apply as well to persons seeking to enter the infected place, whether they came from without or from within the State. The court said:

"The law does not limit the board to prohibiting the introduction of persons from one portion of the State to another and an infected portion of the State, but evidently looked as well to the prohibition of the introduction of persons from points outside of the State into any infected portion of the State. As the object in view would be 'to accomplish the subsidence and suppression of the infectious and contagious diseases and to prevent the spread of the same,' it would be difficult to see why parties from outside of the State should be permitted to enter into infected places, while those from the different parishes should be prevented from holding intercourse with each other.

"The object in view was to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease and the spread of the same.

"The particular places from which the parties, who were to be prohibited from entering the infected district or districts, came could have no possible influence upon the attainment of the result sought to be attained.

"It would make no possible difference whether this 'added fuel' sought to be excluded should come from Louisiana, New York or Europe."

Referring to past conditions and the public dangers which had arisen from them, the evil which the statute of 1898 was intended to remedy was pointed out as follows:

"During the fall of 1897, and during the existence of an epidemic, a vessel arrived in the Mississippi River with emigrants aboard under conditions similar to those under which the Britannia reached the same stream in 1898.

"The excited public discussions at the time as to the right of the state board, under the then existing law, to prevent the landing of the emigrants and as to its duty in the premises, were so extended as to authorize us to take judicial notice of the fact, and in our opinion the clause in the present act which covers that precise matter was inserted therein for the express purpose of placing the particular question outside of the range of controversy.

"For a number of years past emigrants have been coming into New Orleans in the autumn from Italy.

"There was a probability when the general assembly met in 1898 that the epidemic of 1897 might be repeated, and a great probability that emigrants would seek to enter, as they had done the year before, to the great danger, not only of the people of Louisiana, but of the emigrants themselves.

"Independently of this, there was great danger to be apprehended from the increasing intercourse between New Orleans and the West India Islands in consequence of a war with Spain.

"It was to ward off these dangers that this particular provision was inserted in the act of 1898."

And by implication from the reasoning just referred to the existence of the conditions rendering it necessary to call the power into play in the case before it was recognized. Thus construing the statute, the state court held that it was not repugnant to the Constitution of the United States and was not in conflict with any law or treaty of the United States. These latter considerations present the questions which arise for our decision. All the assignments of error relied upon to show the

invalidity of the statute of the State of Louisiana, and hence the illegality of the action of the Board of Health from the point of view of Federal considerations, are, in the argument at bar, summarized in four propositions. We shall consider them separately and thus dispose of the case. In doing so, however, as the first and second contentions both rest upon the assertion that the statute violates the Constitution of the United States, we shall treat them together.

"First. The statute drawn in question, on its face and as construed and applied, is void for the reason that it is in violation of article I, section 3, paragraph 8, of the Constitution of the United States, inasmuch as it vests authority in the state Board of Health, in its discretion, to interfere with or prohibit interstate and foreign commerce.

"Second. The statute is void for inasmuch as it is in conflict with section 1 of the fourteenth article of amendment to the Constitution of the United States, in that it deprives the plaintiff of its liberty and property without due process of law, and denies to it the equal protection of the law."

That from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question. That until Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce, is not an open question. The doctrine was elaborately examined and stated in *Morgan Steamship Company* v. *Louisiana Board of Health*, 118 U. S. 455. That case involved determining whether a quarantine law enacted by the State of Louisiana was repugnant to the commerce clause of the Constitution because of its necessary effect upon interstate and foreign commerce. The court said:

"Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the States when

the vessel is coming from some other State of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens, are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Henderson* v. *The Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661.

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the State on the subject are valid. This follows from two reasons:

"1. The act of 1799, the main features of which are embodied in Title LVIII of the Revised Statutes, clearly recognizes the quarantine laws of the States, and required of the officers of the Treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws created after the passage of that statute, as well as to those then in existence; and when, by the act of April 29, 1878, 20 Stat. 37, certain powers in this direction were conferred on the Surgeon General of the Marine Hospital Service, and consuls and revenue officers were required to contrib-

ute services in preventing the importation of disease, it was provided that 'there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under state laws,' showing very clearly the intention of Congress to adopt these laws or to recognize the power of the States to pass them.

"2. But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress."

Again, in *Louisiana* v. *Texas*, 176 U. S. 1, 21, the court was called upon to consider a quarantine law of the State of Texas which by its terms was applicable to and was enforced as to both interstate and foreign commerce. After referring approvingly to the case which we have above cited, the court, speaking through Mr. Chief Justice Fuller, said:

"It is not charged that this statute is invalid nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserve powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government."

Further, in calling attention to the fact, as remarked by the court in *Morgan Steamship Company* v. *Louisiana Board of Health*, *supra*, that in the nature of things quarantine laws and laws relating to public health must necessarily vary with the different localities of the country, it was said:

"Hence even if Congress had remained silent on the subject it would not have followed that the exercise of the police power of the State in this regard, although necessarily operating on interstate commerce, would be therefore invalid. Although from the nature and subjects of the power of regulating com-

merce it must be ordinarily exercised by the national government exclusively, this has not been held to be so where in relation to the particular subject-matter different rules might be suitable in different localities. At the same time, Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation."

Despite these conclusive adjudications, it is earnestly insisted in the argument at bar that by a correct appreciation of all the decisions of this court on the subject, the rule will be discovered to be that the States may enact quarantine or other health laws for the protection of their inhabitants, but that such laws, if they operate upon or directly affect interstate or foreign commerce, are repugnant to the Constitution of the United States independently of whether Congress has legislated on such subjects. To sustain this contention a most copious reference is made to many cases decided by this court, where the nature and extent of the power of Congress to regulate commerce was considered and the validity of state legislation asserted to be repugnant to such power was passed upon. To analyze and review the numerous cases referred to in order to point out their want of relation to the question in hand, would involve in effect a review of the whole subject of the power of Congress to regulate commerce in every possible aspect, and an analysis of practically the greater body of cases which have in this court involved that serious and difficult subject from the beginning. We shall not undertake to do so, but content ourselves with saying, after duly considering the cases relied upon, that we find them inapposite to the doctrine they are cited to sustain, and hence, when they are correctly appreciated, none of them conflict with the settled rule announced by this court in the cases to which we have referred.

The confusion of thought which has given rise to the misconception of the authorities relied upon in the argument, and which has caused it to be supposed that they are apposite to the case in hand, is well illustrated by the premise upon which the proposition that the cited authorities are applicable rests. That proposition is thus stated in the printed argument (italics in the original):

"Turning now to the decisions of this court, it will be found that the basis upon which it has upheld the exclusion, inspection and quarantine laws of various States, is that criminals, diseased persons and things, and paupers, *are not legitimate subjects of commerce.* They may be attendant evils, but they are not legitimate subjects of traffic and transportation, and therefore, in their exclusion or detention, the State is not interfering with *legitimate* commerce, which is the only kind entitled to the protection of the Constitution."

But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that those cases expressly and unequivocally hold that the health and quarantine laws of the several States are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected, and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce. True, also, it was held in some of the cases referred to by counsel, that where the introduction of a given article was absolutely prohibited by a state law upon the asserted theory that the health of the inhabitants would be aided by the enforcement of the prohibition, it was decided that, as the article which it was thus sought to prohibit, was a well-known article of commerce, and there-

fore the legitimate subject of interstate commerce, it could not be removed from that category by the prohibitive effect of state legislation. But this case does not involve that question, since it does not present the attempted exercise by the State of the power to absolutely prohibit the introduction of an article of commerce, but merely requires us to decide whether a state law, which regulates the introduction of persons and property into a district infested with contagious or infectious diseases, is void, because to enforce such regulation will burden interstate and foreign commerce, and therefore violate the Constitution of the United States. It is earnestly insisted that the statute, whose constitutionality is assailed, is, on its face, not a regulation, but an absolute prohibition against interstate commerce, and it is sought to sustain this contention by various suggestions as to the wrong which may possibly arise from a perversion and an abuse by the state authorities of the power which the statute confers. Thus it is said, what is an infectious and contagious disease is uncertain, and involves a large number of maladies. How many cases of such malady are essential to cause a place to be considered as infected with them is left to the determination of the Board of Health. That board, it is argued, may then arbitrarily, upon the existence of one or more cases of any malady which it may deem to be infectious or contagious, declare any given place in the State, or even the whole State of Louisiana, infected, and proceed to absolutely debar all interstate or foreign commerce with the State of Louisiana. True it is, as said in *Morgan* v. *Louisiana*, *ubi sup.*:

"In all cases of this kind it has been repeatedly held that, when the question is raised whether the state statute is a just exercise of state power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Cannon* v. *New Orleans*, 20 Wall. 587."

But this implies that we are to consider the statute as enacted and the natural results flowing from it. It does not import that we are to hold a state statute unconstitutional by indulging in

conjecture as to every conceivable harm which may arise or wrong which may be occasioned by the abuse of the lawful powers which a statute confers. It will be time enough to consider a case of such supposed abuse when it is presented for consideration. And it is also to be borne in mind, as said by this court in *Louisiana* v. *Texas*, *supra*, 22, if any such wrong should be perpetrated "Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation." And the views which we have previously expressed suffice to dispose of the contention that the subjecting of the vessel of the plaintiff in error to the restriction imposed by the quarantine and health law of the State operated to deprive the defendant in error of its property without due process of law, in violation of the Fourteenth Amendment. It having been ascertained that the regulation was lawfully adopted and enforced the contention demonstrates its own unsoundness, since in the last analysis it reduces itself to the proposition that the effect of the Fourteenth Amendment was to strip the government, whether state or national, of all power to enact regulations protecting the health and safety of the people, or, what is equivalent thereto, necessarily amounts to saying that such laws when lawfully enacted cannot be enforced against person or property without violating the Constitution. In other words, that the lawful powers of government which the Constitution has conferred may not be exerted without bringing about a violation of the Constitution.

"Third. The statute as applied and construed is void, for the reason that it is in conflict with treaties between the United States on the one part and the Republic of France and the Kingdom of Italy on the other part, guaranteeing certain rights, privileges and immunities to the citizens and subjects of said countries."

Reliance is placed to sustain this proposition, on the provisions of a treaty concluded with the Kingdom of Italy on February 26, 1871; on the terms of a treaty with Great Britain of July 3, 1815, as also a treaty between the United States and the Kingdom of Greece, concluded December 22, 1837, and one con-

cluded with the Kingdom of Sweden and Norway on July 24, 1827. The treaties of other countries than Italy are referred to upon the theory that as by the treaty concluded with France on April 3, 1803, by which Louisiana was acquired, it was provided that France should be treated upon the footing of the most favored nation in the ports of the ceded territory, therefore the treaties in question made with other countries than France were applicable to the plaintiff in error, a French subject.

Conceding, *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to and did not deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon. The text of article XV of this treaty is the provision to which our attention is directed, and it is reproduced in the margin.[1]

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[1] "Article XV. It is agreed that vessels arriving directly from the United States of America at a port within the dominion of His Majesty the King of Greece, or from the Kingdom of Greece, at a port of the United States of America, and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessel shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes; Provided always, that there shall be on board no person who, during the voyage, shall have been attacked with any malignant or contagious disease; that such vessel shall not, during the passage, have communicated with any vessel liable itself to undergo quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that country should be considered as suspected, and consequently subject to quarantine."

It is apparent that it provides only the particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United States for the purpose of establishing that infectious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed.

"Fourth. The statute as applied is void for the reason that it is in conflict with the laws of the United States relating to foreign immigration into the United States."

In the argument at bar this proposition embraces also the claim that the statute is void because in conflict with the act of Congress of 1893 entitled "An act granting additional quarantine powers and imposing additional duties upon the Marine

Hospital Service." 27 Stat. 449. And that it also is in conflict with the rules and regulations adopted for the enforcement of both the immigration laws and the quarantine law referred to.

The immigration acts to which the proposition relates are those of March 3, 1875, of August 3, 1882, of June 26, 1884, of February 26, 1885, of March 23, 1887, and March 3, 1891, and the regulations to enforce the same. Without undertaking to analyze the provisions of these acts, it suffices to say that, after scrutinizing them, we think they do not purport to abrogate the quarantine laws of the several States, and that the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary, and subject to such quarantine laws. So far as the act of 1893 is concerned, it is manifest that it did not contemplate the overthrow of the existing state quarantine systems and the abrogation of the powers on the subject of health and quarantine exercised by the States from the beginning, because the enactment of state laws on these subjects would, in particular instances, affect interstate and foreign commerce. An extract from section 3 of the act, which we think makes these conclusions obvious, is reproduced in the margin.[1]

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[1] "SEC. 3. That the Supervising Surgeon General of the Marine Hospital Service shall, immediately after this act takes effect, examine the quarantine regulations of all state and municipal boards of health, and shall, under the direction of the Secretary of the Treasury, coöperate with and aid state and municipal boards of health in the execution and enforcement of the rules and regulations of such boards and in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury, to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia; and all rules and regulations made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place; and at such ports and places within the United States as have no quarantine regulations under state or municipal authority, where such regulations are, in the opinion of the Secretary of the Treasury, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and at such ports and places within the United States where

Nor do we find anything in the rules and regulations adopted by the Secretary of the Treasury in execution of the power conferred upon him by the act in question giving support to the contention based upon them. It follows from what has been said that the Supreme Court of Louisiana did not err in deciding that the act in question was not repugnant to the Constitution of the United States, and was not in conflict with the acts of Congress or the treaties made by the United States which were relied upon to show to the contrary and its judgment is, therefore,

Affirmed.

MR. JUSTICE BROWN, with whom was MR. JUSTICE HARLAN, dissenting.

The power of the several States, in the absence of legislation by Congress on the subject, to establish quarantine regulations, to prohibit the introduction into the State of persons infected

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quarantine regulations exist under the authority of the State or municipality which, in the opinion of the Secretary of the Treasury, are not sufficient to prevent the introduction of such diseases into the United States, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, the Secretary of the Treasury shall, if in his judgment it is necesary and proper, make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and when said rules and regulations have been made they shall be promulgated by the Secretary of the Treasury and enforced by the sanitary authorities of the States and municipalities, where the state or municipal health authorities will undertake to execute and enforce them; but if the state or municipal authorities shall fail or refuse to enforce said rules and regulations the President shall execute and enforce the same and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose. The Secretary of the Treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers and crew, which shall be published and communicated to and enforced by the consular officers of the United States."

with disease, or recently exposed to contagion, and to impose a reasonable charge upon vessels subjected to examination at quarantine stations, is so well settled by repeated decisions of this court as to be no longer open to doubt. This case, however, does not involve that question, but the broader one, whether, in the assumed exercise of this power, the legislature may declare certain portions of the State to be in quarantine, and prohibit the entry therein of *all* persons whatsoever, whether coming from the United States or foreign countries, from infected or uninfected ports, whether the persons included are diseased or have recently been exposed to contagion, or are perfectly sound and healthy, and coming from ports in which there is no suspicion of contagious diseases.

I have no doubt of the power to quarantine all vessels arriving in the Mississippi from foreign ports for a sufficient length of time to enable the health officers to determine whether there are among her passengers any persons afflicted with a contagious disease. But the State of Louisiana undertakes to do far more than this. It authorizes the state Board of Health at its discretion to "prohibit the introduction into any infected portion of the State of persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of said persons would add to or increase the prevalence of the disease;" and at its meeting on September 29, 1898, the Board of Health adopted the following resolution:

"That hereafter, in the case of any town, city or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers or others shall be allowed to enter said town, city or parish so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

In other words, the Board of Health is authorized and assumes to prohibit in all portions of the State which it chooses to declare in quarantine, the introduction or immigration of all persons from outside the quarantine district, whether infected or uninfected, sick or well, sound or unsound, feeble or healthy; and that, too, not for the few days necessary to establish the sanitary *status* of such persons, but for an indefinite and possi-

bly permanent period. I think this is not a necessary or proper exercise of the police power, and falls within that numerous class of cases which hold that States may not, in the assumed exercise of police power, interfere with foreign or interstate commerce.

The only excuse offered for such a wholesale exclusion of immigrants is, as stated by the Supreme Court, "to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease, and the spread of the same." In other words, the excuse amounts to this: that the admission, even of healthy persons, adds to the possibility of the contagion being communicated upon the principle of adding fuel to the flame. It does not increase the danger of contagion by adding infected persons to the population, since the bill avers that all the immigrants were healthy and sound. All it could possibly do is to increase the number of persons who might become ill if permitted to be added to the population. This is a danger not to the population, but to the immigrants. It seems to me that this is a possibility too remote to justify the drastic measure of a total exclusion of all classes of immigrants, and that the opinion of the court is directly in the teeth of *Railroad Company* v. *Husen*, 95 U. S. 465, wherein a state statute, which prohibited the driving or conveying of any Texas, Mexican or Indian cattle into the State, between March 1 and November 1 in each year, was held to be in conflict with the commerce clause of the Constitution. Such statute was declared to be more than a quarantine regulation, and not a legitimate exercise of the police power of the State. Said Mr. Justice Strong, page 472: "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with the transportation into or through the State, beyond what is absolutely necessary

for its self-protection. It may not under the cover of exerting its police powers substantially prohibit or burden either foreign or interstate commerce." The statute was held to be a plain intrusion upon the exclusive domain of Congress; that it was not a quarantine law; not an inspection law, and was objectionable because it prohibited the introduction of cattle, no matter whether they may do an injury to the inhabitants of a 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." Cases covering the same principle are those of *State* v. *Steamship Constitution*, 42 Cal. 578, and *City of Bangor* v. *Smith*, 83 Maine, 422.

I am also unable to concur in the construction given in the opinion of the court to the treaty stipulation with France and other foreign powers. The treaty with France of 1803 provides that "the ships of France shall be treated upon the footing of the most favored nation in the ports above mentioned" of Louisiana. Article 14 of the treaty with Greece of December 22, 1837, set forth in the opinion, provides that vessels arriving directly from the Kingdom of Greece at any port of the United States of America, "and provided with a bill of health granted by an officer having competent power to that effect, at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessel shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes: *Provided always*, That there shall be on board no person who, during the voyage, shall have been attacked with any malignant or contagious disease; that such vessel shall not, during the passage, have communicated with any vessel liable itself to undergo quarantine, and that the country whence they came, shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued, in consequence of which, all vessels coming from that country should be considered as suspected, and consequently subject to quarantine."

Statement of the Case.

If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provision of the treaty that vessels "shall be subject to no other quarantine than such as may be necessary for the visit of a health officer of the port, after which such vessels shall be allowed immediately to enter and unload their cargoes," I am unable to conceive a state of facts which would constitute a violation of that provision. Necessary as efficient quarantine laws are, I know of no authority in the States to enact such as are in conflict with our treaties with foreign nations.

CAPITAL CITY LIGHT AND FUEL COMPANY *v.* TALLAHASSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 209. Submitted April 7, 1902.—Decided June 2, 1902.

The city of Tallahassee has never been under obligation to take electric lighting from the Capital City Light and Fuel Company.

There has been no impairment of any contract between the city and the plaintiff in error or its predecessor, and the city has the right to avail itself of the privileges granted by the acts of 1897 and 1899, so far as regards the electric lighting of the city.

THE plaintiff in error, being the plaintiff below, brings this case here by writ of error to the Supreme Court of the State of Florida for the purpose of reviewing a judgment of that court, affirming the judgment of the circuit court of the second judicial district of that State, dismissing plaintiff's bill of complaint against the defendant with costs.

The bill shows that the Tallahassee Gas and Electric Light Company was incorporated pursuant to the laws of the State, December 20, 1887, for the purpose, as stated in its articles of association, of constructing, maintaining and operating gas works and electric light works in the city of Tallahassee, and for the manufacture of gas for light and fuel, or for the pur-

pose of disposing of or dealing in coal or wood for fuel, and in maintaining and operating electric light machinery for supplying lights in the city, or for manufacturing or dealing in any and all manner of artificial light or heat within that city. After its incorporation the company applied to the city council for the franchise of constructing gas and electric light works in the city for the purposes declared in its charter, and, pursuant to such application, an ordinance of the city council was duly passed on January 4, 1888, the first section of which authorized the company "to construct gas and electric light works in the city of Tallahassee, and for that purpose that the said company shall have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same, and to erect such lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in said city of Tallahassee, and to this end the Tallahassee Gas and Electric Light Company are authorized to make such excavations or erect such structures, poles or towers, and run wires thereto along the streets of said city, as may be necessary or essential. . . ."

Provision was also made in the ordinance as to the manner of excavating the streets, constructing the works and as to the quality and price of the gas to be furnished and the time within which the gas works should be completed and the plant put in operation. It was also provided that the company should file a written acceptance of the ordinance, whereupon the same should become binding upon both parties.

Section 7 of the ordinance provided for the completion of the gas works and for operating the same within a short time, stated therein, and ended with the following provision:

"And the said Tallahassee Gas and Electric Light Company shall put in and operate electric lights as soon as sufficient consumers can be secured to pay eight per cent interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights."

Sections 10 and 11 of the ordinance read as follows:

"SEC. 10. That the said city of Tallahassee, in consideration of the foregoing requirements being complied with on the part

of the said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, shall and hereby obligates itself to take all gas which it may wish to use in lighting its streets or buildings from said company at a price of not more than one and one half dollars ($1.50) per one thousand feet for such as may be used in public buildings used exclusively by said city, and at a price of not more than ($30) thirty dollars per annum for each street lamp as hereinbefore provided for in section six of this ordinance, for the period of twenty-five consecutive years from the completion of said gas works: *Provided*, That nothing herein shall be construed as an obligation on the part of the said city of Tallahassee to take any gas from said company.

"SEC. 11. That the privileges and licenses herein and hereby granted shall be exclusive in and to said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, for and during the term of twenty-five years."

After the adoption of the ordinance the company filed its acceptance thereof, and proceeded to the construction of its gas works, which it completed, and thereafter furnished gas without any complaint until November 8, 1893, when a receiver was appointed, and subsequently its property was sold under a foreclosure decree. It was bid in by William A. Rawls, and a deed made to him. Thereafter, and on March 19, 1894, the plaintiff in error was incorporated, and the property conveyed to it by Rawls. It was stated in the articles of incorporation that the general nature of the business of the company to be transacted by it was "to acquire, construct, improve, maintain and operate gas works and electric light works in and adjacent to the city of Tallahassee, in Leon County, State of Florida, and to manufacture gas for light and fuel; to dispose of and deal in coal or wood for fuel; to construct, maintain and operate electric light machinery for supplying lights in and about the said city, or for manufacturing and dealing in any and all manner of artificial light or heat within or adjacent to said city."

The company was incorporated for the purpose of operating under the terms and provisions of the ordinance of the city above mentioned, the property purchased by Rawls, which he

had purchased for the purpose of transferring to the company, and in pursuance of such purpose the property was made over to the company, which entered into the possession and assumed the management and control thereof, and continued the manufacture of gas for the purpose of supplying the city and its inhabitants with light and heat, and it has since coming into the possession of the property enlarged and extended its plant, and met the increased demands of the city and its inhabitants, the city having ever since recognized, treated and dealt with the company as the lawful successor of the Tallahassee Gas and Electric Light Company, and the legal assignee of all the rights, franchises, privileges and contracts created and conferred on that company by the ordinance of the city of Tallahassee.

The legislature on June 5, 1897, passed an act, chapter 4600 of the Laws of Florida, page 141, entitled "An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease or establish and maintain within its limits one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided." Thereafter, and on May 27, 1899, the legislature of the State passed another act, to enable the city of Tallahassee to exercise the powers provided by the act of 1897, above mentioned. This act of 1899 granted to the city the right to construct and maintain its own electric light plant upon complying with certain conditions specified in the act. These conditions the city proceeded to comply with, and passed a resolution to build and operate an electric light plant of its own, which was ratified at an election by the people of the city, and the city council was about to proceed to carry out the plan for the erection and operation of such electric lighting plant to light the city under the provisions of the act of 1899, when this suit was commenced.

The plaintiff duly protested at each step against the action of the city council for the erection and operation of such a plant, and claimed that it would be a violation and impairment of the contract which it held with the city, and would very greatly injure, if not ruin, the plaintiff in error. It was also stated

that there has never been a time since the establishment of the gas works in that city that the plaintiff in error, or its predecessor, could have procured sufficient consumers to pay eight per cent per annum on the additional capital required to purchase the machinery for and put into practical operation an electric lighting system therein. The bill prayed that the city and its officers might be enjoined from establishing and maintaining an electric plant, and from furnishing electric light to the inhabitants of the city during the balance of the period of twenty-five years for which the exclusive franchise of constructing gas and electric works in that city, and for using the streets thereof for that purpose, and for furnishing gas and electric light to the inhabitants of the city was granted, to wit, until the year 1913. The bill also prayed that the city should be enjoined from making or entering into any contract or from performing any contract with any corporation or firm for furnishing electric lighting and other machinery, and that the city should be enjoined from issuing its bonds for the payment of any such plant.

This bill was demurred to for want of equity, in that it showed no facts entitling complainant to relief against the defendant as to the matters contained in it. The demurrer was sustained and the complainant's bill dismissed, and the judgment entered thereon was affirmed by the Supreme Court of Florida. 28 Southern Rep. 810.

Mr. Frederick T. Myers for plaintiff in error.

Mr. George T. Raney for defendant in error.

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

The plaintiff in error claims that, under the city ordinance, it has a valid contract for the exclusive use of the streets of the city of Tallahassee for the purpose of furnishing both gas and electric light, and that the subsequent acts of the legislature, providing for the erection and operation by the city of an

electric light plant, impair the obligation of its contract, and are therefore void.

As the case involves the provision of the Federal Constitution, which prohibits the States from passing any law impairing the obligation of a contract, and as the state court has given effect to subsequent legislation, which, it is claimed, results in the impairment of the obligation of plaintiff's contract with the city, we are bound to determine for ourselves as to the existence and meaning of the alleged contract, in order to determine the question whether subsequent legislation has impaired the obligation thereof.

Plaintiff in error claims the exclusive right to use the streets and furnish both gas and electric lights by virtue of section 11 of the ordinance of the city council, referred to in the foregoing statement of facts, and by virtue of the provisions of section 38 of the general corporation act of August 8, 1868. We concur in substance in the opinion of the state court of Florida, 28 South. Rep. 813, wherein it stated as follows:

"A careful reading of the ordinance passed in 1888 will show that the city is under no obligation whatever to the appellant or its predecessor company to light the streets and public buildings of the city with either gas or electricity manufactured by said companies. Nothing is said in the ordinance about lighting the streets or public buildings with electricity manufactured by the company. In respect to gas, the city was not required to use any at all, but it obligated itself to take all gas that it might wish to use in lighting its streets and buildings from the company at prices not to exceed the amounts named for a certain term of years. There is no contract, therefore, between the city and the company that the latter shall have the right to furnish the city for lighting its streets and public buildings, all or any, by electricity used for the purpose, nor is there any stipulation in the ordinance that the city will use nothing but gas, nor that the city will not own or operate an electric light plant for supplying the city and its inhabitants with light. If the city is debarred from erecting an electric light plant by the ordinance passed by it, it is because that ordinance legally grants the company the exclusive privilege and license to use

the streets, alleys and lots of the city for the purpose of constructing and operating a plant and its instrumentalities for furnishing electric lights in the city."

The general law of Florida for the incorporation of municipal corporations, passed August 6, 1868, while empowering a city to provide for lighting its streets, and giving to it the power to regulate and control the use of its public streets, gives the city no power to grant an exclusive use of its streets to any person or corporation for the purpose of lighting the city or for providing light to its citizens. The power to obtain such exclusive use of the streets of the city, if not granted by the municipal corporation act of 1868, is said to be found in the general act passed August 8, 1868, or two days subsequently to the above act, and known as chapter 1639 of the Laws of Florida, providing for the incorporation of corporations other than those of a municipal character. Section 38 of such act reads as follows:

"Any corporation organized and put into successful operation under this act shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commences to carry out in good faith the terms of its articles of incorporation: *Provided, however*, That this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit: the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience and to take private property for the public use, and the like."

The defendant in error contends that the proper construction of that section does not authorize the exclusive use of the public streets of the city for lighting purposes even if consented to by the city; that it cannot reasonably be supposed that the legislature, while omitting to give to cities the power of granting exclusive privileges in its streets for lighting or any other purpose, would, at the same time, by another act, grant to a private corporation incorporated thereunder, the right to the exclusive possession of the streets thereof for the purpose of executing the

business for which it was incorporated; that if it were intended that the city should have power to grant such exclusive use it would have been stated in the act providing for the incorporation of cities, and, if it were not so intended, it cannot be implied from the language of the section above quoted, found in an act referring to corporations other than municipal. The two acts, it is said, must be reconciled, and it can be done by excepting from the application of the thirty-eighth section the right to an exclusive use of the public streets of a city for any purpose. The plaintiff in error concedes that the city has full control and management of its streets, and that the plaintiff could not use the streets for the purpose of laying its pipes, etc., therein without the consent of the city. But it urges that, having secured such consent, it is authorized to maintain the exclusive use by reason of the thirty-eighth section above quoted, even if the city had no right to grant it under the act providing for the incorporation of cities. This question, while stated, was not decided by the court below, and we do not find it necessary to decide it ourselves.

The ordinance adopted by the city council has reference to two absolutely separate and distinct privileges, although they are contained in one and the same ordinance. One privilege is to use the streets of the city for the purpose of laying down gas mains and other pipes, to distribute gas throughout the city and to supply consumers with that article. The other is the right to the use of the streets of the city for the purpose of erecting poles and other things to convey the electricity necessary for lighting purposes. These two privileges are as absolutely separate and distinct as is a privilege to convey by railroad from that by steamboat or by stage coach. It is seen by the terms of the ordinance that it was not contemplated that these different privileges and plants should be availed of and constructed at the same time, but on the contrary the gas plant was to be constructed at once, while the obligation to construct the other was left in abeyance and not to be entered upon until consumers enough could be secured to pay eight per cent per annum on the additional capital required to purchase the machinery for and put in practical operation the

lighting by electricity. The two grants might, therefore, have been in two separate ordinances and given to separate persons, firms or corporations. The operation of one would not interfere with that of the other, except perhaps on a question of financial success, but so far as the character of the two grants is concerned, each one is wholly separate and distinct from the other.

The city has never been under any obligation to take electric lighting from the corporation, even after the plant had been erected and was in operation. The exclusive character of the privilege, assuming it to exist by virtue of section 38 of the corporation law, already referred to, does not commence until the company has begun to do the thing required by the ordinance, as the consideration for the grant of the privilege. Nothing has been done by the plaintiff in error towards commencing work looking to the erection and operation of the electric plant. Upon this subject the Supreme Court of Florida stated as follows (28 Southern Reporter, 814):

"It appears from the pleadings that neither the Tallahassee Gas and Electric Light Company, nor the appellant company, ever established an electric light plant in the city of Tallahassee in pursuance of the authority conferred upon either of them. From the organization of the first company up to the time the gas plant was sold at judicial sale about six years had elapsed, and from the time of the judicial sale to the time the city began proceedings to enable it to establish an electric light plant about six years more elapsed. During all this period of time neither company attempted to construct an electric light plant as authorized by its charter. In the meantime that provision in the general incorporation law relating to exclusive privileges had been repealed by the legislature of 1891, and an act passed in 1897 specially authorizing cities and towns to establish gas and electric light plants to supply themselves and their citizens with light, and still later, in 1899, special legislative authority was given the city of Tallahassee to establish an electric light plant. Neither the Tallahassee Gas and Electric Light Company nor appellant company has acquired any vested right to erect an electric light plant by the investment of any money in any such

plant, and the question arises as to whether or not any constitutional right has been impaired by the repeal of the statute granting the alleged exclusive privilege, and by the legislation authorizing the city to do that which is a public benefit, and that which for some twelve years the companies have neglected to do as authorized by their charters and the city ordinance. We are unable to see that any vested right of either company, so far as the establishment of an electric light plant is concerned, is impaired by the legislation which authorizes the city to do that which it now proposes to do. In the first place, the statute, properly construed, does not grant the exclusive privilege in respect to the electric light plant as claimed. A grant of exclusive privileges to appellant's predecessor would be the grant of a franchise from the State, the possession of which would enable it to obtain a practical monopoly of the gas and electric light business in Tallahassee for the term specified. All such grants are strictly construed against the grantee, and nothing passes thereby but such as is clearly intended. *Saginaw Gas Light Company* v. *City of Saginaw*, 28 Fed. Rep. 529; *Florida, Atlantic & Gulf Central Railroad Company* v. *Pensacola & Georgia &c. Company*, 10 Fla. 145. Under the express language of this statute the exclusive privilege did not attach until the corporation was not only organized, but put into successful operation, and the privileges were to attach for twenty years from the time the corporation commenced to carry out in good faith the terms of its articles of incorporation. The condition upon which the exclusive privilege, so far as the electric light plant was concerned, attached, has never been performed, for the company has never been put into successful operation, so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition precedent, and therefore it had no exclusive privilege to transfer to appellant company, so far as the electric light plant is concerned. In the next place, even if an exclusive privilege of

this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right so as to be protected by the constitution of the State or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege. *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646; *Louisville & Nashville Railroad Company* v. *Kentucky*, 161 U. S. 677. See also *Chincleclamouche Lumber & Boom Company* v. *Commonwealth*, 100 Pa. St. 438.

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"Our attention is called to that clause in the seventh section of the city ordinance which required the company to put in electric lights only when sufficient consumers could be secured to pay eight per cent interest per annum on the additional capital required to purchase the machinery and put in successful operation electric lights. It would appear from this clause that from the beginning the company only intended to avail itself immediately of that provision of its charter authorizing it to erect a gas plant and to use the other power granted by its charter, together with the city ordinance, to shut out competition in its business from electric light companies, intending only to put in an electric light plant whenever that plant could be made to secure it an annual profit on its investment in that plant of eight per cent. It is quite apparent that the legislature never intended to secure to it any such right, but, on the contrary, intended the privilege to extend only so far as to secure the company from competition in matters wherein it had complied with its charter by being put into successful operation. We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but even if it did have such power, it could not confer such exclusive right, and at the same time defer construction of the plant until such time as it could be made to pay eight per cent upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the public purpose of furnishing electric lights

for twenty-five years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as it can make an annual profit of eight per cent on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit, *Florida Central & Peninsular Railroad Company* v. *Ocala Street & Suburban Railroad Company*, 39 Fla. 306; *Gonzales* v. *Sullivan*, 16 Fla. 791, 820, and, even if it did, so long as the grantee failed to invest money in a plant, the ordinance could be repealed or modified, being without consideration.

"We have not overlooked the fact that the first company performed its charter powers in part by erecting and operating a gas plant, and as to that plant, and the business connected therewith, it may have possessed exclusive privileges under the statute which could not be impaired by subsequent legislation, and it may be that such privileges passed to appellant through the judicial sale. As to that we express no opinion. But while the purpose of erecting both plants would be the same, in that they would both furnish light to the city and its people, yet they furnish a different light and require separate and different plants and instrumentalities for their operation. We think they are so distinct in character as to amount to separate undertakings, and they are so treated in the articles of association of both companies, and in the ordinance. Power to operate the one would not include power to operate the other, and permission to use the streets for one would not include permission to use them for the other. *City of Newport* v. *Newport Light Company*, 89 Ky. 454. The exclusive privileges as to the electric light plant could not have operated as a consideration for erecting the gas plant; for such privileges, under the statute were to attach to the electric light business only when that plant was put in."

We concur in the result arrived at in the foregoing extract from the opinion of the state court, and, in common with that court, we hold that there has been no impairment of any contract between the city and the plaintiff in error or its predecessor, and that the city has the right to avail itself of the priv-

Counsel for Parties.

ileges granted by the acts of 1897 and 1899 of the legislature already mentioned, so far as regards the electric lighting of the city.

The judgment is, therefore,

Affirmed.

HOTEMA *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

No. 572. Submitted April 28, 1902.—Decided June 2, 1902.

In relation to the part of this charge, in which the court speaks of an irresistible impulse to commit the murder, counsel for the defendant says that he made no claim that the defendant was actuated by an irresistible impulse, and that there is nothing in the evidence to show that he was; that what he did claim was that the defendant was laboring under an insane delusion, and that this charge did not bring that subject before the jury. As there is no portion of the evidence returned in the bill of exceptions, this court is unable to judge whether there was any which would justify, or which did justify the court in submitting the question of irresistible impulse to the jury. If there had been evidence on that subject, the submission of the question was certainly as fair to the defendant as he could ask. The court decides nothing further than that.

Upon the other portion of the charge, as to the general liability of the defendant to the criminal law and to the obligation of the government to prove him guilty beyond a reasonable doubt upon taking into consideration all the evidence, and in regard to every essential element of the crime, the charge of the court was undoubtedly correct.

Taking the whole charge together the court properly laid down the law in regard to the responsibility of the defendant on account of his alleged mental condition.

The question whether, upon a consideration of the facts, the extreme penalty of the law should be carried out upon this defendant is not one over which this court has jurisdiction.

THE case is stated in the opinion of the court.

Mr. Jacob C. Hodges for Hotema.

Mr. Assistant Attorney General Beck for the United States.

Opinion of the Court.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was indicted for the murder of Vina Coleman on April 14, 1899, in the Indian Territory. He is an Indian of the Choctaw tribe of Indians, and after having pleaded not guilty to the indictment the venue was changed upon motion, and the cause was sent for trial to the United States District Court holden at Paris in the Eastern District of Texas. Upon the trial before that court the defendant set up the defence of insanity, the jury found him guilty of murder as charged in the indictment, and he was sentenced to suffer the penalty of death. The defendant in the indictment has brought the case here to review that judgment. There is no part of the evidence contained in the bill of exceptions.

The errors which are assigned in this case relate to those contained in the charge of the court to the jury. The first one we notice is an exception to a statement contained in the charge of the court that: "In this case it is not material, so far as the question of the guilt or innocence is concerned, that the evidence fails to show any motive for the killing." The defendant claims that this is error, because the want of motive is material, and the jury should consider that fact in determining the issue as to defendant's sanity at the time of the homicide. The exception to this single remark of the court fails to give the proper view of the charge, and gives a false impression as to the meaning of the court therein. The attention of the court was directed to the subject of proving motive upon the trial of a person charged with murder, and he charged that it was unnecessary to show a motive for the commission of the crime so long as the evidence satisfied the jury that the person charged was in fact guilty of the act; that it was not necessary to prove by any particular expression of the party charged that he had some personal or what may be termed express malice toward the individual who was killed. The court charged as follows upon this subject:

"Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, and in the peace of the United States, with malice aforethought, either

express or implied. The term express malice means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally of the term 'express malice,' are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be killing upon express malice. These are only illustrations of what is meant by the terms 'express malice,' and any homicide that is shown to have been the result of wilful intent and committed without legal excuse is said to be a killing upon express malice.

"By the term 'implied malice' is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful, that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing, because if the killing was intentional and was not justifiable, the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts."

The expression in the charge which plaintiff excepted to, when read in connection with all that the court said upon the question, is undoubtedly correct.

Prior to giving specific instructions in regard to the legal meaning of the word "insanity," and as to its sufficiency as a defence to the party accused of crime, the court made some general statements upon that subject, as follows:

"Every person, charged with crime, is presumed to be sane; that is, of sound memory and discretion, until the contrary is shown by proof. No act done in a state of insanity can be punished as an offence. The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proven to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to the law. Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists."

The court also charged:

"That the burden is upon the government throughout the entire case to prove every essential element of the case charged, and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant Hotema was sane at the time of the commission of the act charged, you will acquit him. . . . The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed Hotema had a diseased

brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he cannot be punished by law. But if his brain was not in this condition, he can be punished by law, remembering that the burden is upon the government to establish that he was of sound mind, and by that term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and knowing that the act he was committing at the time he was performing it was a wrongful act in violation of human law, and he could be punished therefor, and that he did not perform the act because he was controlled by irresistible and uncontrollable impulse. In that state of case the defendant could not be excused upon the ground of insanity, and it would be your duty to convict him. But if you find from the evidence or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was the product of such disease, and that he was incapable of forming a criminal intent, and that he had no control of his mental faculties and the will power to control his actions, but simply slew Vina Coleman because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled to an acquittal."

In relation to the latter part of this charge, in which the court speaks of an irresistible impulse to commit the murder, counsel for the defendant says that he made no claim that the defendant was actuated by an irresistible impulse, and that there is nothing in the evidence to show that he was; that what he did claim was that the defendant was laboring under an insane delusion, and that this charge did not bring that subject before the jury. As there is no portion of the evidence returned in the bill of exceptions, we are unable to judge whether there was

any which would justify, or which did justify the court in submitting the question of irresistible impulse to the jury. If there had been evidence on that subject, the submission of the question was certainly as fair to the defendant as he could ask. We decide nothing further than that.

Upon the other portion of the charge, as to the general liability of the defendant to the criminal law and to the obligation of the government to prove him guilty beyond a reasonable doubt upon taking into consideration all the evidence, and in regard to every essential element of the crime, the charge of the court was undoubtedly correct. *Davis* v. *United States*, 160 U. S. 469.

Some evidence was given, as is stated by the court in its charge, in regard to the defendant's drinking whiskey about the time the homicide is said to have been committed. As to his alleged irresponsibility, the court charged:

"Upon this matter you are instructed that the recent use of whiskey would not be a defence in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. What I intend for you to understand is this: If the evidence as a whole fails to show, beyond a reasonable doubt, that Hotema was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whiskey he had drunk; but, in arriving at that conclusion, the jury are to look to all the evidence, and if, from all the evidence, they are satisfied that he slew Vina Coleman by reason of the whiskey he had drunk, and not as a result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant and acquit him."

We can see no cause for fault finding with that portion of

the charge on the part of the defendant. The court had already charged there must be a wilful and intentional killing in order to warrant a conviction of murder. If that were present, we have no doubt the fact that defendant had drank some whiskey before the killing was unimportant.

Then in regard to the subject of delusion the court charged:

"There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to the evil influence of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant Hotema believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act. And, also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and that the defendant also used spirituous liquors, and these two combined were the cause or causes that led him to the commission of the act, and that either or both of these were the sole inducement that caused him to do the act, he would not be guiltless and would be responsible therefor. Upon the other hand, I charge you that if you should find from the evidence in this case that Solomon Hotema, the defendant, believed that there were witches, and that he had a right to kill them, and if you further find that such belief was the product of a diseased brain, or if you have a reasonable doubt that such condition of brain existed at the time of the homicide, and that his act was the result of such diseased brain, you will acquit him.

"In this case you are to determine the following questions:

"1st. Was the defendant Hotema at the time he committed

the homicide charged laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but if there is a reasonable doubt as to such mental condition, you will resolve such doubt in favor of the defendant and acquit him.

"2d. Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by teachings of the Bible he had right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment, but if you have a reasonable doubt in regard thereto, you will acquit the defendant."

The court had already properly instructed the jury as to the test to be applied to the general defence of insanity. In substance it had charged the jury that if defendant knew the nature and quality of his act when he committed it, and that it was wrong and a violation of the law of the land, for which he would be punished, that he was responsible for the act he committed. And upon the matter of irresistible impulse, the charge was, as we have said, at least as favorable to the defendant as he had any right to ask.

We think, taking the whole charge together, that the judge properly laid down the law in regard to the responsibility of the defendant on account of his alleged mental condition. It placed the burden on the government (following *Davis* v. *United States*, *supra*), of proving beyond a reasonable doubt that the defendant was sane at the time of the commission of the act, as one of the essential features of the crime. It also held that within the legal definition of insanity the defendant was responsible for his acts if at the time of their commission he was of sufficient mental capacity to understand their nature and quality, and that the particular act in question was wrong

and a violation of the law of the land for which he would be amenable to punishment under that law.

Upon the condition of mind of defendant regarding witches, the court held that if his belief in witches and his right to kill them were the product of a diseased brain, he was irresponsible, and if the jury had a reasonable doubt on that question, it should acquit. If his belief were not the product of an insane delusion but simply an erroneous conclusion of a sane mind, he was, as the court charged, responsible.

The court, by the portions of the charge above adverted to, directed the attention of the jury to the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain. The subject is somewhat difficult and the line of distinction not always easily drawn, but it exists, and we think that in this case the condition of mind which would render the defendant irresponsible was sufficiently and properly indicated by the court in its charge. It assumed that defendant might have formed an erroneous opinion regarding witches and witchcraft, and yet might not have been insane within the legal definition, and therefore, although possessing such erroneous ideas and acting on them, he might still be responsible criminally for his actions. And on the other hand, if his opinion on the subject were the result of insane delusions, and he acted on them, he was irresponsible, and responsibility must be proved beyond a reasonable doubt. We think this was all the defendant could require.

A special plea to the indictment in this case was filed by the defendant, setting up the fact that he had been once placed in jeopardy, and it appeared in the plea that the defendant on the same day on which he killed Vina Coleman also killed two other persons, and two indictments were found charging defendant with the murder of each of such persons, the indictments were thereupon consolidated and upon his trial on the consolidated indictments the defence set up was insanity, the same ground as set up in this case, and it was alleged that the only issue made in the case was whether the defendant was sane or insane at the time that he killed the two persons. The jury upon the trial of defendant on the consolidated indictments

for the murder of the two found him not guilty, on the issue of insanity. The indictment in this case was for the killing by the defendant of the third of the three persons, and it is upon these facts that he sets up the plea of once in jeopardy.

While the plea, on such facts, is wholly without merit, and need not be further noticed, it is only adverted to for the purpose of recognizing the fact that the defendant has been charged with the murder of three different persons on the same day, and that seemingly there was no motive shown for the killing of any of them, or, at any rate, there was none shown for the killing of the person described in the indictment in this case, as the charge of the court in substance concedes. It also appears in this record that the first jury impanelled in this case was unable to agree upon a verdict. We are thus made acquainted, from the record, with the fact that one jury, upon the question of the insanity of the defendant, has upon the trial of the consolidated indictments charging him with two distinct and separate murders, acquitted him of the alleged crimes on that ground; another jury has been unable in this case to agree upon the question; a third one has, in the case now before us, convicted him. Being unable to see any legal error committed by the trial court we are bound to affirm the judgment. The question whether, upon a consideration of the facts, the extreme penalty of the law should be carried out upon this defendant, is one which must be addressed to the consideration of the executive, as it is not one over which this court has jurisdiction. The judgment must be

Affirmed.

HAGAN *v.* SCOTTISH INSURANCE COMPANY.

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

No. 206. Argued April 8, 1902.—Decided June 2, 1902.

Where a marine policy is taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties; and courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail.

By virtue of the language contained in the policy, "on account of whom it may concern," it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind; but if he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough.

This court differs from the conclusion arrived at by the Circuit Court of Appeals in its statement that there was nothing in the case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein, because of the retention in the policy of the provision that it should be entirely void, unless otherwise provided by agreement, if any change, etc., should be made; and holds that the very purpose of stating that the insurance was on account of whom it may concern was to do away with the printed provisions in regard to the sole ownership and to the change of interest and that was an agreement "otherwise provided," than in the printed portion of the policy.

THIS was a libel in admiralty by the petitioners, Peter Hagan and Edward F. Martin, on a policy of insurance issued by the Scottish Union and National Insurance Company, November 19, 1897, against loss or damage by fire to an amount, not exceeding $2000, on the tug boat Senator Penrose. The District Court made a decree for the libellants. 98 Fed. Rep. 129.

This decree was reversed by the Circuit Court of Appeals for the Third Circuit. 102 Fed. Rep. 919.

By the policy it is provided, among other things, that the company—

"In consideration of the stipulations herein named and of twenty-five dollars premium does insure *Peter Hagan and Company for account of whom it may concern* for the term of one year from the 19th day of November, 1897, at noon, to the 19th day of November, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding *two thousand* dollars, to the following-described property while located and contained as described herein, and not elsewhere, to wit:

"On the iron tug Senator Penrose, her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture and supplies.

"Privilege to engage in such employment as may be incidental to her trade; also to lay up and haul out on railways and dry docks and to undergo alterations and repairs; also to use kerosene oil for lights.

"Other insurance permitted without notice until required.

"N. Y. and Penna. standard,

"Percentage coinsurance clause.

"If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than 80 per cent of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent of the actual cash value of such property.

"Attached to policy No. 2,139,457 Scottish U. & N. Insurance Co.

"S. D. Hawley & Son,

"*Agents, Resident Managers.*

* * * * * * * *

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered

Counsel for Appellant.

in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building or ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss," etc.

The words "Peter Hagan and Company for account of whom it may concern" are written with a pen, while the paragraphs commencing with the words "On the iron tug," and ending with the words "S. D. Hawley & Son, Agent, Resident Managers," are in typewriting, and on a separate strip attached to the face of the policy.

In June, 1898, Peter Hagan, who obtained the insurance, sold one half interest in the tug to Edward F. Martin, and the latter held that interest at the time of the destruction of the tug by fire. No notice was given to the insurance company of the fact that Martin had acquired an interest in the boat. The respondents denied all liability to the plaintiffs because no notice was given of the change of ownership or of the interest in the tug by respective libellants as required by the terms of the policy.

Mr. John Frederick Lewis for petitioner. *Mr. Horace L. Cheney* was on his brief.

Mr. Henry R. Edmonds for respondent.

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

The decision of this case turns upon the significance to be given to the written provision of the policy which provides for insuring "Peter Hagan and Company for account of whom it may concern."

In the District Court Judge McPherson said:

"The decision of the case depends upon the effect to be given to the words 'for whom it may concern.' This clause, so far as it may be in conflict with other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words. Moreover, even if the court doubted which provision should prevail, another well-known rule requires the policy to be construed against the company rather than against the insured; and, therefore, upon either ground, the clause now under consideration is controlling. . . . The first step, therefore, in a given case is to determine what interest the person taking out the policy intended to protect. It is not essential that he should have had any specific individual in mind. It is enough if he intended to protect the interest that afterwards passed to the person injured; and if he so intended, the policy may be adopted afterwards by a subsequent sole or partial owner of the interest, although such owner may have been unknown to the person taking out the insurance, or to the company, at the time the policy was written. In the present case I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name, omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in himself alone,

or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists. The facts bring the dispute within the rule laid down in *Hooper* v. *Robinson*, 98 U. S. 528, and in other cases to which reference need not be made."

The decree of the District Court was reversed by the Circuit Court of Appeals, with directions to dismiss the libel with costs. Judge Dallas, speaking for that court, said:

"It is true that the written terms of a policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be sustained as a whole, and in the present instance the printed provisions in question and the written words 'for account of whom it may concern,' are not irreconcilably repugnant. That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly the then existing or future creditors of the boat, or perhaps the constituents of Peter Hagan and Company; but, no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of any one who, by the express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it. It is not necessary to our conclusion that we should question the rule of law which was applied by the court below, and we do not do so. It is not doubted that a policy in the name of a special party, on account of whom it may concern, will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known; but we find nothing in this case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein. On the contrary, we think, as we have already said, that the retention in the policy of the provision that it should be entirely void if any transfer in interest, title or possession should be made, absolutely precludes the inference of an intent to make the policy applicable to any person claiming under or by virtue of such a transfer."

In these two extracts from the opinions delivered in the courts below we find the different views of the judges of those courts upon the question at issue. It is to be observed, in the first place, that the policy in question covers property on the water, viz., a tug boat, yet the printed portion of the policy shows that it was intended generally to be used for insuring property on land. A marine policy was made out upon blanks not intended for that kind of insurance. Consequently many of the printed provisions were wholly inapplicable to insurance of property on the water.

Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.

In *Dudgeon* v. *Pembroke*, decided in the English House of Lords, in 1877, 2 App. Cas. 284, at 293, in speaking of this question of the difference between the written and the printed portions of a policy, and in delivering the opinion of the court, Lord Penzance said:

"My lords, the policy in this case is a time and not a voyage policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that, by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe, and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law to permit of any such conclusion."

This rule is recognized and assented to by both courts below. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail. It becomes necessary, therefore, to determine what is the meaning of the written portion of the policy, and what was intended by the parties by the language "on account of whom it may concern." Both courts below concur in the statement that a policy so worded will cover the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended was not then known. It was said in the District Court that it was enough if the person taking out the insurance intended to protect the interest that afterwards passed to the person injured; that it was not essential that he should have had any specific individual in mind at the time when he took out the insurance. The opinion of the Court of Appeals concedes that a policy in the name of a special party, "on account of whom it may concern," will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known. But the Court of Appeals was unable to discover anything in the case to support a finding that Hagan (the person taking out the insurance) intended to insure a subsequent vendee of the boat or of an interest therein, because of the retention in the policy of the printed provision that it should be entirely void, unless otherwise provided by agreement, if any change in the interest, title or possession should be made. The retention of this printed provision, the court said, precluded the inference of any intent to make the policy applicable to any person claiming under or by virtue of such transfer.

We concur in the view that by virtue of the language contained in the policy, "on account of whom it may concern," it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough. In *Hooper* v. *Robinson*, 98 U. S. 528, it was said that a policy upon a cargo in the name of A, on ac-

count of whom it may concern, will inure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party or the latter subsequently adopted it. The facts in that case differ materially from those presented by this record, but the meaning of the language "on account of whom it may concern" is stated in the opinion of the court, and authorities are therein cited which show that it is not necessary that at the time of effecting the insurance the person taking it out should intend it for the benefit of some then known and particular individual, but that it would cover the case of one having an insurable interest at the time of the happening of the loss, and who was intended to be protected at the time the party took out the insurance.

In 1 Phillips on Insurance it is stated:

"SEC. 385. The rule, that an insurance 'for whom it may concern' will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended. . . . But he may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person subsequently ascertained to have such an insurable interest, who adopts the insurance.

"SEC. 388. One may become a party to the insurance effected in his behalf, in terms applicable to his interest, without any previous authority from him, by adopting it, either before or after a loss has taken place and is known to him, though the loss may have happened before the insurance was made."

In 2 Duer on Marine Insurance, p. 28, it is stated as follows:

"In England, the policy in its usual and almost invariable form contains a general clause, the terms of which are sufficiently comprehensive to embrace all persons who have an insurable interest in the property, and a lawful right to be insured. The insurance is expressed to be 'in the name of A. B., (the person effecting the policy,) as well in his own name as for and in the name and names (without specification) of all and every other person and persons, to whom the same (the property insured) doth, may or shall appertain, in part or in all.' In the

United States, as on the continent of Europe, the general clause is framed in various forms of expression, and the construction necessarily varies, as the terms used are, more or less, extensive in their application. In some cases the insurance is expressed to be 'on account of the owners.' In some, on 'account of a person or persons, to be thereafter named;' but its most usual form is, 'on account of whom it may concern.' An insurance on account of the 'owners,' is probably limited to those who have a legal interest in the subject insured. But the words, 'on account of whom it may concern,' are coextensive in their possible application, with the general clause of the London policy."

And the learned author adds in a note the following:

"The Philadelphia policies retain the English form; and why it has been departed from in any of the cities of the Union, it is not easy to understand. The words are the most comprehensive and significant that could be chosen, since they apply not only to all persons, but to every species of interest. As the clause, however, 'for whom it may concern,' has received the same construction, it is not now necessary to alter it."

The English form insures the person to whom the property insured "doth, may or shall appertain," thus insuring the owner or one who has an interest in the property at the time when the loss occurs. And the author says the words "on account of whom it may concern" have the same significance as the language used in the English form.

We are constrained to differ from the conclusion arrived at by the Circuit Court of Appeals in its statement that there was nothing in the case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein, because of the retention in the policy of the provision that it should be entirely void, unless otherwise provided by agreement, if any change, etc., should be made. It seems to us that the very purpose of stating that the insurance was on account of whom it may concern was to do away with the printed provisions in regard to the sole ownership and to the change of interest. It was an agreement "otherwise provided," than in the printed portion of the policy. It provided for the happen-

ing of a contingency by which at the time of the loss the person taking out the insurance might not be the sole and unconditional owner of the thing insured because of a change in the interest or title happening by the act of such person between the time of taking out the insurance and the occurrence of the loss. This, we think, was the intention of the party taking the insurance, to be arrived at by reading the written language of the policy and by reference to the fact that he intended to insure the whole title, and not his mere interest therein from time to time. Otherwise we do not see what effect is given to the written portion of the instrument.

There is no doubt, and the District Court so found, that Hagan intended by the policy to secure the insurance upon the entire title, and he therefore intended thereby to protect that title during the running of the policy, and when the clause is added in writing that it was issued on account of whom it may concern, it shows that he intended that such title should be protected in the hands of any person to whom he might transfer the same or any portion thereof. If otherwise, and the intention were only to protect his own interest, the policy, as stated by the District Judge, would naturally have been taken out in his own name, omitting the qualifying phrase, on account of whom it may concern. This phrase was put in for some purpose, and such purpose was, as it seems to us, to protect the whole title without making it necessary to notify the company and obtain its consent to any transfer of interest.

At the time when Hagan took out the policy he was sole owner, and unless he intended the written words to apply to those to whom he might afterwards assign his interest or some portion thereof, the language would seem to fill no purpose.

If the policy were to become void in case of a transfer of all or any part of the interest of the person taking out the insurance unless the company were notified and provided by agreement endorsed on the policy for such change, we do not see that any alteration in its terms and meaning was accomplished by the insertion of the phrase in question. By the interpretation contended for by the company, it would have the same right, if the written provision were contained therein,

to refuse to otherwise provide by agreement for the transfer of an interest, that it would have if such provision were stricken out, and the terms of the policy would in truth be unaltered by the insertion of that provision. We think this would be a totally different result from that contemplated by the parties. The words "on account of whom it may concern" do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. We think this the common sense interpretation of the language used and that it is justified and required by the authorities, many of which are cited in *Hooper* v. *Robinson*, *supra*.

Northern Assurance Company v. *Grand View Building Association*, 183 U. S. 308, has no bearing upon this case. There the party insured proved by parol an alleged waiver, by the general agent of the company, of one of the conditions in the policy which required that such waiver should only be given in writing and endorsed on the policy. It was contended that the company was estopped because of the conduct of the agent in the existing circumstances, in issuing such policy and taking the premium, from setting up and claiming the benefit of the condition. This court held that the evidence was improperly received, and reversed the judgment.

In this case there is no question of receiving parol evidence to alter or change any condition in the policy. It is simply a question of construction as to the meaning of the language used in the policy, and as to the intention of the party taking it out, and whether the written portion (the intention of the party being as stated) is inconsistent with any printed portion thereof; and if so, whether it should prevail as against such printed portion. We think the written portion is inconsistent with the printed condition as to change of interest, and as to sole ownership, and there being such inconsistency the written portion

must be held to cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance.

The judgment of the Circuit Court of Appeals must be reversed, and that of the District Court of the United States for the Eastern District of Pennsylvania affirmed, and it is so ordered.

MR. JUSTICE GRAY did not hear the argument and took no part in the decision of this case.

FARMERS' LOAN AND TRUST COMPANY *v.* PENN PLATE GLASS COMPANY.

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

No. 180. Argued April 24, 25, 1902.—Decided June 2, 1902.

This was a suit in equity, brought by the petitioner, in the United States Circuit Court for the Western District of Pennsylvania, commenced to foreclose a mortgage given January 1, 1891, by The Pennsylvania Plate Glass Company upon its property in the county of Westmoreland and State of Pennsylvania, to The Farmers' Loan and Trust Company, to secure the payment of $250,000 of bonds then to be issued by the mortgagor company. A decree was entered by direction of the Circuit Court, providing for the foreclosure and sale of the property and for the application of the insurance moneys as prayed for. Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed as to the insurance moneys, and the court below was directed to enter a decree that those moneys should be paid to the defendant, The Penn Plate Glass Company. The material facts in the case are stated in the opinion of the court. The only question involved arose from the provision made in the decree by the Circuit Court judge, impressing what is termed an equitable lien upon the insurance moneys collected on the policies taken out by The Penn Company, sufficient to pay any balance which may remain unpaid on the bonds secured by the mortgage to complainant, after the application of the proceeds of the sale of the property mortgaged. The Circuit Court held that the complainant had such equitable lien, while the Circuit Court of Appeals was of the contrary opinion. *Held* that the judgment of the Circuit Court of Appeals was right.

Statement of the Case.

THIS is a suit in equity, brought by the petitioner, in the United States Circuit Court for the Western District of Pennsylvania, and the case comes here on certiorari to the Circuit Court of Appeals for the Third Circuit. The suit was commenced to foreclose a mortgage given January 1, 1891, by The Pennsylvania Plate Glass Company (hereinafter called the mortgagor company) upon its property in the county of Westmoreland and State of Pennsylvania, to complainant, The Farmers' Loan and Trust Company, a corporation of New York, to secure the payment of $250,000 of bonds then to be issued by the mortgagor company. A supplemental bill was filed, by leave of the court, which averred a loss by fire of a large portion of the premises mortgaged, and on the allegations contained in the supplemental bill the complainant asked that a decree should be entered granting to it a lien on the insurance moneys to the extent necessary to pay the bondholders the balance which might be due, after applying to their payment the proceeds of the sale of the property mortgaged. A decree was entered by direction of the Circuit Court, providing for the foreclosure and sale of the property and for the application of the insurance moneys as prayed for. Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed as to the insurance moneys, and the court below was directed to enter a decree that those moneys should be paid to the defendant, The Penn Plate Glass Company, Circuit Judge Acheson dissenting. The opinion of the judge of the Circuit Court, as well as those delivered in the Circuit Court of Appeals, will be found reported in 103 Fed. Rep. 132.

The material facts in the case are as follows: The Farmers' Loan and Trust Company is a corporation of the State of New York. The defendant, The Pennsylvania Plate Glass Company (the mortgagor company), is a corporation of the State of Pennsylvania, organized for the purpose of constructing and operating plate glass works in the city of Irwin in that State. The defendant, The Penn Plate Glass Company, is also a corporation of the State of Pennsylvania, and is also organized for the purpose of constructing and operating plate glass works in the same city. The defendant William L. Kann is a citizen of the State

of Pennsylvania. On January 1, 1891, the mortgagor company executed to the complainant trust company a mortgage on its property in Westmoreland County, Pennsylvania, to secure the payment of $250,000 of bonds as therein stated. Among other things it was provided by article 1 of the mortgage that, until default should be made in the payment of the principal or interest of the bonds secured by the mortgage, or in the performance of some one or more of the covenants, stipulations or agreements required by the mortgage to be kept, performed or done by the mortgagor, it was to be permitted to possess and operate the premises and glass works with the appurtenances described in the mortgage.

By articles 2 and 3 it was provided that in case default should be made in the payment of any installment of the interest on any of the bonds or of any of the coupons accompanying the same, or in the performance of any of the covenants, agreements or stipulations contained in the mortgage and thereby required to be kept and performed by the mortgagor, and if such default continued for six months after demand made in writing, the mortgagee might take possession of the property, or foreclosure proceedings might be taken.

By article 4 the mortgagor is exempted from all personal liability for the mortgaged debt, and from the obligations of the other covenants contained in the mortgage, the article providing as follows:

"It being expressly understood and agreed by and between the parties hereto, and by and between the said party of the first part and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons shall ever be commenced or prosecuted, either against the party of the first part, or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons or any of them, or by any person or corporation to whom the same or any of them may be assigned or transferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts,

and that the sale of the said mortgaged premises, whether under the power of sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

It was provided by article 10, among other things, as follows:

"The right of action under this indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding on or under this indenture, for the purpose of enforcing any remedy herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee, according to its sound discretion; but the trustee shall be under no obligation to institute any such suit, or to take any proceedings under this indenture, or to enter any appearances, or in any way defend in any suit in which it may be made defendant, or to do anything whatever as trustee, until it shall be indemnified to its satisfaction from any and all costs and expenses, outlays and counsel fees, and other reasonable disbursements, and from all possible claims for damages, for which it may become liable or responsible on proceeding to carry out such request or demand. The trustee may, nevertheless, begin suit, or appear in and defend suit, or do anything else in its judgment proper to be done by it as such trustee, without such indemnity, and in such case it shall be compensated therefor from the trust fund.

"The trustee shall be under no obligation to recognize any person as holder or owner of any bonds secured hereby, or to do or refrain from doing any act pursuant to the request or de-

mand of any person, until such supposed holder or owner shall produce said bonds and deposit the same with the trustee.

"It shall be no part of the duty of the party of the second part to file or record this indenture as a mortgage or conveyance of real estate or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employé selected with reasonable discretion; it shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any services that it may at any time perform in the discharge of the same; and all such fees, commissions, compensation and disbursements shall constitute a lien on the mortgaged property and premises."

Many other provisions and conditions were contained in the mortgage, which are not material to be mentioned.

Most of the moneys arising from the issuing of these bonds were applied towards the construction of the plant of the mortgagor company at its place of business in the city of Irwin, Pennsylvania. The company soon got into financial difficulties, and about January, 1894, the defendant Kann became a stockholder therein and was elected its treasurer. By March 19, 1894, the company had become involved in litigation, and was very greatly embarrassed financially, and some of the other officers of the company had disagreements with Kann in regard

to his advances of money, so that on the day last named a bill in equity was filed against the company, in the name of some of its creditors and directors, in the Court of Common Pleas of Westmoreland County, Pennsylvania, praying among other things for the appointment of a receiver of the property of the company, and for a decree winding up its business. In that suit Joseph W. Stoner, the then secretary of the company, was appointed receiver, and such proceedings were had therein that on or about June 18, 1894, the court made an order for the sale of all the property of the mortgagor company, and the same was sold at public auction to defendant Kann for the sum of $37,500, he being the highest bidder at the sale, which was open and public, and attended by others who made bids on the property. The sale was made subject to the mortgage to the complainant, and a deed was given by the receiver, pursuant to the order of the court, to Kann, the deed bearing date July 2, 1894, and reciting that the property was thereby conveyed "subject to a mortgage made by said Pennsylvania Plate Glass Company to The Farmers' Loan and Trust Company of the State of New York, dated first of January, 1891, recorded in Westmoreland County, in mortgage book No. 43, page 1," and being the mortgage or deed of trust made to complainant as stated. Kann continued in possession as owner of the property under this deed from the receiver until about July 1, 1895, when he conveyed, by deed dated on that day, all of the mortgaged property, together with the improvements made thereon by himself, to the defendant, The Penn Plate Glass Company, for a consideration named in the deed of $83,500. Kann in his evidence says the consideration really amounted to $118,000. The deed from Kann to the company also recited that the property therein conveyed was "subject to a mortgage made by said Pennsylvania Plate Glass Company to The Farmers' Loan and Trust Company of the State of New York, dated first of January, 1891, recorded in Westmoreland County, in mortgage book No. 43, page 1."

While Kann held the property he paid the interest on the bonds, but default was made in the payment of the coupons maturing on July 1, 1895, and no coupons have been paid since that time.

Statement of the Case.

There was some insurance on the property when it went into the hands of the receiver in the suit which was commenced to wind up the affairs of the company, a portion of which insurance had not been paid for at the time of the appointment of the receiver, and he thereupon secured directions from the court to maintain the insurance, and for the purpose of paying the premiums thereon he issued receiver's certificates under the order of the court. Some but not all of this insurance was still in force when the receiver turned the property over to Kann at the time of the deed, July 2, 1894. This insurance expired by the lapse of time, and afterwards, and while Kann was in possession of the property under his deed from the receiver, he procured insurance upon his own interest therein and in his own name. These policies subsequently expired. The Penn Company when organized, and after it had purchased the property, took out insurance in its own name upon the same and for its own benefit exclusively, the amounts running from $250,000 to about $400,000, and the policies containing this provision: "This property is subject to a bonded indebtedness of $250,000, but it is distinctly understood and agreed that this insurance does not cover the interest of the bondholders." There was no insurance on the property during the time that the Penn Company owned it, other than as just stated, but that insurance was to an amount more than sufficient to secure the bondholders under the mortgage if the moneys were to be so applied.

While the property was in the hands of Kann and after the insurance thereon had expired, which had been procured by the mortgagor company or by its receiver, the mortgagee notified Kann and required him to keep up or renew or take out other insurance for the benefit of the bondholders under the mortgage, up to the amount thereof, and the same notice and requirement were given to and demanded of the mortgagor company. That company made default and Kann refused to take out any such insurance, and denied that he was under any obligation so to do. After Kann sold and conveyed the property to the Penn Company, the complainant notified that company and required it to insure in a sum sufficient to afford security for the bondholders under the mortgage to complainant. The Penn Company re-

fused to so insure and denied any obligation to do so, but, on the contrary, did insure for its own benefit, the policies of insurance containing the provision excluding the interest of the bondholders under the mortgage.

As stated, the mortgagor company, and also Kann and the Penn Company, defaulted in the payment of the coupons due July 1, 1895, and upon those due January 1 and July 1, 1896, and thereupon complainant commenced this suit by the filing of its bill July 8, 1896, asking for the foreclosure of the mortgage, and making the mortgagor company, Kann and the Penn Company defendants. On the same day a motion for a receiver was noticed on the ground that the mortgage was not good security for the debt. The mortgagor company made default and has not appeared in the suit. The other defendants duly appeared and opposed the motion. It was heard on July 20, 1896. Shortly after the motion had been argued counsel for the complainant received notice from the judge before whom the motion had been made, stating that he had concluded to deny the application for the appointment of a receiver. Upon a subsequent day, the parties being in court, (no formal order denying the motion having as yet been filed,) the counsel for the complainant said to the court that in the motion for a receiver it occurred to him that the court had not considered the fact that this property was without insurance; that there was danger of fire; that the plaintiff was a trustee without funds, and that that was a matter that ought to be considered; that the trustee was entitled to insurance. Counsel upon the other side denied that they were bound to insure under the terms of the mortgage, and so the dispute continued before the judge, counsel for the complainant insisting that complainant should have insurance and counsel for the other side denying that complainant was entitled to it at the cost of the defendants, and at the end the judge remarked that he could not then decide that question, but intimated to counsel for defendants that if they were bound to insure they ought to protect the complainant as trustee and mortgagee. Finally it was suggested that a bond should be given of the tenor now to be mentioned, but counsel for complainant stated in his evidence upon the subject given in this

case, that he did not wish to be misunderstood, and that it must be admitted that counsel for the defendants, upon the occasion mentioned, expressly denied that they were bound to insure for the benefit of the bondholders; the bond or agreement was given just as its terms set forth, that if defendants were bound to insure the insurance would stand for the benefit of the complainant, and if not, the complainant would get nothing. The bond or agreement was then given by Emanuel Wertheimer and defendant Kann. It was put in evidence, and Wertheimer and Kann therein agreed "that in the event of a loss by fire of the property described in the said Pennsylvania Plate Glass Company mortgage, that then there shall be paid out to the said Farmers' Loan and Trust Company, trustee, in trust for the holders of valid bonds secured by the said mortgage, a sum equal to the total amount of such valid bonds, out of the policies of insurance existing in favor of the Penn Plate Glass Company. Provided, that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage." This agreement was given, as counsel for complainant stated, in order to meet the views of the court, "that if I was entitled to insurance I should have a bond, and if I was not entitled to insurance, I would get nothing."

By an interlocutory order, as mentioned in the decree subsequently entered, and grounded upon this agreement, the court appointed Emanuel Wertheimer as receiver for the purpose of receiving the insurance moneys under the various policies of insurance, and, pursuant to such appointment, Wertheimer was directed to hold, as such receiver, $125,000 of the insurance moneys so collected, and if it should be finally decreed that the complainant had an equitable lien upon such insurance moneys, then the receiver was to pay over to the complainant so much of that sum as should be necessary to pay and discharge the $90,000 of the bonds secured by the mortgage, not including the $160,000 of such bonds belonging to Wertheimer, in regard

Counsel for Parties.

to which he released and waived all claim to an equitable lien upon the said sum of $125,000 so collected and held by him, and he was also to pay to the complainant and discharge the coupons upon such $90,000 of bonds.

The formal order denying the motion for a receiver was filed September 7, 1896. Considerable testimony was taken in the case subsequently to that time upon the various issues made by the pleadings, but the trial had not been concluded, when on April 12, 1898, a fire occurred, by reason of which, as claimed on the part of the mortgagee, the greater part of its security was destroyed. A supplemental bill was then filed by complainant by leave of court, and various insurance companies which had insured the property for The Penn Company were brought in as parties to the suit, and the complainant demanded, in addition to the relief which was prayed for in the original bill, a decree providing that the complainant should have a first lien on the insurance moneys paid or to be paid under such policies for the purpose of paying the bondholders holding the $90,000 of bonds as above mentioned, any balance which might be due them after the sale of the mortgaged premises should be made, if such sale should result in any deficiency in the payment of those bonds.

Testimony was taken relative to the averments contained in the supplemental bill. It was proved on behalf of The Penn Company that since Kann and The Penn Company had the title to and possession of the property, there had been spent by them upon the property, by way of repairs and improvements, between $180,000 and $200,000.

The decree of the Circuit Court, after providing for the foreclosure and sale of the mortgaged premises, made specific provision for the application of the insurance moneys in the hands of Wertheimer to the payment of any deficiency that might arise, after applying the proceeds of the sale of the mortgaged property to the payment of the bonds mentioned in the decree.

Mr. Herbert B. Turner and *John G. Johnson* for petitioner.

Mr. Louis Marshall for respondents.

Opinion of the Court.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

The only question involved in this case arises from the provision made in the decree by the Circuit Court Judge, impressing what is termed an equitable lien upon the insurance moneys collected on the policies taken out by The Penn Company, sufficient to pay any balance which may remain unpaid on the bonds secured by the mortgage to complainant, after the application of the proceeds of the sale of the property mortgaged. The Circuit Court held that the complainant had such equitable lien, while the Circuit Court of Appeals, Judge Acheson dissenting, was of the contrary opinion, and therefore reversed that portion of the decree which provided for it.

The policies upon which the moneys were collected to pay the loss happening by fire, were taken out by The Penn Company for the purpose of covering its own interest in the property, and the language of the policies covered such interest only. There was no contract in the policies covering the interest of the complainant as mortgagee, nor was the insurance, in fact, effected for the purpose of carrying out any agreement or obligation on the part of The Penn Company with the complainant to effect insurance covering the interest of the bondholders. On the contrary, this purpose was disaffirmed and the obligation denied. The Penn Company had the right to insure its own interest, and unless there was some contractual obligation on its part on the subject, which bound it, or some conduct on its part, or on the part of Kann, its immediate grantor, which would estop it from setting up the fact that it had procured the insurance for itself, the moneys arising out of the contracts which it made with the various insurance companies, cannot be taken from it and bestowed on the complainant for the benefit of the bondholders secured by the mortgage in suit. Some obligation of the defendant of a contractual nature must exist, or some conduct must be proved, estopping the defendant from denying such obligation, before the court can be authorized to take such moneys and bestow them upon the mortgagee for the benefit of the bondholders.

The complainant asserts that, without regard to any provision in the mortgage, it has an equitable lien upon The Penn Company's insurance, and that, under the circumstances, such company must be treated as in the position of a receiver appointed on complainant's motion in this case. The peculiar circumstances upon which the claim is based that defendants should be so treated, seem principally to be the denial of complainant's motion for the appointment of a receiver at the time of the commencement of this suit to foreclose the mortgage, and the fact that The Penn Company had insurance on the property. The denial of the motion for a receiver, it is averred, was brought about by the opposition of the defendants Kann and The Penn Company, and it is argued that they ought not to have opposed the motion, and their opposition was improper and in bad faith. But it must be remembered they were parties to the suit, and in the legal protection of their rights it was perfectly proper for them to oppose, before the court, the appointment of a receiver, even though their opposition secured the denial of the complainant's motion. We see nothing upon which to base an accusation of bad faith in this conduct of defendants. The complainant, however, regards the application for a receiver as the same in substance as an application to take possession of the premises in pursuance of the provisions of the mortgage, consequent upon a default in the payment of the principal or interest of the bonds, or because of a violation of any other of the covenants contained in such mortgage. Even if that be so, we see nothing in such fact to in any way alter the right of defendants to oppose by argument before the court the appointment of a receiver. There is no pretence that they made any allegations upon the hearing which were untrue or that their opposition was based upon anything other than conceded facts. Possibly the Circuit Court ought to have appointed a receiver upon the application of the complainant. That was a matter resting a good deal in its sound discretion. The Penn Company and Kann were, however, entirely within their legal rights when they opposed such application, and we are unable to see that their conduct in so doing in any manner altered those rights

or added to their own legal obligations. Very likely a receiver, if he had been appointed, would on his own motion have taken out insurance upon the property, or would have been directed by the court to do so, in order to cover the interest of the bondholders. But no receiver was appointed and no such insurance was taken out, and we cannot see that the defendant, The Penn Company, has in any manner made itself liable to pay to the complainant any of the insurance moneys which it obtained to cover its own interest only, in the property, because of the successful opposition made by it to the appointment of a receiver.

The court on hearing all sides and interests denied the application. There was nothing which then prevented the complainant from itself taking out insurance under the tenth article of the mortgage. It could have taken out such insurance as a thing proper to be done by it as trustee within the provisions of the mortgage, and in such case it would have been entitled, by the specific provisions in the tenth article, to reimbursement therefor and to compensation from the trust fund. We do not say that it was its duty to do so, for it had no cash of the mortgagor on hand, but it had the power under the article to advance the insurance premiums and the right to demand reimbursement and compensation for having done so. The fact that it had no funds at its command at that time is very likely an answer to the proposition that it was its duty to have itself procured insurance; but if it had advanced the money and thus procured the insurance, the amount which it advanced would have been a lien on the trust fund and payable thereout before any claim on the part of the bondholders could have been asserted. The risk of loss to the complainant by making such advances would have been nothing. We refer to the subject to show that the mere fact that the trustee was without actual cash in hand to procure the insurance is not material.

Nor can we see that the execution of the agreement soon after the court had decided to deny the application for the receiver, in any way affects the liability of the defendants on this branch of the case. From the time that Kann bought the premises on the receiver's sale and took a deed therefor subject to

the mortgage, he denied any liability on his part to insure the premises for the bondholders, and refused so to do, and The Penn Company from the time it became the purchaser of the premises, also denied any liability to insure and refused to do it. The denial of this obligation to insure and the refusal on the part of both Kann and The Penn Company had been explicit, open and continuous from the time the property had first been acquired up to the hearing upon the motion for a receiver. Whether the defendants or either of them were bound to insure for the benefit of the bondholders was a question which the Circuit Court said it could not decide at that time. This was after the court had stated its determination to deny the motion for a receiver. Finally it was agreed between counsel who were then before the court that Kann and Wertheimer would sign an agreement that in the event of a loss by fire there should be paid to complainant out of the policies of insurance existing in favor of The Penn Company a sum equal to the total amount of valid bonds secured by the mortgage, provided it was finally adjudicated that the company, the then owner of the property, was bound or liable by anything contained in the mortgage or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the mortgage.

We do not see that this agreement altered in any degree or added to the rights or obligations of the defendants in regard to insurance on the premises. The agreement simply was that if the defendants were bound to insure, then they would take moneys arising from the insurance policies sufficient to pay the bonds. Whether they were or were not so liable was not determined or in any way intimated. If the court had then decided that they were liable, they would have had the opportunity of placing the necessary amount of insurance to cover the interest of the bondholders in addition to that which The Penn Company then had covering its own interest, but no such decision was arrived at and no such order was made and no extra or other insurance taken out, and all parties seemed to be content to rest upon their legal rights and to take the risk of an error as to what those rights were. To make a decree after a

loss has happened, by which the moneys arising from policies covering only the interest of The Penn Company and procured by it as security for such interest against the loss of property by fire, requires the existence of an obligation on the part of that company founded upon considerations other than the fact that it had opposed the appointment of a receiver, and that the agreement had been made in the circumstances mentioned. In our view there are no facts disclosed by this record which authorize or justify the court in regarding the defendants in the same light as if they were receivers appointed upon the motion made by complainant in this suit and as such had taken out these policies. The court with all the facts before it refused to appoint such receiver, and the fact that these defendants, Kann and The Penn Company, successfully opposed the appointment, furnishes no tenable ground to regard them as receivers because of such successful opposition. This ground of liability must, therefore, be rejected.

While it is true that as a consequence of this voluntary agreement entered into by Kann and Wertheimer, the latter was appointed a receiver to collect and hold a sufficient amount of the insurance moneys to pay these bonds, and in that way the moneys may be described as being in court, yet the court did not obtain jurisdiction to make any disposition of those moneys in behalf of complainant except upon the conditions made in the agreement, by virtue of which alone the moneys came under its immediate control. Unless the court held that there was a liability, as expressed in the agreement, it obtained no jurisdiction over these moneys to make a disposition of them in accordance with general equitable principles. There is no fund in court to be thus disposed of. We must confine ourselves, therefore, strictly to the question of whether there was a right on the part of the complainant to enforce the application of these insurance moneys, in the hands of the companies or of the defendants, to the payment of these bonds, and a corresponding liability of defendants to apply these moneys for the benefit of the bondholders, free from any assumed power of the court to make a disposition of the funds on general equitable principles because they are in its possession, and to that extent subject to its immediate control.

In this view, we must ask was there any obligation resting upon these defendants to insure by reason of the contents of the mortgage and of the deeds under which The Penn Company now claims title? In order to determine whether there was an obligation of this nature it must first be decided there was such obligation on the part of the mortgagor company, because if that company was never under any obligation to insure, it is clear that the grantees subject to the mortgage were also free from any liability of that nature.

It is claimed that the mortgagor company became liable to insure by reason of the provision in article tenth of the mortgage, or at least that it became thus liable to insure, when under that provision, it was required to do so by the mortgagee. That portion of the article directly in question here, after providing that it should be no part of the duty of the trustee to do certain things therein named, continued: "Nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made; but the trustee may in its discretion do any or all of the matters and things in this paragraph set forth or require the same to be done."

It is argued that by this language a covenant arose on the part of the mortgagor, by which it covenanted to insure the property if required to do so by the mortgagee. Reading the whole of that article with the other provisions of the mortgage, we think there is great force in the reasoning of Judge Gray in the Circuit Court of Appeals, by which he concludes that there was no original obligation imposed by the mortgage on the mortgagor to insure for the benefit of the mortgagee. But we do not ourselves decide that no such obligation existed. The Court of Appeals did not place its determination upon that ground alone, but after discussing it and coming to the conclusion which it did, it then proceeded to discuss the question whether the defendant company was liable upon the assumption that there rested upon the mortgagor an original obligation imposed upon it by the mortgage to insure for the benefit

of the bondholders. We will make the same assumption, and the inquiry then arises as to the obligation of the defendants to themselves insure for the benefit of the bondholders after they respectively became the owners of the equity of redemption in the premises.

Kann became the purchaser under a receiver's sale ordered by the court and pursuant to its directions, and he received from the officer conducting that sale a deed conveying to him the premises subject to the mortgage of the complainant. He thus occupies the position of a purchaser at a judicial sale which was ordered to be made subject to the lien of an existing mortgage upon the premises to be sold, and he made no agreement which in terms obligated him to pay a dollar of the mortgage or to comply with a single one of the covenants of the mortgagor. Whatever his obligations may have been in regard to the mortgage or to the covenants of the mortgagor arising from the simple fact of his taking a deed subject to that mortgage, the obligations of his grantee are no greater than his own. The Penn Company took the title which he had subject to the same mortgage as in his case, and with no promise on its part, in terms, to pay the mortgage or to insure the premises for the benefit of any other interest than its own.

Counsel for the complainant argue that the extent of the obligation of grantees or purchasers subject to a mortgage in Pennsylvania has always been, at the least, that by taking such a deed the grantee impliedly agrees to indemnify the grantor against his liability on the mortgage. Many cases are cited by the parties on both sides in relation to this question.

In *Moore's Appeal*, 88 Penn. St. 450, decided in 1879, Chief Justice Sharswood, delivering the opinion of the court, it was held that such a clause was a covenant of indemnity only, as between the grantor and the grantee for the protection of the former. Or, in other words, it was held that on taking the land the grantee will indemnify the grantor to the extent of the mortgage, in the same manner as if the consideration had been paid in cash and then applied by the mortgagor at the time. It was also held that an agreement to pay the encumbrance might be implied from the circumstances of any particu

lar case. In the course of his opinion the Chief Justice reviews many prior cases in that State, and, in speaking of the words "subject to the mortgage thereon," said:

"Why should a covenant be inferred from these words by the vendee to the vendor to do more than protect the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant from his vendee for the benefit of a stranger? If such personal liability does exist why should he exact anything more than indemnity? Surely, then, something should appear to create the inference of such a covenant. The words 'under and subject' import no such thing. They import that the vendee takes the land encumbered, and at most that so taking it at an agreed consideration, which includes the encumbrance, he will indemnify the vendor to the extent of that consideration, in the same manner as if it had been paid in cash and so applied at the time. It is unwise to give an arbitrary, artificial meaning to words commonly used in contracts and conveyances, and thus entrap parties into engagements into which they had no reason to suppose, in the common use of language, they were entering. The act of assembly of June 12, 1878, Pamph. L. 205, has very wisely provided that the grantor shall not be personally liable unless he shall expressly assume such liability by agreement in writing, or condition in the conveyance."

In *Blood's Executors* v. *Crew Levick Co.*, 171 Penn. St. 328, the import of the clause "under and subject to the lien of" a mortgage was under consideration, and it was held that an implied covenant to indemnify arose from that language. It was also held that the vendor had no right of action against the vendee in such a deed until he had been forced to pay the mortgage, either in whole or in part. This was also held in a case between the same parties, reported in the same volume (171 Penn. St.) at page 339.

The act of June 12, 1878, of the Pennsylvania legislature, (P. L. p. 205,) provides as follows:

"Grantees of real estate which is subject to ground rent or

bound by mortgage or other encumbrance shall not be personally liable for the payment of such ground rent, mortgage or other encumbrance unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability therefor: *Provided*, That the use of the words 'under and subject to the payment of such ground rent, mortgage or other encumbrance, shall not alone be construed so as to make such grantee personally liable as aforesaid."

Under the various cases cited, and the statute above quoted, we may assume that by the law of Pennsylvania the grantee who simply takes a deed subject to the lien of a mortgage is at most nothing more than an indemnitor of his grantor against the payment of the mortgage or any part of it by such grantor. There is no liability on the part of the grantee to the mortgagee so that the latter has any cause of action against him for the payment of the mortgage. If the mortgagor be not liable to pay at all there is no liability resting on the grantee to pay.

It then becomes necessary to determine what liability, if any, rested upon the mortgagor. By reference to the fourth article of the mortgage, already set forth in the statement of facts, it will be seen that there is no personal liability on the part of the mortgagor. There is no obligation, therefore, on the part of The Penn Company to indemnify the mortgagor company for any personal liability to pay the mortgage or any part thereof, for no such liability exists. However much below the amount of the mortgage the land should sell for is, so far as this question is concerned, a matter of no legal interest to the mortgagor company, and the fact in no way creates any liability on its part. As there was no liability on the part of the mortgagor to pay any portion of the debt secured by the mortgage, and the liability, if any, to indemnify the mortgagor on its covenant to insure is, as stated by the judge delivering the opinion of the Circuit Court of Appeals, incidental and subordinate to its liability to indemnify the mortgagor regarding the mortgage debt, no such liability to indemnify upon the insurance covenant would seem to rest upon the defendant com-

pany or upon Kann, because there is none such existing in relation to the mortgage debt itself.

The covenant to insure does not run with the land, so that one taking a conveyance comes under a primary obligation to insure, over and above that of a mere indemnitor. *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507, 513; *The City of Norwich*, 118 U. S. 468, 494.

But, assuming the law of Pennsylvania to be that there is an obligation on the part of these defendants, by reason of their taking the deeds subject to the mortgage, to indemnify the mortgagor on its covenant to insure, contained in the mortgage, what is the extent and character of that obligation thus assumed? The covenant on the part of the mortgagor, which we assume exists by reason of the language contained in the mortgage, was a personal obligation or covenant. The question then arises, what consequences would follow upon a breach of the covenant by the mortgagor? Suppose it had not conveyed the property and still remained the owner and in possession, and yet refused or omitted to insure, as it had covenanted to do in the mortgage, what remedy under this mortgage existed because of this violation by the mortgagor? The complainant might have taken out insurance and claimed reimbursement or added the premiums paid to the amount of the mortgage debt. It did not do so. What other remedy it had for a violation of any covenant by the mortgagor is stated in the mortgage. It is therein expressly understood and agreed between the parties "that no other suit or proceeding for the collection of the bonds shall be commenced, except such suits or proceedings as shall be necessary to recover the possession of the premises mortgaged, or to subject the same to the payment of the debts, and that the sale of the mortgaged premises, whether under the power of sale granted or any other power of sale, or by or under any judicial proceeding whatsoever, *shall operate as a full and complete satisfaction and discharge of the indebtedness of the mortgage and of the obligation of the covenants therein contained*, whether the premises should be bidden in for the whole amount of the indebtedness or for a less price, anything in the bonds or coupons to the contrary

thereof notwithstanding." The sale of the mortgaged premises is by the specific terms of the mortgage to operate as satisfaction of all the covenants contained in the mortgage. And in asking for the sale of the property, by the commencement of this suit, complainant cannot add to the relief it is entitled to by a sale, any other or different relief than that. By the express provisions of the mortgage there was not only an exemption of personal liability for the payment of the bonds and coupons, or any part of them, but there was also an exemption of all personal liability on account of the obligation of any other covenant contained in the mortgage; such exemption covering not only the obligation to pay the debt, but also any other covenant. Hence the obligation to indemnify the mortgagor on account of any failure by it to insure does not exist, because there is no liability on the part of the mortgagor to answer for its breach of covenant in any other way than by complainant taking possession of the premises, or by a foreclosure of the mortgage and sale thereunder. The mortgagor having conveyed the premises, has no further interest in them, and hence their sale under the mortgage would be no damage to the mortgagor, and no case for indemnity to it would be made out.

The alleged contractual obligation to indemnify, as well regarding the covenant to insure, as that regarding the payment of the bonds and coupons, does not help the complainant in this case, because of the affirmative provisions of the mortgage. Whether the sale, under the foreclosure prayed for in this case, has taken place or not, there is no other or personal liability of the mortgagor to respond for its breach of covenant to insure than that which it has provided for in the mortgage. If it be under none other, then the indemnitor has nothing to idemnify.

In regard to the contractual obligation to insure on the part of defendants, which complainant avers exists as one of the foundations for the equitable lien claimed by it, the judge, delivering the opinion of the Circuit Court of Appeals, 103 Fed. Rep. 151, said:

"But, apart from cases of fraud, it is only when there is such

a contract or promise, which can be so enforced, that courts of equity will recognize for that purpose the existence of an equitable lien. In such case the lien is impressed upon funds or property which, belonging to the promisor, were the very funds or property which constituted the subject-matter of the contract or to which the contract or promise related. It is essential, therefore, that the funds or other property, which are to be charged with the lien, should have, either at the time of the contract or afterwards, and while it was still unperformed, belonged to the party against whom the contract is to be so enforced, and be so identified, even though at the time of suit the said funds or property have come into the hands of volunteers, or of others who may be affected with notice. There must, therefore, exist a contract by the party owning, either *in præsenti* or in expectancy, the property sought to be charged, which directly or by necessary implication, expresses the intention to charge such property with the lien, in favor of the other party to the contract. . . . It is not pretended that there was any contract between Kann or the appellant company and the complainant to insure for its benefit, or any promise or declaration of intention, upon any or no consideration, that they, or either of them, would so insure, or that policies or funds arising therefrom should be assigned or charged with a lien in its favor. The first essential requisite to an equitable lien, as above described, is, therefore, entirely wanting. There is no contractual relation of any kind between the mortgagee and the appellant," (respondent in this court) "in whose name, and for whose sole benefit, these policies of insurance were taken out. If such a lien, therefore, exists on these insurance funds, in favor of the complainant, it must be on other grounds than these ordinary and well-understood ones. This is not the case of a mortgagee claiming an insurance taken out by the mortgagor, who had covenanted to insure for the benefit of the mortgagee; nor is it the case of such mortgagee claiming such insurance funds, when they had come into the hands of third persons, 'who are either volunteers, or who take the estate [the insurance funds] on which the lien is agreed to be given with notice of the stipulation.' The complainant does not claim that the funds due on policies taken out

by the mortgagor, and which the mortgagor is held to have promised that he would assign to the mortgagee, have come into the possession of the appellant (respondent), with notice, and are, therefore, charged with a lien in favor of the mortgagee. Its claim is that the grantee of the equity of redemption, having taken the property expressly subject to the mortgage, which contained a covenant on the part of the mortgagor to insure, on that ground alone came either under a direct obligation to insure the premises for the benefit of the mortgagee, or under an obligation to indemnify the mortgagor for his liability under said covenant. But the property or 'estate' which came to the hands of the appellant, as grantee of the equity of redemption, was the mortgaged premises, subject to the mortgage. There is no difficulty in determining what that estate is to be charged with. The court here, however, is asked to impress a lien in favor of the mortgagee, not on this estate, but upon funds which were never in any sense the property of the mortgagor, and could never have been the subject-matter of a promise on its part. It is the first branch of the claim above stated (*i. e.*, the alleged direct obligation) that we are now considering."

We fail to see any contractual obligation on the part of the defendants to insure for the benefit of the bondholders further than we have stated, as indemnitors of the mortgagor for its breach, if any, of its covenants.

The case of *Wheeler* v. *Insurance Company*, 101 U. S. 439, is founded upon the existence of the obligation of the mortgagor to insure, and it is said that under such circumstances the mortgagee will have an equitable lien upon the money due upon a policy of insurance taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed, and that such equitable lien exists, although the contract provided that in case of the mortgagor's failure to procure and assign that insurance, the mortgagee might procure it at the mortgagor's expense.

If the insurance had been taken out by this mortgagor company, even in its own name, we would have the same principle as decided in the last cited case, and the complainant herein

might, as its counsel claim, have had an equitable lien upon the moneys arising from such insurance to the extent of the loss under the mortgage. But here is no such case. The mortgagor did not insure after it lost title to the property under the conveyance by its receiver to Kann, and the insurance that was procured was for the interest of the defendants in the property to the exclusion, in terms, of the interest of the complainant. Although the defendant bought subject to the mortgage and with full knowledge of the insurance covenant, yet it held the property subject only to an obligation on its part, at most, to indemnify the mortgagor on account of the mortgage debt or on account of its covenant to insure, and we have seen that that obligation, under the terms of this mortgage, was of no materiality because by its terms the mortgagor was under no personal liability, and there was, therefore, no subject upon which indemnity could rest.

If there is no contractual obligation arising from the terms of the mortgage, and the taking of the deeds with an "under and subject" clause, as above referred to then there must have been some conduct on the part of the person to be charged which would estop him from setting up as a defence the lack of such obligation. The complainant urges that the defendants have been guilty of conduct which does estop them from denying their liability. This is a different claim from that first remarked upon as to the treatment of defendants as receivers. This claim is based upon a survey of the whole conduct of defendants in connection with the mortgagor company and the insurance upon the property. The record in this case, in our opinion, discloses no conduct on the part of the defendants which estops them or either of them from showing the lack of any obligation on their part to apply any portion of the insurance moneys to the payment of the bondholders. There has been no wrecking of the mortgagor company by either or both defendants, and neither has done anything depriving himself or itself of any defence he or it might otherwise have. In other words, both defendants have, so far as this record shows, full liberty to set up as a defence the want of any contractual or other obligation to insure. The opinion of the Circuit Court of Ap-

peals is quite full in regard to this claim, and we feel there is no necessity in ourselves going over this particular ground.

After a careful consideration of the whole case, we are of opinion that the judgment of the Circuit Court of Appeals was right, and it is, therefore,

Affirmed.

MR. JUSTICE GRAY did not hear the argument and took no part in the decision of this case.

LANDER *v.* MERCANTILE BANK.

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

No. 227. Argued April 18, 1902.—Decided June 2, 1902.

This suit was brought in the Circuit Court of the United States for the Northern Division of Ohio, Eastern District, to restrain the collection of certain taxes levied by the officers of Cuyahoga County, Ohio, upon the appellee bank. The grounds of the suit were that the acts of the taxing officers of said county were in violation of the "rights of the plaintiff (appellee) and of its shareholders accorded to them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio." The bill alleged that the plaintiff (appellee) was a national bank, and stated the capital stock of the bank and the number of shares into which it was divided; that its cashier made the proper returns of the resources and liabilities of the bank to the county auditor; that the latter fixed the value thereof, as required by section 2766 of the Revised Statutes of the State, after deducting the assessed value of the real estate of the bank, and transmitted a statement of his action, and a copy of the report made by the cashier, to the state board of equalization, for incorporated banks and that board, professing to act under sections 2808 and 2809 of the Revised Statutes of the State, increased the valuation of the shares without notice to the bank or to its shareholders, and that the board was hence without jurisdiction to make such increase, and "its action in respect thereto was void and of no effect." It was averred "that said state board of equalization knowingly and designedly did fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed

Statement of the Case.

upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland." After the answer was filed, the case was referred to a master, and upon the coming in of his report, and, after considering the exceptions of the parties to it, the court dissolved the injunction which had been granted and dismissed the bill. That action was reversed by the Circuit Court of Appeals and the cause remanded, with instructions to enter a decree in favor of the complainant (appellee here). Thereupon an appeal was taken. *Held* that the judgment of the Court of Appeals should be reversed, and the judgment of the Circuit Court should be affirmed.

THIS suit was brought in the Circuit Court of the United States for the Northern Division of Ohio, Eastern District, to restrain the collection of certain taxes levied by the officers of Cuyahoga County, Ohio, upon the appellee bank. The grounds of the suit were that the acts of the taxing officers of said county were in violation of the "rights of the plaintiff (appellee) and of its shareholders accorded to them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio."

The bill alleged that the plaintiff (appellee) was a national bank, and stated the capital stock of the bank and the number of shares into which it was divided; that its cashier made the proper returns of the resources and liabilities of the bank to the county auditor; that the latter fixed the value thereof, as required by section 2766 of the Revised Statutes of the State, after deducting the assessed value of the real estate of the bank, and transmitted a statement of his action, and a copy of the report made by the cashier, to the state board of equalization, for incorporated banks and that board, professing to act under sections 2808 and 2809 of the Revised Statutes of the State, increased the valuation of the shares without notice to the bank or to its shareholders, and that the board was hence without jurisdiction to make such increase, and "its action in respect thereto was void and of no effect."

It was averred "that said state board of equalization know-

ingly and designedly did fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland."

Section 2730 of the Revised Statutes of Ohio was set out in the bill, which defines "credits" to be the excess of certain legal claims and demands over and above legal and *bona fide* debts, and it was averred "that a large amount of moneyed capital in the hands of individual citizens of the State of Ohio invested in promissory notes and other legal obligations, securities, claims and demands, amounting to several hundred millions of dollars, is by the aforesaid provision, allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation."

Figures were given in support of the allegation as to individuals, "building and loan incorporations," which, it was alleged, "were empowered and authorized by said statute to borrow and loan money and to do a general banking business with their members and depositors," and savings banks, in which it was alleged that there was on time deposit an amount exceeding the entire capital stock of all the national banks in the State, which deposits were credits belonging to the depositors from which legal *bona fide* debts were authorized by the statute to be deducted in order to ascertain the taxable value of said deposits.

That on account of such exemptions unlawful discrimination was practiced against moneyed capital invested in national banks, and that the tax lawfully assessed and paid on its shares by complainant amounted to upwards of twenty per cent of the income which arose from its operations.

That each of the shareholders was indebted in an amount of *bona fide* debts, "exclusive of the exceptions allowed by the statute, to an amount equal to the actual and par value of the number of shares specified opposite their respective names, and which said excess of said debts over said credits as aforesaid,

the said shareholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them."

Proof of this indebtedness was submitted to the county auditor, but he refused to make any deduction, and threatened to collect taxes on such shares with said deductions disallowed.

That the right to have such deductions made was adjudicated in a suit brought by plaintiff on the 8th of April, 1887, against Horatio N. Whitbeck, the predecessor of the defendant, as treasurer of Cuyahoga County, and also in other suits brought against other predecessors of the defendant, in which said suits the issues were the same as those in the present suit, and that each of the defendants in said suits "represented the same interest, sustained the same relation, was charged with the same duties to the public as the present defendant," and in which the issues determined and adjudged "involved the same subject-matter, and that the judgments therein given are wholly unreversed and still in full force and operation."

The bill prayed for an injunction of the collection of any of the taxes which were charged on the duplicate tax list of the county, "including those levied on such unlawful increase of valuation by such state board of equalization for incorporated bank shares, permitting, however, said treasurer, without prejudice to his rights in the premises, to receive the amounts so as aforesaid tendered by the plaintiff to him."

The answer admitted some of the averments of the bill and tendered issue on those upon which complainant based the charge of illegality of and discrimination in the assessment. As to the action of the auditor the answer alleged that "the auditor was greatly deceived and mislead by complainant's statement of the true value of its returns to him for taxation, and that the returns so made did not exceed forty (40) per cent of the actual value of said property and assets of complainant; when in truth and in fact the said complainant should have returned the same at its true value in money." And also averred "that said board of equalization began work at the time the statutes require, and continued its work continuously, but for want of the necessary information it could not complete its work earlier than December 6, 1897."

In an amendment to the answer the deception of complainant cashier as to the true value of the shares was again averred, and the justness and legality of the action of the state board of equalization were circumstantially asserted.

As a second defence it was alleged that section 167 of the Revised Statutes of Ohio was in *pari materia*, and was a part of the taxing system of the State and of the machinery for the collection of the public revenue of the State, and provided that when the amount of taxes to be remitted exceeded $100, as in the case at bar, that the board of revision provided for by said section, consisting of the governor, auditor of State and attorney general, was constituted an appellate board to the action of the state board of equalization, of shares of incorporated banks, and had the power and authority and jurisdiction to review, revise and correct all excessive, illegal or erroneous assessments, fines or judgments that might have been made by said board of equalization; that complainant, not having appealed to such board of revision, and by refusing to submit to such board its "cause and the matters in dispute, had not exhausted its usual and ordinary remedy at law," and had not exhausted the remedies provided by the statutes of Ohio, and hence the court had "no jurisdiction in equity to hear and determine said cause, and said plaintiff bank should not be permitted to further prosecute its action herein."

The case was referred to a master, and upon the coming in of his report, and, after considering the exceptions of the parties to it, the court dissolved the injunction which had been granted and dismissed the bill. 98 Fed. Rep. 465. That action was reversed by the Circuit Court of Appeals and the cause remanded, with instructions to enter a decree in favor of the complainant (appellee here). 109 Fed. Rep. 21. Thereupon this appeal was taken. Other facts are stated in the opinion. Most of the sections of the Revised Statutes of Ohio on the subject of taxation, which are applicable to the questions involved, are printed at length in 173 U. S., page 209, *et seq.* Other sections are inserted in the margin[1] or referred to in the opinion.

[1] "SEC. 2807. The said boards (certain city boards,) shall hear complaints and equalize the assessment of all personal property, moneys and

Counsel for Parties.

Mr. J. M. Sheet and *Mr. Smith W. Bennett* for appellant. *Mr. P. H. Kaiser* was on their brief.

Mr. W. W. Boynton for appellee.

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

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credits, new entries and new structures returned for the current year, by the township assessors and county auditors; and they shall have power to add to, or deduct from the valuation of personal property, or moneys or credits, of any person returned by the assessor or county auditor, or which may have been omitted by them, or to add other items upon such evidence as shall be satisfactory to the said boards, whether said return be made upon oath of each person or upon the valuation of the assessor or county auditor, but when any addition shall be ordered to be made to any list returned under oath, a statement of the facts upon which such addition was made shall be entered on the journal of the boards: *Provided*, That no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons whose personal property is sought to be added to or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased; . . ."

"SEC. 2808. The governor, auditor of State and attorney general shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors as the same shall have been reported by the county auditors to the state auditor."

"SEC. 2809. Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and if the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such per cent as will equalize said shares to their true value in money: *Provided*, That said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum.

"SEC. 2810. The auditor of State shall, forthwith after such equalization shall have been made, certify to the auditors of the proper counties the valuation, as equalized, of the shares of banks situated in such counties, which valuation shall be put on the proper tax list."

The Circuit Court of Appeals based its opinion on two questions: (1) The jurisdiction of the state board of equalization for incorporated banks to increase, without notice to the bank, the valuation fixed by the county auditor on the shares of its stock; (2) the fact of the former adjudications as determining the right to reduce the valuation of the shares by taking *bona fide* indebtedness therefrom. Counsel for appellee objects to a broader discussion by appellant's counsel of the case than those questions present, urging they were the only ones made by the appellee in the Circuit Court of Appeals. In view of this insistence, and as appellee took the case to the latter court, we may make them the grounds of our discussion and decision, although the first question was not passed upon by the Circuit Court.

The findings of the master sustained the allegations of the bill as to the action of the auditor, and that the board of equalization met as required by section 2808 of the Revised Statutes of Ohio, and transacted no business except to adjourn "at the call of the secretary." It met again on the 10th and 20th of September, but took no action as to the valuation of the shares of plaintiff. "On the 4th December, 1897," (the master found,) "the members of said board next meet at the call of the state auditor to consider unfinished business. The record of the meetings of said board, as originally made by the secretary, shows that at the meeting held June 15, 1897, September 10, 1897, September 20, 1897, the 'board adjourned.' At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words: 'Amended to read, "adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the State,"' and thereupon said board adjourned *sine die.* Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

"Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board, assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320.00, so fixed by the county auditor, to $642,320.00, and on the 6th day of December certified said

valuation to the auditor of Cuyahoga County, to be by him placed on the treasurer's duplicate, which was accordingly done; that neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary, and no notice or information of any kind or opportunity to be heard was given by said board, its secretary or any other person to said bank, or any of its officers, directors or shareholders of any or either of said meetings, except such as the statute gave them, to wit, section 2808, Revised Statutes, and succeeding sections; nor did they, or either of them, have any notice of any of said meetings or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board or of the purpose to increase the value of the shares so fixed by the auditor was on the 7th day of December, 1897, after the action of the board was had and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board; that thereupon, said bank and its shareholders, through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and was notified that two of the members of said board were out of the State, and that December 28 was as early as the bank officers could be received; that on said day the officers of said bank, on behalf of said shareholders duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned *sine die* and could not reconvene as a state board of equalization for banks to consider any claim or application respecting the value of said shares.

"At the time the persons who had composed the state board of equalization for banks, and who are the same persons required to act under section 167 of the Revised Statutes of Ohio, offered to convene and organize under said section 167 to consider the case of the various plaintiff banks at such time as

might be convenient for the representatives of the Cleveland banks to appear. Some doubt was expressed by some of the members of the committee that the board would not have the power under section 167 to afford as full relief as the board of equalization, and only one of the Cleveland banks appeared before the board when organized under section 167, viz., the First National Bank; the others declined to appear.

"Ninth. That the said auditor of said county of Cuyahoga, upon the receipt of the certificate from said state board of equalization, entered said valuation of $642,320.00 upon the tax duplicate of said county for the year 1897, and assessed against the same taxes at the rate of 3.03 cents on each dollar, and which amounted on said valuation to $19,462.30. The taxes on said bank shares at the said rate of 3.03 on each dollar, if assessed on the valuation of $519,320.00, as fixed by the auditor of Cuyahoga County, would have amounted to the sum of $15,735.39."

As conclusion of law the master reported that the increase made by the board of equalization was void for want of notice to the bank or its shareholders.

The Circuit Court of Appeals concurred in the legal conclusions of the master upon the ground that "it is an elementary principle of law that tribunals vested with the power to affect the property of citizens must act with notice," and in the light of that principle considered the statutes of Ohio, and construed them to require the state board of equalization to give notice to persons to be affected by its action. That is, as we understand, notice other than the statute gives by designating the time and place of the meeting of the board.

The court deduced its conclusion from the provisions of section 2809 of the Revised Statutes of Ohio. It is there provided that "said board (board of equalization) shall hear complaints and equalize the value of said shares according to the rules prescribed by this title, and for valuing and equalizing the values of real and personal property." The title referred to is Title 13, and turning to it we find quite an elaborate system. Many boards of equalization are constituted. There are annual county boards, annual city boards, annual state

boards for railroads and for banks, decennial state, county, and city boards, and the duties of all the boards are carefully prescribed. In the sections constituting some of these boards there are references to sections constituting other boards. For instance, in section 2804, providing for a county board of equalization, there is this provision: "Said board shall have power to hear complaints, and to equalize the value of all real and personal property, moneys and credits, within the county, and shall be governed by the rules prescribed for the government of decennial county boards for the equalization of real property: *provided*, . . . the annual county board shall not increase or reduce the valuation of any real estate, except upon reasonable notice to all persons directly interested, and an opportunity for a full hearing of the question involved." The rules referred to are contained in section 2814, and pertain strictly to producing uniformity of valuation. In other words, the board is enjoined to raise or reduce the valuations returned in order to make them conform to the standard of valuation prescribed by the statute. There is a limitation upon the power of the board with which we are not concerned. The board afterwards sits as a board of revision.

Again, section 2705 provides for a city board of equalization, and it is given all the "powers," and is to be "governed by the rules, provisions and limitations prescribed in the next preceding section for the annual county board." Section 2804, *supra*. So, again, in section 2805 certain state boards are given "all the powers provided by law for decennial county boards for the equalization of real property, and shall be governed by the rules prescribed for such decennial county boards for equalizing the valuations returned by district assessors." These careful provisions for equalization of valuation seems to have been caused by the command of the constitution of the State that taxation should be by "uniform rule," and, we think, furnished the key to the meaning of section 2809. In execution of the constitution of the State that section defined and enjoined the powers of the board in the equalization of values, and did not intend to require personal notice to shareholders of the exercise of those powers.

We agree with the Court of Appeals that some notice was necessary to be given, and the question occurs, did the statute give notice by fixing the time of the meeting of the board? It seems to be conceded that the statute did do so as to the first meeting of the board, and that such notice would have been sufficient as to subsequent adjournments if they had been made to days certain.

In the case of *Hamilton* v. *Dempsey*, 20 Ohio St. 168, the Supreme Court of Ohio decided that the law of the State which fixed the time and place of meeting of a board of equalization, but which provided for no other notice, nevertheless gave notice to every citizen whose property, real or personal, had been returned for taxation.

In *State ex rel.* v. *Jones, Auditor*, 51 Ohio St. 492, the same proposition was affirmed in passing upon the law providing for the taxation of the property of express, telegraph and telephone companies. It was contended, and we quote from the opinion of the court—

"The property of the express company, it is alleged, was taken without due course of process of law in this, that the act in question does not provide for any notice to the company, nor for a hearing by the board of appraisers and assessors, nor for an appeal to any superior authority for the correction of illegal, erroneous or excessive valuations."

Replying to the contention, the court said:

"The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had a right to be present and explain the statement rendered of its property and the value thereof. Indeed, without notice from the board, or by the terms of the law, the company would have been unable to make the return prescribed by the statute. And of the company's return it may be said, in the language of the opinion in the *Kentucky Railroad Tax cases*, 115 U. S. 321: 'This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert.'"

The court also cited *The State Railroad Tax cases*, 92 U. S. 575.

In the latter cases, it was claimed that the state board of equalization had no power to increase the assessment or value of railroad property reported by the companies to the state auditor and by him to the board without notice to the companies, and for want of such notice "the whole assessment and the levy of taxes" became void. The court said, by Mr. Justice Miller: "It is hard to believe that such a proposition can be seriously made." After pointing out the "absurdity" of the claim, he added: "Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked." See also *Hagar* v. *Reclamation District*, 111 U. S. 701; *Palmer* v. *McMahon*, 133 U. S. 660; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461.

We do not think the principle of those cases is affected by an adjournment of the Ohio board without fixing a date of meeting. How were the rights of the bank affected and to what inconvenience was it put? It did not appear at the first meeting of the board. It rested on the evidence it had returned to the auditor, and it knew that the report it had made to the comptroller of the State would be before the board, and it knew also the duties and power of the board. The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjournments. What it had done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board.

2. The master's report on the claim of *res judicata* was as follows:

"The master finds the issues made by the bill and answer, relating to the former adjudications of the question of the right to deduction of legal *bona fide* indebtedness of the stockholders from the value of their shares in determining their value for

taxation, with the defendant; that such fact or right was not directly involved in the actions set up in the bill and it was not therein by said courts adjudicated and decided, and the fact carried into judgment in favor of said bank, that its stockholders were entitled to said deductions of indebtedness from the value of their shares, under the same legislation now existing on the subject, both state and national, and that said judgments are not in full force and effect, as against said defendant."

The Circuit Court concurred with the master. The court, after expressing that its impressions at the oral argument had been to sustain the plea of former adjudication, said:

"Looking into the bill, however, in the former case, and after an examination of the case of *National Bank of Wellington* v. *Chapman*, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining credits, but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character, to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence."

And further:

"The adjudication, therefor, upon which the complainant relies, is an adjudication, not of law, but of fact; not of the fact at issue in the present case, but of the fact as to the practical operation of the law at the time of that adjudication, to wit, in 1887, 1893, and in 1894."

The Circuit Court of Appeals reviewed the *Whitbeck case*, 127 U. S. 193, and considered its interpretation by this court in *National Bank of Wellington* v. *Chapman*, 173 U. S. 205. From that review the court declared that it was not "prepared to say that the judgment in that case was *res judicata* as to the rights of complainant's stockholders, to deduct their debts from their shares of national bank stock." But to the other adjudications the court expressed a different view and held them to be prior and conclusive adjudications of the issue now involved. In other words, we understand the court to decide, that in the former cases unlawful discrimination was made by the Ohio

statute, "and that it had been adjudicated therein (in the cases pleaded) that national bank shareholders were entitled to deduct their debts from the value of their shares for the purpose of taxation," and that the adjudication should prevail as an estoppel against the appellants, notwithstanding the statute has been subsequently construed not of itself to work such discrimination. The conclusion is claimed to be sustained by the decision of this court in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371.

A consideration of the records in the pleaded cases becomes necessary.

In the *Whitbeck* case the plaintiff (appellee here) averred that it was a bank and had been discriminated against; that its cashier had made reports to the taxing officers according to law; the auditor *pretended* to proceed in fixing value of its shares in accordance with section 2766 of the Revised Statutes of Ohio, and that the value placed by him thereon was knowingly in excess of the value fixed in said county on other moneyed capital in the hands of individual citizens of the State, city and county. The state board of equalization assumed, and pretended to comply, with sections 2808 and 2809, and examined the report of the cashier and return of the auditor, and pretended to equalize said shares to their true value in money, and fixed their valuation at $495,774.76.

The further action of the board was described as pretended with the design, and the execution of the design, of placing an excessive value on the shares; that a large part of the stock of the bank was invested in United States securities and the lawful money thereof, and the tax levied and assessed was in violation of law and unauthorized and void.

The requirements of the constitution of the State were cited and the restriction of the taxation of national bank shares by the Revised Statutes of the United States was stated.

The definition of credits by section 2730 was given, and it was averred that the law required persons who listed property for taxation to set forth their credits as defined; that a large part of moneyed capital in the hands of individuals, which was invested in notes, obligations and credits, were, by the provi-

sions allowing the deduction of *bona fide* debts, exempted from taxation, which made a discrimination against national bank shares in violation of section 5219 of the Revised Statutes of the United States.

The names of the shareholders were set out, and it was averred that they were indebted in an amount in excess of credits equal to the value of their respective shares. That at the time of the return and statement to the auditor the fact of such indebtedness was not known, nor was there opportunity given the shareholders to deduct such indebtedness, nor was there provision made for the deduction of such indebtedness from the value of the shares, but before the taxes became due proof of the indebtedness was tendered and a demand made for its reduction. The proof and demand were refused, and the payment of the whole tax insisted on. The illegality of the taxes was asserted for the following reasons:

1. Because in violation of the act of Congress under which the bank was incorporated.

2. The laws of Ohio permitted the owner of credits to deduct therefrom his *bona fide* debts, and denied such right to the "owner of capital stock" of the bank, and required him to list "the whole number of shares owned by him and not simply the excess of the value of said shares over his indebtedness." A discrimination was hence averred to result from the taxation of such shares at much greater rate than was assessed upon other moneyed capital in the hands of individual citizens.

3. The property of the bank was not valued and taxed as the property of individuals, nor was equality preserved in the valuation of the shares as compared with other property in the locality, but the valuation was twice as high, while the rate of levy was the same.

4. Illegality of the action of the board of equalization under the state laws.

5. The taxation of the shares was at a greater rate than was assessed upon other moneyed capital in the hands of individuals.

6. That by the proceedings had in the assessment and levy of the taxes had the effect to deprive the bank and its share-

holders, "both in the manner of valuation and equalization, of all benefit of the constitution and general laws of the State, by which only uniformity in the burdens of taxation upon all description of property could be secured, to take from them the security afforded by the limitations of the acts of Congress, and to impose upon them such excessive exactions as to make the franchise granted by said act comparatively valueless."

There were averments of grounds of relief in equity which we need not quote.

The respondent filed a demurrer to the bill, which was overruled. An answer was then filed, which denied the allegations of the bill, from which it was claimed discrimination against the complainant and its shareholders resulted.

The following are quotations from the answer: The defendant denies "that any of the shareholders of said banking association, at the times named in said bill of complaint, were indebted or owing to others of *bona fide* debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of his said shares or any part thereof." He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate and no tax assessed thereon. This defendant denies the averment in said petition that neither of said shareholders authorized any one to list his said shares for him. He denies that it was necessary for said shareholders so to do. . . . That any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint. This defendant further denies that the taxes so levied and assessed on the shares of said complainant's stock are, for the reasons alleged in said bill of complaint, or for any reason, unjust, illegal or void."

A special master was appointed "to examine the evidence and record on file and to report who, if any, of the shareholders of

the complainant, on the day preceding the second Monday of October, 1885, had *bona fide* indebtedness which should have been deducted from the valuation of the shares."

The master reported "that having examined the evidence and heard the claim of counsel, he finds and reports that all the shareholders are entitled to the deductions as charged in the bill, except the following, who should be taxed for the amount stated, viz.: E. R. Perkins had credits subject to taxation above his indebtedness on the day named to the sum of $4374.40; C. L. Murfry had credits subject to taxation above his indebtedness on the day named to the sum of $724; Robert L. Chamberlain had credits subject to taxation above his indebtedness on the day named to the sum of $4448; James Parmelee had credits subject to taxation above his indebtedness on the day named to the sum of $3113.60; James Barnett had credits subject to taxation above his indebtedness on the day named to the sum of $17,792."

A decree was entered in accordance with the finding, and recited that the court found all the allegations of the bill to be true except as to the three stockholders mentioned by the master. Except as to them, the respondent and his successors in office were enjoined from collecting the taxes remaining unpaid.

This decree was afterwards by consent vacated, and two questions certified to this court. The only one with which we are concerned was as follows:

"Whether the taxation of national bank shares in the State of Ohio in the year 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his *bona fide* indebtedness existing on the Wednesday next preceding the second Monday in May in 1885, and on the day preceding the second Monday in April, 1885, is a discrimination forbidden by the act of Congress, the said shareholder not having deducted said *bona fide* indebtedness from any credits owned by him at either of said dates."

In the case against Kimberly, treasurer, the pleadings were substantially the same as in the *Whitbeck* case, and the following judgment was entered:

"The court further find that there should be deducted from

said first valuation the sum of $169,235, being the amount on which the particular shareholders named in said bill of complaint are not taxable, the same being less in amount and value than their *bona fide* debts from which they are entitled to have the same deducted, leaving the sum of $380,670, which is hereby declared to be the true valuation of the shares of said bank taxable under the act of Congress for said year 1888."

In the *Shields* cases, (there were two, respectively numbered 5122 and 5127,) the bills on the merits were the same as in the *Whitbeck* case, and the *Whitbeck* case was pleaded as a prior adjudication of the right of the shareholders of complainant to deduct their *bona fide* debts from the value of the shares of stock. The bill in No. 5122 alleged that "in said suit (*Whitbeck* suit) this complainant alleged by its bill the refusal by the then auditor of said county, to allow a deduction of *bona fide* debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction so joined issue as to present the question of the right of said owners of said shares, to said deduction, in view of the laws of Ohio, the said laws being the same as the present laws of the State and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deductions to be made of *bona fide* debts of stockholders from the valuation of said shares; and the complainant says that upon the issue so joined the said court at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of *bona fide* debts from the value of their said shares, to an equal amount fixed for taxation." The same allegations were substantially made in case No. 5127.

A demurrer was filed to the bill in No. 5122, which was overruled, and the respondent electing to stand by his demurrer, the following judgment was entered:

"The parties appearing by counsel, this cause came on for hearing, and by consent of the parties the judgment or order *pro confesso* heretofore entered in said case, is hereby vacated, and the respondent has leave to demur to said complaint; and there-

upon came the respondent and demurred to the bill of complaint; and the cause came on for hearing upon said demurrer and was argued by counsel; on consideration whereof it was ordered, adjudged and decreed that said demurrer be and the same is hereby overruled, and the defendant electing to stand by his demurrer, the court upon further hearing find the allegations of the complainant's bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection. It is therefore ordered, adjudged and decreed that the defendant and his successors in office be and they are hereby perpetually enjoined from collecting or in any way or manner attempting to collect the said illegal tax set out and particularly described in said bill of complaint."

In case No. 5127 Shields did not appear, and a decree was entered restraining the collection of taxes.

The law of *res judicata* is well settled. Its essential principle is, that questions once litigated shall not be litigated again between the same parties or their privies. And it may be conceded that the appellant in the case at bar is a privy to his predecessors in the suits which are pleaded as prior adjudications, and that *res judicata* applies to tax cases if the cause of action relied on is the "thing" which was "adjudged" in a prior suit. *New Orleans* v. *Citizens' Bank*, *supra*.

But the final question is, what was the "thing adjudged" in the prior cases? The answer to the question is found in the pleadings in those cases and in the judgments which were entered. In the *Whitbeck* and *Kimberly* cases the judgments were substantially alike. They adjudged a deduction of the *bona fide* debts of the shareholders from the valuation of the shares. The judgment in the *Shields* case, No. 5122, was more general. It found "the allegations of the bill to be true, and that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection." The judgment in case No. 5127 was equally as general.

But those were conclusions from propositions not only of law but of fact, and granting that one of the propositions of law was the construction of the Ohio statute, (a wrong con-

struction, as has since been held,) a necessary element of fact was that the discrimination complained of was effected through the practical operation of the statute in the years the assessments were made. This was pointed out in *National Bank of Wellington* v. *Chapman*, 173 U. S. 205. In that case the same contentions were made as in this, and the same statute was passed upon. And also the effect and extent of *Whitbeck* v. *Mercantile National Bank* were carefully considered, explained and defined.

All the cases pleaded as *res judicata* were based on the *Whitbeck* case, and there was in each, as we have said, the fact of the practical operation of the Ohio statute exempting from taxation moneyed capital in the hands of individuals, and that fact determined the judgments in each case. In other words, as the Circuit Court found, the complainant in those cases (appellee here) relied not only upon the statute but upon its practical discriminatory operation. And we need not point out that judgments based on such discrimination in 1885, 1887, 1893 or 1894 cannot be conclusive proof of the existence of discrimination in 1896 or 1897.

In the case at bar the fact of discrimination was put in issue by the pleadings, and on the issue made the Circuit Court found in effect adversely to appellee. In the other cases the discrimination was either proved or admitted.

The judgment of the Circuit Court of Appeals is reversed and the judgment of the Circuit Court is affirmed.

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

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY VOLUMES 185 AND 186.

No. 216. WALTERS, ADMINISTRATRIX, *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. Error to the Circuit Court of the United States for the District of Nebraska. Submitted April 7, 1902. Decided April 14, 1902. *Per Curiam.* Judgment affirmed, with costs, on the authority of *St. Louis & San Francisco Railway Company* v. *James*, 161 U. S. 545; *Louisville &c. Railway Company* v. *Louisville Banking Company*, 174 U. S. 552. *Mr. N. C. Abbott* for the plaintiff in error. *Mr. J. W. Deweese* and *Mr. Charles F. Manderson* for the defendant in error.

No. 447. SHARKEY *v.* INDIANA, DECATUR & WESTERN RAILWAY COMPANY. Error to the Circuit Court of the United States for the Southern District of New York. Submitted April 7, 1902. Decided April 14, 1902. *Per Curiam.* Order affirmed, with costs, on the authority of *Goldey* v. *Morning News*, 156 U. S. 518. *Mr. John H. Hazelton* and *Mr. George C. Hazelton* for the plaintiff in error. *Mr. Rush Taggart* for the defendant in error.

No. 220. RICHARDS *v.* MICHIGAN CENTRAL RAILROAD COMPANY. Error to the Circuit Court of the United States for the Northern District of Illinois. Argued April 15, 16, 1902. Decided April 21, 1902. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Colvin* v. *Jacksonville*, 157 U. S. 368; *Arkansas* v. *Schlierholz*, 179 U. S. 598; *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75; *Robinson* v. *Caldwell*, 165 U. S. 359; and see *Richards* v. *Michigan Central Railroad Company*, 102 Fed. Rep. 508; *Richards* v. *Michigan Central Railroad Company*, 179 U. S. 686; *Richards* v. *Elevator Company*, 158 U. S. 299; 159 U. S. 477. *Mr. John*

C. Chaney and *Mr. Alphonso Hart* for the plaintiff in error. *Mr. George S. Payson* for the defendant in error.

No. 229. Missouri, Kansas and Texas Railway Company *v.* Truskett. Error to the United States Circuit Court of Appeals for the Eighth Circuit. Argued April 18 and 21, 1902. Decided April 28, 1902. *Per Curiam.* Judgment affirmed, with costs, on the opinion of the court below, *Railway Company* v. *Truskett*, 104 Fed. Rep. 728, and cause remanded to the United States Court for the Northern District of the Indian Territory. *Mr. James Hagerman*, *Mr. Clifford L. Jackson* and *Mr. Joseph M. Bryson* for the plaintiff in error. *Mr. S. M. Porter* for the defendant in error.

No. 576. Hall *v.* Johnson, Agent and Warden. Appeal from the Circuit Court of the United States for the Southern District of New York. Motions to dismiss or affirm submitted April 21, 1902. Decided April 28, 1902. *Per Curiam.* Order affirmed, with costs, on the authority of *Storti* v. *Massachusetts*, 183 U. S. 138, 141; *Brown* v. *New Jersey*, 175 U. S. 272; *Andrews* v. *Swartz*, 156 U. S. 272. See *People* v. *Hall*, 169 N. Y. 184. *Mr. Robert C. Taylor* for the motions. *Mr. Charles Haldane* and *Mr. Frank S. Black* opposing.

No. 264. Brown, Devisee, *v.* City of Denver. Appeal from the Circuit Court of the United States for the District of Colorado. Submitted May 2, 1902. Decided May 5, 1902. *Per Curiam.* Decree reversed at the cost of appellants, and cause remanded with directions to dismiss the bill, at complainants' costs, for want of jurisdiction, on the authority of *Wheless* v. *St. Louis*, 180 U. S. 379. *Mr. James H. Brown* for the appellants. *Mr. H. M. Orahood* for the appellees.

No. 314. Northern Central Railway Company *v.* Hering, Comptroller. Error to the Court of Appeals of the State of

Maryland. Motions to dismiss or affirm. Submitted April 28, 1902. Decided May 5, 1902. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *New Orleans Water Works Company* v. *Louisiana State*; *Wisconsin* v. *Commissioners*, and cases cited, 183 U. S. 693; *California Powder Works* v. *Davis*, 151 U. S. 393. *Mr. Isidor Rayner* and *Mr. A. S. Worthington* for the motions. *Mr. John J. Donaldson*, *Mr. Wayne McVeagh* and *Mr. Frederic D. McKenney* opposing.

No. 243. HANIFEN *v.* PRICE. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Argued April 29, 1902. Decided June 2, 1902. Decree affirmed, with costs, by a divided court, and cause remanded to the Circuit Court of the United States for Southern District of New York. *Mr. W. P. Preble, Jr.*, for the petitioner. *Mr. Edmund Wetmore*, for the respondents.

No. 533. NATIONAL SURETY COMPANY *v.* MCCORMICK. Error to the Supreme Court of the State of California. Motions to dismiss or affirm submitted May 19, 1902. Decided June 2, 1902. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Pim* v. *St. Louis*, 165 U. S. 373; *Duncan* v. *Missouri*, 152 U. S. 377, and other cases. *Mr. James A. Louttit* for the motions. *Mr. John J. Burt* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 583. MAURER *v.* DICKERSON. Third Circuit. Denied April 7, 1902. *Mr. Hector T. Fenton* for the petitioner. *Mr. Livingston Gifford* opposing.

No. 605. ANIMARIUM COMPANY *v.* MAHLER. Eighth Circuit.

Denied April 14, 1902. *Mr. Lysander Hill* for the petitioner. *Mr. Leslie A. Gilmore* and *Mr. Frank P. Blair* opposing.

No. 620. De Gigmac *v.* United States. Seventh Circuit. Denied April 14, 1902. *Mr. William S. Forrest* for the petitioners. *Mr. Attorney General, Mr. Solicitor General Richards* and *Mr. S. H. Bethea* opposing.

No. 621. L. Bucki & Son Lumber Company *v.* Atlantic Lumber Company. Fifth Circuit. Denied April 14, 1902. *Mr. H. Bisbee, Mr. George C. Bedell* and *Mr. James E. Padgett* for the petitioner. *Mr. Richard H. Liggett* opposing.

No. 624. United States *v.* Klipstein & Co. Second Circuit. Denied April 14, 1902. *Mr. Attorney General, Mr. Solicitor General Richards* and *Mr. Assistant Attorney General Hoyt* for the petitioner. *Mr. Albert Comstock* opposing.

No. 622. Cable, Administratrix, *v.* United States Life Insurance Company in the City of New York. Seventh Circuit. Granted April 14, 1902. *Mr. H. H. C. Miller* for the petitioner. *Mr. William G. Beale* opposing.

Nos. 600 and 608. Bunker Hill and Sullivan Mining and Concentrating Company *v.* Empire State-Idaho Mining and Developing Company. Ninth Circuit. Denied April 21, 1902. *Mr. Curtis H. Lindley* for the petitioner. *Mr. W. P. Heyburn* opposing.

No. 625. Central of Georgia Railway Company *v.* Charles-

TON AND WESTERN CAROLINA RAILWAY COMPANY. Fifth Circuit. Denied April 21, 1902. *Mr. Henry C. Cunningham* and *Mr. Alexander R. Lawton* for the petitioners. *Mr. Augustine T. Smythe* opposing.

No. 637. TRAIN *v.* UNITED STATES. Second Circuit. Denied April 21, 1902. *Mr. Albert Comstock* for the petitioners. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

No. 639. MAYES *v.* SOUTHERN RAILWAY COMPANY. Fourth Circuit. Denied April 21, 1902. *Mr. Charles W. Tillett* for the petitioner. *Mr. Charles Price* opposing.

No. 651. MUNN *v.* BAKER. Second Circuit. Denied April 28, 1902. *Mr. James J. Macklin* for the petitioner. *Mr. Harrington Putnam*, *Mr. James K. Symmers*, *Mr. J. E. Carpenter* and *Mr. Samuel Park* opposing.

No. 653. FIRST NATIONAL BANK OF LOUISVILLE *v.* HINDMAN. Sixth Circuit. Denied April 28, 1902. *Mr. Alexander Pope Humphrey* and *Mr. John L. Dodd* for the petitioners. *Mr. Augustus E. Willson* and *Mr. Edward J. McDermott* opposing.

No. 652. HARDING *v.* HART. Seventh Circuit. Denied April 28, 1902. (Mr. Justice Brown took no part in the disposition of this application.) *Mr. A. A. Hoehling, Jr.*, for the petitioner. *Mr. Frederic Ullman* and *Mr. D. J. Schuyler* opposing.

No. 636. GUARANTY TRUST COMPANY OF NEW YORK *v.* GROT-

RIAN. Second Circuit. Denied May 5, 1902. *Mr. Julien T. Davies* for the petitioner. *Mr. James B. Dill* and *Mr. Arthur J. Baldwin* opposing.

No. 648. BARR CAR COMPANY *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY. Seventh Circuit. Denied May 5, 1902. *Mr. John W. Munday* for the petitioner. *Mr. George S. Payson* opposing.

No. 649. SEYMOUR LUMBER COMPANY *v.* CARLING. Fifth Circuit. Denied May 5, 1902. *Mr. John R. L. Smith* for the petitioners. *Mr. A. O. Bacon*, *Mr. Washington Dessau* and *Mr. Nathaniel E. Harris* opposing.

No. 657. FAIRGRIEVE *v.* MARINE INSURANCE COMPANY (LIMITED), OF LONDON. Denied May 5, 1902. *Mr. Harvey D. Goulder* for the petitioners.

No. 585. BOARD OF COMMISSIONERS OF STANLY COUNTY *v.* COLER & COMPANY. Fourth Circuit. Granted May 19, 1902. *Mr. James E. Shepherd*, *Mr. A. C. Avery* and *Mr. C. M. Busbee* for the petitioners. *Mr. John F. Dillon*, *Mr. Charles Price*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* opposing.

No. 665. PATTON *v.* SOUTHERN RAILWAY COMPANY. Fourth Circuit. Denied May 19, 1902. *Mr. Theodore F. Davidson* for the petitioner. *Mr. Charles Price* opposing.

No. 669. TAYLOR *v.* PARRAMORE. Second Circuit. Denied May 19, 1902. *Mr. W. G. Henderson* and *Mr. J. Edgar Bull* for the petitioner. *Mr. Edwin H. Brown* and *Mr. James A. Hudson* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 631. UNITED STATES *v.* GUGGENHEIM SMELTING COMPANY. Third Circuit. Denied April 21, 1902. *Mr. Attorney General, Mr. Solicitor General Richards* and *Mr. Assistant Attorney General Hoyt* for the petitioner. *Mr. Paul Fuller* opposing.

No. 627. HUBBERT *v.* CAMPBELLSVILLE LUMBER COMPANY. Sixth Circuit. Granted April 21, 1902. *Mr. W. O. Harris* for the petitioner. *Mr. Ernest Macpherson* opposing.

No. 635. LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* ELLISON. Sixth Circuit. Denied April 28, 1902. *Mr. Henry H. Ingersoll* and *Mr. H. W. Bruce* for the petitioner.

No. 647. SANSOM, ADMINISTRATOR, *v.* SOUTHERN RAILWAY COMPANY. Sixth Circuit. Denied April 28, 1902. *Mr. Heber J. May, Mr. Edward T. Sanford* and *Mr. Tully R. Cormick* for the petitioner. *Mr. Fairfax Harrison, Mr. W. A. Henderson* and *Mr. Leon Jourolmon* opposing.

No. 673. COLUMBIAN EQUIPMENT COMPANY *v.* MERCANTILE TRUST AND DEPOSIT COMPANY. Fifth Circuit. Denied May 19, 1902. *Mr. Henry D. Hotchkiss* for the petitioner. *Mr. Archibald H. Taylor* and *Mr. E. P. Keech, Jr.*, opposing.

No. 666. DOWNS *v.* UNITED STATES. Fourth Circuit. Granted May 19, 1902. *Mr. Ernest A. Bigelow* for the petitioner. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

No. 676. ADAM *v.* NEW YORK LIFE INSURANCE COMPANY. Fifth Circuit. Denied June 2, 1902. *Mr. Charles A. Culberson* for the petitioner.

Decisions on Petitions for Writs of Certiorari.

No. 678. St. Louis & San Francisco Railroad Company *v.* Furry. Eighth Circuit. Denied June 2, 1902. *Mr. L. F. Parker* for the petitioner. *Mr. Joseph M. Hill* and *Mr. James Brizzolara* opposing.

No. 664. Bragg, Special Administrator, *v.* Wright. Seventh Circuit. Denied June 2, 1902. *Mr. Edward S. Bragg* for the petitioner. *Mr. William Worthington* opposing.

No. 671. Edison *v.* American Mutoscope Company. Second Circuit. Denied June 2, 1902. *Mr. Richard N. Dyer* for the petitioner. *Mr. T. B. Kerr* and *Mr. Drury W. Cooper* opposing.

No. 680. Miller *v.* United States. Fifth Circuit. Denied June 2, 1902. *Mr. George Clark* for the petitioners. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

No. 677. La Republique Francaise *v.* Saratoga Vichy Spring Company. Second Circuit. Granted June 2, 1902. *Mr. Archibald Hopkins* for the petitioners. *Mr. Edgar T. Brackett* opposing.

No. 679. Benziger *v.* United States. Second Circuit. Granted June 2, 1902. *Mr. W. Wickham Smith* and *Mr. Charles Curie* for the petitioners. *Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

RESIGNATION OF THE REPORTER.

NAHANT, MASS., September 11, 1902.

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT.

Gentlemen: I hereby resign my office as Reporter of this Court, to take effect at once. I cannot do this without thanking you for the kindness and consideration which I have received from all.

Very respectfully,

Your obedient servant,

J. C. BANCROFT DAVIS.

SUPREME COURT OF THE UNITED STATES, October 18, 1892.

Dear Sir: In accepting your resignation as Reporter, we desire to express our appreciation of your long and valuable labors in that capacity, covering a period of nineteen years, and seventy-nine volumes of Reports.

We sever our relations, which have been uniformly intimate and cordial, with sincere regret, and with the earnest hope that you may enjoy for many years the repose you have so well earned.

Very truly yours,

MELVILLE W. FULLER,
JOHN M. HARLAN,
DAVID J. BREWER,
HENRY B. BROWN,
GEORGE SHIRAS, JR.,
EDWARD D. WHITE,
R. W. PECKHAM,
JOSEPH MCKENNA.

HON. J. C. BANCROFT DAVIS.

INDEX.

MORTGAGE.

the appellee bank. The grounds of the suit were that the acts of the taxing officers of said county were in violation of the "rights of the plaintiff (appellee) and of its shareholders accorded to them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio." The bill alleged that the plaintiff (appellee) was a national bank, and stated the capital stock of the bank and the number of shares into which it was divided; that its cashier made the proper returns of the resources and liabilities of the bank to the county auditor; that the latter fixed the value thereof, as required by section 2766 of the Revised Statutes of the State, after deducting the assessed value of the real estate of the bank, and transmitted a statement of his action, and a copy of the report made by the cashier, to the state board of equalization, for incorporated banks and that board, professing to act under sections 2808 and 2809 of the Revised Statutes of the State, increased the valuation of the shares without notice to the bank or to its shareholders, and that the board was hence without jurisdiction to make such increase, and "its action in respect thereto was void and of no effect." It was averred "that said state board of equalization knowingly and designedly did fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland." After the answer was filed, the case was referred to a master, and upon the coming in of his report, and, after considering the exceptions of the parties to it, the court dissolved the injunction which had been granted and dismissed the bill. That action was reversed by the Circuit Court of Appeals and the cause remanded, with instructions to enter a decree in favor of the complainant (appellee here). Thereupon an appeal was taken. *Held* that the judgment of the Court of Appeals should be reversed, and the judgment of the Circuit Court should be affirmed. *Lander* v. *Mercantile Bank*, 458.

TERRITORIAL LEGISLATION.

1. By an act passed in 1887, the territorial legislature of Arizona constituted a Board of Loan Commissioners for the purpose of refunding the territorial indebtedness. In 1890, Congress passed an act approving and confirming the territorial act of 1887, "subject to future territorial legislation." This act was a repetition of the territorial act with a few immaterial changes and an additional section. *Held:* that the territorial act of 1887 was repealed by the act of 1890, and that the Board of Loan Commissioners still continued in existence, notwithstanding that the territorial legislature in 1899 repealed that portion of the act of 1887 constituting such board. *Murphy* v. *Utter*, 95.
2. *Held*, also, that the act of 1890 which declared the territorial act of 1887 to be "subject to future territorial legislation," was intended to au-