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UNITED STATES REPORTS

VOLUME 189

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1902

CHARLES HENRY BUTLER

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.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY,* Associate Justice.

PHILANDER CHASE KNOX, Attorney General.
JOHN KELVEY RICHARDS,† Solicitor General.
HENRY MARTYN HOYT,‡ Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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* Appointed March 2, 1903, in place of George Shiras, Jr., Associate Justice, resigned February 23, 1903.

† Resigned March 16, 1903.

‡ Appointed March 16, 1903, in place of John K. Richards resigned.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1902.

PROPERTY OF UNITED STATES SENATE LIBRARY.

KENNEDY MINING AND MILLING COMPANY *v.* ARGONAUT MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 49. Argued December 10, 11, 1902.—Decided March 9, 1903.

Where the contention is that the title to ore taken from a mine depends upon whether the mine was patented under the act of July 26, 1866, or the act of May 10, 1872, and involves the effect of the want of parallelism of the end lines of the location, a Federal question is so presented that this court has jurisdiction.

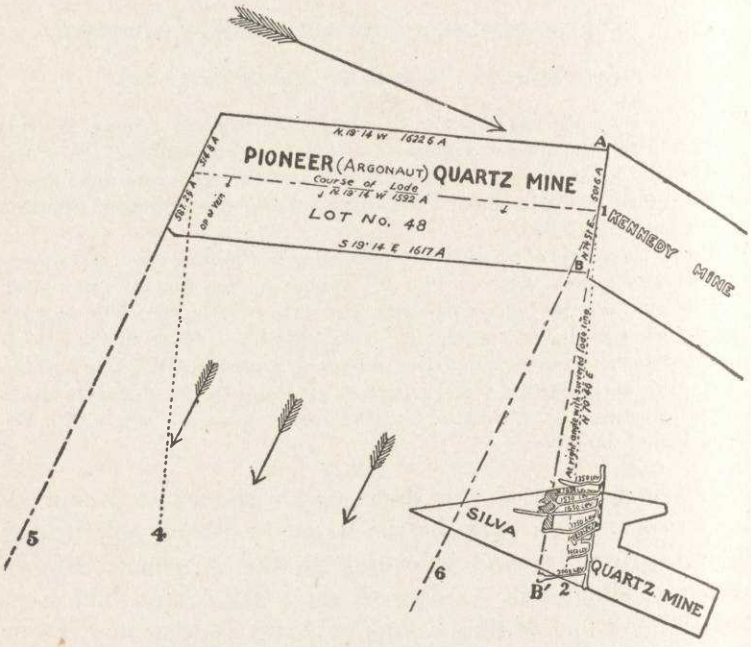
Where, as the result of an adverse proceeding in the land office and a compromise agreement entered into by applicants for patents for mining claims on the same lode, a common end line crossing the lode at right angles was established and patents were issued according to the adjustment, this fixed the rights of the parties in length on the lode and the extra-lateral right as between them; and estopped each and its successors from asserting the right to ore body extracted from the vein within the end line of the other.

THIS was an action for damages for the value of ore alleged to have been taken by the Kennedy Mining and Milling Company from ground belonging to the Argonaut Mining Company, situated in Amador County, California. The Kennedy Mining and Milling Company denied taking any ore or gold-bearing rock which was the property of the Argonaut Mining Company, and averred that it was the owner of the vein or lode from which the rock was taken. The case was

submitted to the trial court on an agreed statement of facts, and resulted in a judgment in plaintiff's favor, which judgment was affirmed by the Supreme Court of California. 131 California, 15. Writ of error was then allowed, and each party docketed the case in this court, but the record was only printed in No. 49.

The parties are co-terminous mining proprietors upon the same vein or lode, the top or apex of which passes through the Pioneer location, belonging to the Argonaut Company, into the Kennedy location, belonging to the Kennedy Mining and Milling Company.

A certain map of the Pioneer and Kennedy mining claims was made part of the findings of fact, but the Supreme Court of California made use of a diagram simplified from that exhibit, which is as follows:



The common boundary is the line A–B, crossing the lode at the point marked 1 on this diagram. The line A–B–B′ is

the end line produced indefinitely in the direction of the dip or downward course of the vein.

The Kennedy mine was entered, and payment made in November, 1871, and the patent was issued July 29, 1872.

The Pioneer was located under the law of 1866; on February 23, 1872, it was entered and paid for; and the patent was dated August 12, 1872.

During the pendency of the patent proceedings a conflict arose as to a segment of ground lying at the north end of the Pioneer, and at the south end of the Kennedy. This controversy was subsequently adjusted by an agreement between the then owners of the two properties. Both parties had sunk working shafts, the openings of which did not start at the apex, but each intersected the vein, and all the workings of both were on this vein. The vein on its downward course passed underneath the Silva mining claim belonging to the Kennedy Mining and Milling Company, located and patented on another vein, which had its apex within the Silva ground. This Silva ground was patented to the Kennedy Mining and Milling Company, February 6, 1893, and the patent recited an entry made in October, 1892.

The patent contained this reservation: "That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge."

The ore in dispute, although taken from the Pioneer-Kennedy vein, was south of the Kennedy south end boundary, as shown by its patent, and the Kennedy Mining and Milling Company did not assert any right to it by virtue of its ownership of the Kennedy mine. The ore though taken from beneath the surface of the Silva location was taken from the discovery lode of the Pioneer location, which was the only lode that had its apex within that location. It entered the location near the middle point of the southern end line, and ran northerly through the

location in a direction practically parallel to the side lines, through the center of the northern end line.

Plaintiff in error admitted the ownership by the Argonaut Mining Company of the Pioneer mine, and that the lode had its apex within its surface location, but denied that the quartz taken by it from that lode was within that location, on the ground that because of non-parallelism of the end lines of the Pioneer, it carried no extra-lateral rights; and that if the court could as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel would be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The Supreme Court of California held that the Argonaut Company was entitled to all the rights which would attach under the act of 1866, and to any additional rights which inured under the act of 1872; that the act of 1866 did not require parallel end lines, and the failure to so parallel them in the Pioneer location did not deprive that claim of extra-lateral rights; that the extra-lateral rights on lodes located under the act of 1866, where end lines were not parallel, were to be defined by drawing lines at right angles to the general course of the lode, at the extreme points of the lode within the location; that the contention of plaintiff in error, that because the description in the Pioneer patent commenced at the south end of the claim, and the south end line was first run, the inequalities arising through diverging end lines should be adjusted by drawing a produced line from 1 to 6 in the diagram, parallel to the produced south end line from 3 to 5 in the diagram, could not be sustained.

The ore bodies in controversy were south of the northern end line plane of the Pioneer as made by agreement the boundary line between it and the Kennedy mining claim, and also within the extra-lateral right planes constructed at right angles to the general course of the lode through the extreme points of the lode within the location.

The act of July 26, 1866, 14 Stat. 251, c. 262, provided that patentees thereunder should have "the right to follow such vein

or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

The act of May 10, 1872, 17 Stat. 91, c. 152, §§ 2, 3, provided that the end lines of each claim should be parallel to each other, and that locators should have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations: *Provided*, That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges."

Mr. John Malmesbury Wright and *Mr. John Garber* for plaintiff in error. *Mr. Byron Waters* was with them on the brief.

Mr. Curtis H. Lindley for defendant in error. *Mr. Henry Eickhoff* was with him on the brief.

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

Plaintiff in error contended in the courts below that, by force of sections 2 and 3 of the act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent because the end lines of the latter were not parallel to each other.

The defendant in error contended that its title was not acquired under the act of 1872, but under the act of July 26, 1866, which did not require parallelism of end lines.

In these circumstances it is held by a majority of the court that a Federal question was so presented that we have jurisdiction.

It was stated in the agreed statement of facts that the Kennedy Mining Company on October 13, 1870, filed its application for patent in the United States land office at Sacramento, California, and that a diagram of the premises for which patent was applied for was posted in that land office October 15, 1870; that on January 13, 1871, the Pioneer Gold and Silver Mining Company, the immediate predecessor in title of the Argonaut Company, filed its application for patent in the same land office, and a diagram of the ground it claimed, and for which patent was sought, was posted in the office of the register of the land office, and upon the claim; that there was a surface conflict as to area claimed by the respective applicants for patent, as shown by the proceedings in the land office, the conflict occurring on the northern end of the Pioneer mine as applied for, and the southern end of the Kennedy mine as applied for; that on said January 13 the register and receiver of the land office made and entered an order in respect of the adverse claim of the Pioneer, directing proceedings in the case of the Kennedy Mining Company to be suspended so far as affecting the piece or parcel of land described in the order; that on February 20, 1871, the Pioneer Gold and Silver Mining Company and the Kennedy Mining Company entered into a compromise agreement, in which each of the parties withdrew from their applications their claim to a certain portion of the surface ground in dispute; and which provided that "the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface ground thereto appurtenant, and at the point hereinbefore designated." The line thus agreed upon was the line from A to B in the foregoing diagram. Thereafter surveys for the patent for the Kennedy mine and for the Pioneer mine were duly made, and patent was issued to the Kennedy Mining Company, July 29, 1872, and to the Pioneer Gold and Silver Mining Company, August 12, 1872. The Argonaut Company became the owner of the Pioneer mine, July 3, 1893, by a deed from the Pioneer Gold and Silver Mining Company, and the Kennedy Mining and Milling Company became the owner of the Kennedy mine by conveyance from the Kennedy Mining Company,

dated December 25, 1886. The Kennedy Mining and Milling Company became the owner of the Silva quartz mine, February 6, 1893, by a patent issued to it on that day, which recited that that company on February 13, 1892, duly entered and paid for the mining claim or premises known as the Silva quartz lode mining claim.

It thus appears that a common end line was established by the patent surveys, which described this line as crossing the lode, and that the Kennedy Mining and Milling Company purchased with the knowledge that this was a common boundary established as such by the patents many years prior to its purchase. The common boundary A B, crossing the lode, was fixed as the result of an adverse proceeding in the land office, and the agreement entered into with respect thereof was as set forth in the agreed statement of facts.

We think, then, that the Kennedy Mining and Milling Company is estopped from asserting any right to the ore body in dispute, which it was also agreed was extracted by the Kennedy Mining and Milling Company from the vein south of the vertical plane drawn through the line A B produced in the direction B′, and which was the same vein which had its top or apex in the Kennedy quartz mine, and in the Pioneer quartz mine, and was continuous from the apex of both properties downward to the lowest depths. The boundary line agreed on fixed the rights of the parties in length on the lode, and so involved the extra-lateral right as between them.

The Argonaut Mining Company and the Kennedy Mining and Milling Company succeeded to the interests of the Pioneer Company and the original Kennedy Company, with a knowledge of the boundary line so determined, and both parties were concluded by it and the results following therefrom. *Richmond Mining Company* v. *Eureka Mining Company*, 103 U. S. 839, 846.

Apart from the questions discussed by the Supreme Court of California, we are of opinion that the judgment must be affirmed on the foregoing ground.

Judgment affirmed.

Mr. Justice White and Mr. Justice McKenna dissented.

KOKOMO FENCE MACHINE COMPANY *v.* KITSELMAN.

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

No. 148. Argued January 22, 1903.—Decided March 23, 1903.

Where the patents sued on are not pioneer patents and do not embody a primary invention, but are only improvements on the prior art and defendants' machines can be differentiated, the charge of infringement cannot be maintained.

In view of the state of the art, and what passed in the Patent Office, this court cannot regard the Kitselman patent of January 18, 1887, for wire fabric machines, as a pioneer patent, but its claims must be limited in their scope to the actual combination of essential parts as shown and cannot be construed to cover other combinations of elements of different construction and arrangement.

The same rule applies to the other patents in suit, and tested by it infringement was not made out.

THIS was a suit in the Circuit Court of the United States for the District of Indiana for infringement of claims 1, 2, 3, 9, 10, 11, 15 and 20 of letters patent No. 356,322, issued January 18, 1887, to Alva L. Kitselman and Davis M. Kitselman for an improvement in wire fabric machines; of claims 1 and 2 of letters patent No. 289,507, issued December 4, 1883, to W. J. Davisson for an improved machine for making wire fabrics; of claims 2, 3 and 4 of letters patent No. 357,067, issued February 1, 1887, to Theodore M. Connor for improvement in machines for forming netted wire fabrics; and of claims 1 and 10 of letters patents No. 505,607, issued September 26, 1893, to John C. Pope, for wire fabric machines.

Defendant denied patentable novelty of each of the patents, and also denied infringement, and alleged that it constructed its wire fabrics as licensee under and pursuant of letters patent No. 502,025, issued to W. D. Whitney, December 24, 1895, for improvements in wire fabric machines.

The cause was heard by District Judge Baker, who held

that the claims of the four patents sued on were for specific constructions, which defendant did not use, and that there was no infringement of either of the letters patent, and dismissed the bill. The case was carried to the United States Circuit Court of Appeals for the Seventh Circuit, and that court, one of its members dissenting, reversed the decree, and held that the defendant had infringed the first, second, eleventh and fifteenth claims of the patent issued to the Kitselmans. 108 Fed. Rep. 632.

The writ of certiorari was granted on the petition of the Kokomo Fence Company, and afterwards the cross writ on the petition of the Kitselmans. The Machine Company alleged error in the judgment of the Court of Appeals sustaining and finding infringement of the Kitselman patent, and the Kitselmans alleged error in that court in not sustaining and finding infringement of the Davisson, Connor and Pope patents.

Mr. Thomas A. Banning for petitioner. *Mr. Ephraim Banning* and *Mr. C. C. Shirley* were with him on the brief.

Mr. Robert H. Parkinson for respondents.

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

The Circuit Court was of opinion that neither of complainants' patents was a pioneer invention ; that they were all merely improvements on the prior art, and to be construed in that light; that complainants could not be treated on the basis that they or their assignors were the first to make a portable machine for weaving wire fencing fabric in the field, which claim had been distinctly made by complainants, rejected by the Patent Office, and the claim thereupon withdrawn. In its judgment, complainants and defendant contended as to infringement on an equal field, the presumption of the validity of complainants' patents being met by the presumption of the validity of the patent to Whitney. And, taking up complainants' patents *seriatim*, the Circuit Court held that the differences between their machines and defendant's machine were not

mere colorable invasions by the latter, and that the identity of means and of operation essential to infringement were lacking.

The Circuit Court of Appeals concurred with the Circuit Court that the case turned upon the question whether the patents sued on embodied a pioneer invention; that if complainants' invention was not of a primary character, a substantial departure from the machines of the prior art, defendant's machine was so sufficiently differentiated that the claim of infringement could not be maintained; while, on the other hand, if complainants' patents "were the first to give to the world a workable, portable machine for weaving wire fences in the field—a machine distinctly creating a new product—and aptly embody in their specifications and claims the mechanical arrangements that bring about such a result, the decree below is erroneous."

The opinion was preceded by an extended statement of facts, which gave the specifications of the Davisson patent of December 4, 1883, and certain of the accompanying figures, together with the second and third claims, alleged to be infringed; also "the pertinent drawings and specifications of the Kitselman patent," and the claims alleged to be infringed, which were as follows:

"1. In a wire-fabric machine, a series of sectional twisters, each of which comprises a central section for carrying a warp-wire, and having rotary movement imparted thereto, and the shifting sections for carrying the weft-wire, and receiving rotary motion from the central section to form the twist, substantially as and for the purpose herein described.

"2. In a wire-fabric machine, the combination of a series of sectional twisters geared together for simultaneous rotation, and each comprising a central portion movable only on its axis and side portions capable of a compound movement—that of rotation on their axes—and of a shifting longitudinal movement, substantially as described, for the purpose set forth."

"9. In a wire-fabric machine, the series of sectional twisters, comprising the central and side sections, the central section of each twister being geared to the twister adjacent thereto for simultaneous operation, substantially as described, for the purpose set forth.

"10. In a wire-fabric machine, the combination of a series of twisters geared directly together for simultaneous operation, and each comprising a central section and the side section, each side section carrying a spool or reel for the wire, substantially as described, for the purpose set forth.

"11. In a wire-fabric machine, a series of twisters connected for simultaneous operation, and each consisting of a central section and the side section, in combination with the spools carried by the side sections, the central section of each twister being provided with a longitudinal opening for the passage therethrough of the warp-wire, substantially as described."

"15. In a wire-fabric machine, the combination of a series of rotary twisters geared directly together for simultaneous operation, each twister having a central section capable of rotary movement only, and two side sections which are capable of a shifting movement independently of the central section in opposite directions simultaneously, whereby the said shifting sections of one twister are adjusted to register with the central sections of twisters on opposite sides of the same, substantially as described, for the purpose set forth."

"20. In a wire-fabric machine, a series of sectional twisters, each comprising a central section, the central sections being geared together to be simultaneously rotated on their axes, and the shifting side sections adapted to align with the central sections to be rotated therewith, substantially as described, for the purpose set forth."

The drawings and specifications of the Connor and Pope patents were not set out because unnecessary in the view taken of the case. Both these patents were issued subsequently to the Kitselman patent.

The drawings and specifications of the patent to Whitney of December 24, 1895, were then given.

The statement further set forth "the essential drawings and specifications of letters patent No. 10,743, granted John Nesmith, April 4, 1854, and referred to in the opinion as most adequately representing one branch of the prior art," namely, as stated by the court, loom machines by which wire netting was made in the factory, and then transferred to the field; and

also Figure 2 of the drawings of the Middaugh and Wilcox patent of December 23, 1884, that patent being regarded as "the best example of the second branch of the prior art," field machines which constructed the fence *in situ*.

The statement is given in full, with eleven pages of drawings in the report of the case, 108 Fed. Rep. 632.

The Kitselman and Pope patents described portable machines. The Davisson and Connor patents described stationary machines. The Kitselman and Pope patents were intended to be operated by hand and the Davisson and Connor patents were intended to be operated by power. But the essentials of the mechanism were not dependent upon the circumstance of their being embodied in either a stationary or a portable machine, or in a power or a hand machine. Complainants' leading expert testified that "the essentials of the invention described in the several claims here in suit are not dependent on their use in a stationary or portable machine, or in a power or hand machine, or upon their capacity to weave a fabric into which slats may or may not be used, or upon their capacity to weave a fabric of any special size of mesh."

In the specification of the Kitselman patent the inventor said: "The primary object I have in view in my invention is to provide a simple and easily operated machine of the class named which can be adapted for use in the open field or other place for the construction of fences, as well as a stationary or fixed machine for the manufacture of wire fabric." And also: "I may either construct a portable machine as shown in the accompanying drawings, to work in the open field or other place, or dispose the parts in a horizontal instead of a vertical position, and mount the same on suitable bearings and legs to provide a stationary machine for indoor use."

The Middaugh and Wilcox patent of December 23, 1884, was a patent for a "Portable Fence Machine," described in the claims as "a portable machine for constructing wire-and-picket fences" and "a portable fencing machine." Longitudinal pairs of wires were intertwisted with vertical slats inserted between the twists, the wires passing through tubes or spindles in the frame of the machine, which moved along the wires as the fence was formed.

In the Kitselman specifications and drawings, plans of picket and slat fencing and of the common form of wood fence held together by wires, as made by that machine, were shown. The Middaugh and Wilcox machine made wire and picket fence. The Kitselman machine made diamond mesh, and wire and picket, fence. But the diamond mesh fabric was old, as shown not only in the Davisson patent but in many others antedating those in suit, as, for instance, that of Nesmith of April 4, 1854.

The diamond mesh fabric had been woven while the machine was in a standing position. The Middaugh and Wilcox patent made wire and picket fence in the field. Kitselman converted the stationary into a portable machine by setting it on end and mounting it on a truck; and he converted the portable machine, as he himself says, by disposing the parts "in a horizontal instead of a vertical position," and mounting "the same on suitable bearings to provide a stationary machine for indoor use." The mechanism and operation were the same. Whatever its merits, it was not in itself primary invention to mount a machine for making diamond mesh fencing on a truck, and using it in the field, as the old machine had been used to make wire and picket fences. The getting up and walking was not new, though the machine may have gone at a better gait and made a better fence.

When Kitselman made his original application, his nineteenth claim read: "In a wire-fabric machine the combination of a track, a carrying frame geared to the track and having the twisting devices and the reels, and pawl and ratchet mechanism for feeding the frame and its devices, substantially as described, for the purpose set forth." This claim was rejected by the Patent Office on reference to the Fultz patent of May 13, 1884, and the Watson patent of July 21, 1885.

Fultz's was a patent for "an upright machine for making or weaving fence composed of wire and pickets, and may be used, movably, along the line where the fence is to be made, or stationary."

Watson's was a patent for a wire fence machine, the invention relating "to that class of fence-machines in which the pickets and wires are bound together and the fence put up in one operation."

Kitselman acquiesced in the rejection and withdrew his nineteenth original claim, and cannot now reasonably claim a construction which would protect his machine as a pioneer field machine.

The first, second, eleventh and fifteenth claims of the Kitselman patent were held by the Circuit Court of Appeals to be infringed. We repeat these claims as follows:

"1. In a wire-fabric machine, a series of sectional twisters, each of which comprises a central section for carrying a warp-wire, and having rotary movement imparted thereto, and the shifting sections for carrying the weft-wire, and receiving rotary motion from the central section to form the twist, substantially as and for the purpose herein described.

"2. In a wire-fabric machine, the combination of a series of sectional twisters geared together for simultaneous rotation, and each comprising a central portion movable only on its axis and side portions capable of a compound movement—that of rotation on their axes—and of a shifting longitudinal movement, substantially as described, for the purpose set forth."

"11. In a wire-fabric machine, a series of twisters connected for simultaneous operation, and each consisting of a central section and the side section, in combination with the spools carried by the side sections, the central section of each twister being provided with a longitudinal opening for the passage therethrough of the warp-wire, substantially as described."

"15. In a wire-fabric machine, the combination of a series of rotary twisters geared directly together for simultaneous operation, each twister having a central section capable of rotary movement only, and two side sections which are capable of a shifting movement independently of the central section in opposite directions simultaneously, whereby the said shifting sections of one twister are adjusted to register with the central sections of twisters on opposite sides of the same, substantially as described, for the purpose set forth."

It is obvious, as said by complainants' expert, "that the terms 'sectional twisters' 'twisters' and 'rotary twisters,' used in the several claims under consideration, refer to the same three-part twister devices."

In Kitselman's original application, the first claim called for "a series of sectional twisters geared directly together;" the second, for "a series of sectional twisters capable of sliding movement with relation to each other and geared for simultaneous rotation;" the third, for "the series of sectional twisters comprising the central hub section and the two side sections disposed on opposite sides of the central section, the hub section being stationary, while the side sections are capable of shifting movement;" the fourth, for "the series of sectional twisters, each of which comprises a longitudinally immovable section and two sections which have longitudinal movement;" the fifth, for "the series of sectional twisters, each of which comprises the central portion carrying the warp-wires and the shifting side sections which carry the weft-wires."

The first and second claims were rejected, and thereupon erased, and others substituted, which were likewise rejected, (the Nesmith patent of 1854 being cited,) were withdrawn, and the numbers of original claims 3, 4 and 5 were changed to 1, 2 and 3. The latter were then rejected on reference to the Smith British printed publication of 1876, withdrawn, and claim 1 as it now stands submitted. That publication, which was a provisional specification, described a two-part twister, and added: "Or I divide the twisting wheels into three parts, my extra wire passing through the central division, and the two side segments travel to and fro to form the twist, leaving the central division in position with my supplementary wire therein maintained."

The two substituted claims above mentioned as rejected on reference to Nesmith, and withdrawn, read as follows:

"1. In a wire-fabric machine, a series of rotary twisters geared directly together for simultaneous rotation and each having two sections which are capable of a sliding movement, substantially as described, for the purpose set forth.

"2. In a wire-fabric machine, the combination of a series of rotary twisters geared directly together, substantially as described, for the purpose set forth."

The Nesmith patent described a machine comprising two separate but simultaneously operating parts, termed in the

patent the "feeder" and the "twister." It was a loom machine, so called, and adapted to produce the wire netting and wrap it about suitable rolls. The feeder was a complete device for supporting the warp wires, and supporting, rotating and shifting the woof wires, provided with a take-up roll mounted on the front end of the "twister." It comprised a rectangular frame, together with operating mechanism supported thereon. At the front and rear were five gears in successive engagement, and means were provided for simultaneously rotating both series.

The specification stated that the border wires of the netting were placed on reels supported on the frame of the machine, and these passed through holes drilled in the center of the outside gears; and also showed that the gears, other than the outermost ones, were perforated for the passage of wires in case it was desired to make a narrower fabric. Each of the outside gears was formed with two opposite radial slots, extending inward from the margin sufficient to form recesses which received the ends of spool-carrying frames, each carrying a woof-wire spool, the front end of each frame being seated in the marginal slot of one of the gears, and the rear end in the corresponding slot of the corresponding gear. When all the gears on their spindles or hubs were so adjusted as to bring the slots into the same horizontal line any spool-carrier might be transferred from its supporting gears to the gears next adjacent to those which supported its front and rear ends. When the spool-carriers of the machine were arranged in pairs on the alternate gears the rotation of all the gears rotated each pair of spool-carriers about a common axis, and when the two spool-carriers on one pair of gears were shifted in opposite directions to the two pairs of gears on the opposite sides of the pair previously forming the support of the spool-carriers a remating of the spool-carriers was effected, and the next rotation of the gears rotated each newly formed pair of spool-carriers about a common axis coincident with the axis of the supporting gears. As a means of transferring the spool-carriers the machine was provided with "shippers," together with means for sliding them vertically, one of the "shippers" being adapted to trans-

fer the spool-carriers in one direction and the other being adapted to transfer them in an opposite direction or back to their position. Each of the shippers consisted in a series of wedges supported in a suitable frame and having inclined faces adapted to impinge upon the side faces of the end portion of the spool-carrying frames, the corresponding faces of the wedges being oppositely inclined in order to impart to them the reverse movement.

There were in effect five rotating centers, each gear in the front series with the corresponding gear in the rear series acting as a single rotating part or center. The number of spool-carriers was one less than the number of centers in use, the number of rotating centers being five and the number of spool-carriers being four. In the rotation of the centers the two outermost centers would each support a single spool-carrier, and the central rotating center would support two spool-carriers. The rotation of the gears when the spools had the first arrangement would wrap the outer woof wires about the marginal warp wires and intertwist the other two warp wires at the center of the machine; and the rotation of the gears after the spool-carriers had been shifted to the second and fourth rotating centers intertwisted the first and second wires in front of the second center and the third and fourth wires in front of the fourth center. The repetition of this operation formed the fabric.

The Circuit Court of Appeals pointed out that in the Davisson patent the supplemental mechanism of Nesmith was dispensed with and that the diamond mesh was made by a shifting of the reels instead of the wires.

In respect of the differences between Davisson and Kitselman the court stated:

"The spindles of the Davisson machine were arranged vertically; had, with reference to the Davisson machine, a longitudinal movement; and were alternately forced forward and withdrawn from the plane of operation by means of a shifting device that was necessarily bulky and impracticable for field use. The Kitselman spindles were horizontally placed; had no

longitudinal or lateral movement; and were confined permanently to the plane of their rotation.

"In the Davisson machine, as in the Kitselman, the spindle, with its reels, acts as the twisting agent, the spindle forming the rotator; but in the Davisson machine the spindle, where the warp wire emerges from its hollow center, stands well back from the reels, thus allowing the warp wire to go unsupported to the plane of operation; while in the Kitselman machine the spindle extends clear forward to the twisting zone, to which it carries, through its hollow center, the warp wire, fully supported against side pulls. In the Davisson machine the spool-carriers are transferred to their adjacent spindles by means of an apparatus previously described as involving a longitudinal and transverse motion. Kitselman effects the transfer of his spool-carriers by shifting the one to the spindle above the spindle with which it has just operated, and the other to the spindle below. This shifting, being brought about by a longitudinal motion only, thus eliminating the necessity of a transverse motion.

"In the Davisson invention a simple gear is set behind each spindle, but none of these gears engage each other, so that, when the spool-carriers are shifted to adjacent spindles and cross-heads at each successive twist, they are revolved about a practically new center. Kitselman provided each twister at its central section with a spur gear of sufficient diameter to engage the gears of the adjacent twisters, and by this means imparted a simultaneous motion to the whole series of twisters. The gear arrangement of the Davisson machine tends to twist the opposing carriers out of alignment; subjects the central wire to certain deflection; and pulls the woof wires somewhat from their intended direction. In the Kitselman machine the pull, incident to the twisting operation, is constantly equalized, the central portions of the twisters offsetting each other in the plane in which the strain comes.

"These distinctions are, to a certain extent, subsidiary, but nevertheless important."

In view of what passed in the Patent Office, and the state of the art, we cannot regard the Kitselman patent as a pioneer

patent, but think its claims must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements of different construction and arrangement.

Passing then to the question of infringement, we avail ourselves of the description of the Kitselman patent by defendant's expert as sufficiently comprehensive to enable us to indicate our views on that question. He says:

"The Kitselman machine has a frame made up of three vertical rigidly connected members forming respectively the front and rear walls of the frame and an intermediate wall somewhat nearer to the rear member than to the front. The front and intermediate members of the frame may each be made of two parallel bars, or may be each a single bar having a vertical slotted center; and the rear member may be either open or solid, as may be desired. . . . A series of rotatable horizontal hollow spindles are mounted in suitable bearings in the rear and intermediate members of the frame and are provided with gears in successive engagement with each other, each gear being rigidly fastened on its spindle, so that the rotation of the gear must rotate the spindle. One of the gears of the series is provided with a bevel gear rigidly fastened to it and this gear is in engagement with a bevelled pinion mounted on a crank shaft, the crank shaft in turn being provided with a suitable crank and handle for its rotation and for the consequent rotation of all the gears of the series.

"Each of the rotatable spindles is formed with a flat forward extension in the form of a skeleton frame made up of two transverse members and two longitudinal members, the whole being formed in a single piece and being of such length that the transverse members of each flat extension lie respectively, one just in rear of the front member of the frame and the other just in front of the intermediate member of the frame. These forward extensions, which are supported by and rotate with the shafts, have their respective axes coincident with the axes of the hollow shafts; and the two transverse members of each of the forward extensions are centrally bored, in line with the bore of the corresponding shaft, so that warp wires may pass in

horizontal lines through the rotatable shafts and their forward extensions. The machine is provided with a series of spool-carriers, each of which may carry a woof-wire spool; and each of these spool-carriers is a single-piece casting of the same length as the forward extension on each of the shafts. Each such casting consists of a flat longitudinal member adapted to lie side by side with the flat longitudinal bars of any one of the forward extensions of the rotatable spindles, and two segmental heads or ends each adapted to lie with its flat side against the corresponding transverse member of any one of the forward extensions of the rotating spindle. The segmental heads of the spool-carrier castings are of such dimensions that when two of the castings are placed on opposite sides of any one of the forward extensions of the rotatable spindles, the two segments and the intermediate transverse member of the spindle extension between them, form a complete circle at either end of the compound three-part structure made up of the spindle extension and the two spool-carrier castings. Each of the spool-carrier castings is adapted to receive and support a woof wire; and it is evident that if two of the castings, with their spools, be held at any time in fixed connection with one of the spindle extensions between them, the rotation of the spindle and its extension must rotate the spool-carrier castings and their spools. The segments at the ends of each spool-carrier casting are similar; but only one of them is perforated for the passage of the woof wire from the spool; and this segment is in use, made the front end of the spool-carrier. It is clear that the rotation of any given spindle and its extension, with two spool-carriers lying on opposite sides of the extension and in connection therewith, must intertwist the woof wires from the two spools, at a point in front of the front end of the spindle extension; and it is further evident that if the machine is to make the diamond-mesh fabric, means must be provided for shifting the spool-carriers to and fro between the adjacent spindle extensions or rotating centers which effect the rotation of the spool-carriers.

"For the purpose of holding the spool-carrier frames temporarily in registration or engagement with the rotating spindle

extensions, and for the further purpose of shifting the spool-carriers, in order to remate the woof wires, the machine is provided with two vertically reciprocating guides or shifters, one on either side of the vertical plane of the axes of the spindles and their extensions. Each of these guides is made up of two rigidly connected vertical bars, one just in rear of the front member of the frame, and the other just in front of the intermediate member of the frame, each of the bars being provided with a series of castings, extending inward toward the central plane of the machine and each terminating at its inner end in a reëntrant segmental curve adapted to conform to the segmental margin of any one of the heads of the carrier frames or castings. These castings lie in the planes of the segmental heads of the carrier frame; and when the two guides or shifters on opposite sides of the machine are so adjusted that their castings are directly opposite each other, the curved edges of any two opposite castings are arcs of a common circle and will practically enclose and hold in working relation, as a complete circle, the two segmental carrier frame heads lying between them, together with their interposed transverse member of the spindle extension. The consequence is, that the carrier frames may be arranged in pairs on the alternate spindle extensions of the machine and held in place by the curved edges of the castings on the guides or shifters, the two curved edges of any opposite pair of such castings forming a circular guide adapted to hold the three parts of the corresponding circle of the twister in proper relation to each other while they are rotated; and when the parts are thus arranged, the rotation of the spindle must evidently effect the rotation of the three-part twisters with their spools and thereby intertwist the wires from the two spools carried by each spindle extension. Furthermore, the guides on the two opposite sides of the machine are connected by a walking-beam at the upper end of the frame, so that as one of them moves upward, the other must move downward to an equal extent; and a lever is provided for effecting this opposite reciprocation of the two guides or shifters. Before each such movement of the guides or shifters, the twisters are all rotated into such positions that their flat central mem-

bers (the forward extensions of the spindles) are in the central vertical plane of the machine, the plane faces of the spool-carrier castings being likewise of course in vertical planes. When the parts are in this relation, the opposite vertical movement of the two guides or shifters must evidently carry the spool-carriers at one side of the center of the machine downward and those at the opposite side upward; and the shifters are given sufficient movement to transfer each spool-carrier from one spindle to the one next above or below it. It will be understood that in the use of this machine, as in that of any of the others under consideration, only the alternate spindles are provided with spools during any given rotation of the parts, the intermediate spindles being empty. By means of the operation of the guides or shifters just described, the spool-carriers, in the intervals between the periods of rotation, are transferred each time from the full spindles to the empty ones, and this transfer, as in all other machines, remates the wires and effects the formation of the diamond mesh."

Defendant's machine as described in the Whitney patent of December 24, 1895, consisted of a vertical upright bar or support; a series of horizontal tubes set rigidly therein; a series of intermeshing gears mounted and rotating on the tubes, and provided with two projecting studs at the opposite sides of their centers; a set of plates loosely journalled on the tubes, and connected to and rotating with the intermeshing gears, and provided with two projecting spring pins at opposite sides of their centers, a small distance from the forward projecting studs on the gears; a set of spool-carriers, each mounted on a plate having inclined notches at the diagonal corners on one side, and inclined grooves at the opposite diagonal corners on the other side, so that when one side of the plate is inserted between a gear and its plate one of the studs may pass along a groove on one side, and a spring pin or stud pass into and catch against the notch on the opposite side, and thus retain and support the spool-carrier, as long as the parts are rotated in the same direction; spools for the woof wires mounted in the spool-carriers, and means for imparting rotation to the intermeshing gears. To transfer the spool-carriers the parts are rotated until the

carriers are between the stationary spindles, when the direction of rotation is reversed. This causes a pin and stud on the adjacent gear to enter the empty or unoccupied groove in the carrier plate, and to lift it out of connection with the gear plate with which it had been rotating and to carry it around in its new relation as long as rotation is continued in that direction. To shift it again to bring it into relation with another gear and plate the direction of rotation is again reversed.

Considering the complainants and Whitney as alike having improved on the prior art, the question is whether the specific improvements of the one actionably invaded the domain of the other. The presumption from the grant of the letters patent is that there was a substantial difference between the inventions.

The Circuit Court found these differences between the two machines: That in the Kitselman machine the spool-carriers were shifted from one section to another by sliding them in a straight path; that all the spool-carriers at one side of the spindles were attached together and moved from one section to another by means of a common bar; that the spindles were fastened to the pinions and rotated with them; that the spool-carriers were shifted from one section to another by a hand lever provided for that purpose; that the spool-carriers were required to be supported at both ends; that the spool-carriers could readily be taken out, turned end for end, and reinstated in place again; that the hollow spindle could not be made stationary without destroying the capacity to operate; that the segmental ends of the side sections of the twisters made, with the lateral end pieces of the central sections, wheels at both ends of the twisters, resting in supports, permitting their rotation; and that the spool-carriers could not be transferred except when the parts had been brought to a position of rest and the pinions were stationary.

That on the other hand, in defendant's machine, the spool-carriers rotated through a curvilinear path; that the spool-carriers were each separate from, and moved independently of, the others; that the spindles were fastened to the frame and had the pinions loosely mounted on them, and not rotating with the spindles; that the spool-carriers were shifted without any

lever by reversing the direction of the rotation of the crank; that they were only required to be supported at one end, and could not be taken out, turned end for end, and reinserted; that the spool-carriers could be made rotative instead of stationary; that the ends of the central spindles and the spool-carriers formed no wheels, and were received in no bearings; and that the spool-carriers could only be transferred when they were rotated. Finally, that the spool carriers in the two machines were so different and mounted and operated in such different ways that they could not be interchanged or transferred from one to the other without reorganization.

We perceive no reason to decline acceptance of these findings of the Circuit Court, and agree with that court in the conclusion that the machines lack that identity of means and identity of operation which must be combined with identity of result to constitute infringement.

As we have before stated, the Circuit Court of Appeals concurred with the Circuit Court that, unless the patents sued on embodied a pioneer invention, the defendant's machine was so differentiated from either of the others that the charge of infringement could not be maintained. The Circuit Court held all complainants' patents to be only improvements on the prior art, and dismissed the bill on the ground of non-infringement.

The Circuit Court of Appeals held that the Kitselman patent was entitled to be treated as embodying primary invention and to such liberal construction as brought defendant's machine within it. The decree of the Circuit Court was therefore reversed because, in the opinion of the Circuit Court of Appeals, certain claims of the Kitselman patent were infringed.

For the reasons given in treating of the Kitselman patent we think that none of complainants' patents embodied primary invention, and we concur with both the courts below that, this being so, the differences in means and operation between defendant's machine and the others were such that there was no infringement.

It does not seem necessary for us to enumerate these differences in respect of the other three patents. This was well done in the Circuit Court, and the Circuit Court of Appeals ac-

cepted the view of that court as to the absence of infringement if primary invention did not exist. We are content with that conclusion.

Decree of the Circuit Court of Appeals reversed; decree of the Circuit Court affirmed, and mandate to that court accordingly.

HENNESSY *v.* RICHARDSON DRUG COMPANY.

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

No. 203. Argued March 12, 1903.—Decided March 23, 1903.

An averment in a bill that the complainants are "all of Cognac in France, and citizens of the Republic of France," is sufficient to give the Circuit Court of the United States for Nebraska jurisdiction in a controversy where the defendants are citizens of Nebraska. No averment of alienage is necessary.

Where the Circuit Court dismisses a bill on the ground that it has no jurisdiction because diversity of citizenship did not appear, and certifies this question of jurisdiction, that is the only question for the consideration of this court on an appeal under the first subdivision of section 5 of the Judiciary Act of March 3, 1891, and if jurisdiction is found to exist the case will be remanded to be heard on the merits, notwithstanding the Circuit Court also expressed the opinion that the bill was without equity.

THE case is stated in the opinion of the court.

Mr. Adolph L. Pincoffs for appellants, with whom *Mr. James L. Hopkins* and *Mr. Richard S. Horton* were on the brief.

I. The Constitution and the Judiciary Act provide that the Federal courts shall have jurisdiction as to controversies where the necessary jurisdictional amount is involved "between citizens of a State and foreign States, citizens, or subjects thereof." The complaint alleges that complainants are all citizens of the Republic of France which clearly and indubitably complies

with the statutory provision. It would not have been sufficient to allege that the complainants are aliens but the allegations must be to the effect, as was done here, that they are either citizens or subjects of a foreign State. *Wilson* v. *City Bank*, 3 Sumner, 422. The cases cited by the learned judge below in no way indicate that this allegation is insufficient. *Stuart* v. *Easton*, 156 U. S. 46, distinguished as holding that the fact of alienage must affirmatively appear and that the allegation that a party is a citizen of the city of London is not sufficient, because, as was suggested by Lacombe, J., in the case of *Betancourt* v. *M. R. F. Life Assn.*, 101 Fed. Rep. 305, London is not a free and independent country,—not a State within the meaning of that word as used in the Constitution and Judiciary Act. That case, therefore, is in no way an authority in support of the proposition that the allegation that the party is a citizen of the Republic of France, which is a free and sovereign State, is insufficient to show jurisdiction where the defendant, as in this case, is a citizen of a State of the Union.

The case of *Rondot* v. *Township of Rogers*, 79 Fed. Rep. 676, held that an allegation that the complainant was a resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain was insufficient.

It is unnecessary to discuss whether that case was properly decided and did not extend the doctrine laid down by this court beyond its original limits. It might be said in support of it that it is improper to allege that a person who resides in a monarchical government is a citizen but that the proper allegation would be that he is a subject of the monarch to whom he owes allegiance. In our case, as France has a republican form of government, the allegation that he is a citizen of such government, is sufficient.

The distinction here insisted upon between the words "citizen" and "subject" is recognized by this court in the case of *United States* v. *Wong Kim Ark*, 169 U. S. 649, 662, 664, which cites with approval *United States* v. *Rhodes*, 1 Abb. U. S. 28, in which it is said "all persons born in the allegiance of the King are natural born subjects and all persons born in the allegiance of the United States are natural born

citizens." Also citing *State* v. *Manuel*, 4 Dev. & Bat. 20, 24, 26: "The term *citizen* in our law is precisely analagous to the term *subject* in the common law and the change of phraseology has entirely resulted from the change of government. The sovereignty has been transposed from one man to the collective body of the people and a subject of the King is now a citizen the State."

Judge McPherson interprets the words "citizens or subjects" as if they read "citizens and subjects." While it is true that sometimes the word "or" may be changed to "and" in interpreting a statute, this is only so where the word "and" as used would lead to absurd results and would be clearly contrary to the intention of the legislature. Endlich on Statutes, sec. 305.

In this case no such necessity exists, as the meaning of the statute is perfectly clear and we venture to say has never before, as to this point, been doubted.

II. If it is held by this court that the allegation of the citizenship of complainants was sufficient, it is clear that the burden of proving such allegation to be untrue is on the defendant. This is so even if the objection to the jurisdiction has been properly taken by the defendant. *Adams* v. *Shirk*, 117 Fed. Rep. 801, and cases cited.

In the case at bar there was no plea to the jurisdiction or plea in abatement, nor was the objection to the jurisdiction raised in the answer. No evidence contradicting the allegation as to the citizenship of appellants was introduced by defendants. The court acted on its own motion. In order to justify this action it must appear from the record that the suit did not involve a controversy of which the court could properly take cognizance. Act of March 3, 1875, 18 Stat. 472; *Morris* v. *Gilmer*, 129 U. S. 315; *Anderson* v. *Watt*, 138 U. S. 694.

The only evidence in this record bearing on the subject is the statement by the appellants (page 11) that they reside in Cognac, France. Even if the burden were on the complainants to prove the correctness of that allegation as to their citizenship, proof of their residence in France would be *prima facie* sufficient. *Shelton* v. *Tiffin*, 6 How. 163; *Express Company* v.

Kountze Bros., 8 Wall. 342; *Collins* v. *City of Ashland*, 112 Fed. Rep. 175.

III. The court erred in assuming to pass on the merits after it had determined the question that it had no jurisdiction and its attempt to do so must be treated as a mere nullity. While we disclaim any intention to argue the merits of this case before this court, we wish to say that it is difficult to see how the court below could have come to any other conclusion but that complainants were entitled to at least an injunction where it finds that the complainants have proved their trade mark beyond question; and that the defendants have sold goods bearing counterfeit labels, even if such sales were made in good faith. *Saxlehner* v. *Siegel Cooper Co.*, 179 U. S. 42.

In the amended decree the court, while dismissing the bill for lack of the necessary jurisdictional allegations, "further" dismisses it on the merits. And in the certificate, while certifying that it has passed on the question of jurisdiction, it states that the merits have also been passed upon. The court had no power both on general principles and in virtue of the express provisions of the statute from which it derives its jurisdiction, to pass on the merits after it had decided that it had no jurisdiction. Its attempt to do so must be treated as an absolute nullity. *Taylor* v. *Mutual Reserve Fund Life Association*, 97 Virginia, 60; *Howard* v. *Kentucky & Louisville Mutual Ins. Co.*, 52 Kentucky, 282; *Stough* v. *C. & N. W. R. R. Co.*, 71 Iowa, 641; *Gray* v. *Dean*, 136 Massachusetts, 128; *Wheeler & Wilson Mfg. Co.* v. *Whitcomb*, 62 New Hampshire, 411.

This court has consistently followed the principle here contended for. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Metcalf* v. *City of Watertown*, 128 U. S. 586.

It has repeatedly reversed the decrees of the lower court dismissing bills upon the merits in cases where such court had no jurisdiction and has directed that the bill should be dismissed without prejudice. *Barney* v. *Baltimore City*, 6 Wall. 280; *Kendig* v. *Dean*, 97 U. S. 423; *Parker* v. *Ormsby*, 141 U. S. 81, 83; *Lake County Commissioners* v. *Dudley*, 173 U. S. 243.

The provision of the statute in virtue of which the court be-

low acted fully recognizes this principle. The question of the jurisdiction was not raised by the defendants and the sufficiency of the jurisdictional allegations was not challenged by them. The court acted of its own motion. The statute giving it such power expressly says that if in "any suit commenced in the Circuit Court . . . it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve the dispute or controversy properly within the jurisdiction of said Circuit Court . . . the said Circuit Court *shall proceed no further but shall dismiss the suit.*" Act of March 3, 1875, chap. 137, sec. 5.

This provision has by numerous adjudications by this court been held a salutary one and that it is the duty of the Circuit Court to exercise their power under it in proper cases. *Williams* v. *Nottawa*, 104 U. S. 209; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. It has further been held that the action of the Circuit Court is reviewable by this court under the act of March 3, 1891, chap. 517, sec. 5. *Wetmore* v. *Rymer*, 169 U. S. 115; *Huntington* v. *Laidley*, 176 U. S. 668; *United States* v. *John*, 155 U. S. 109.

Nor can any life be injected into such attempted finding on the merits by the decision of this court that the court below had jurisdiction. The purpose of the statute, as we argued, is that the question of jurisdiction, if its existence is denied by the court below, should be settled before the merits are touched. The complainants, when they appealed on the jurisdictional question to this court, as was their duty and right, could not, even if they had wished to, have appealed to the Circuit Court of Appeals on the merits, because the statute does not permit of two appeals in the same case. *McLish* v. *Roff*, 141 U. S. 661. They had a right to treat such decision as a nullity. If any effect were given to it because the court below improperly denied its own jurisdiction, it would follow that although they followed the only course open to them, they might be deprived by the lapse of time of the right given to them by statute to have the decision on the merits reviewed by the Circuit Court of Appeals.

IV. On the point suggested on the argument, whether it was sufficient to allege that the value of the trade mark sought to be protected exceeded $2000, or whether there should have been an allegation that the amount of the damage done by the acts of the defendants exceeded that sum, the following cases and text writers sustain the contention of the appellants, and pass upon this exact point. *Symonds* v. *Greene*, 28 Fed. Rep. 834; *Hennessy* v. *Herrman*, 89 Fed. Rep. 669; Foster on Federal Practice, § 16, p. 51. See also Hopkins on Unfair Trade, p. 216.

While this court is not bound by any of these decisions, it is submitted that they are based on correct principles and are supported by the decisions of this court. They are merely an application of the general rule, approved by this court, that in an action for an injunction jurisdiction is determined by the value of the right to be protected and by the values of the object to be gained. *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485; *Market Co.* v. *Hoffmann*, 101 U. S. 112. See also *Humes* v. *City of Ft. Smith*, 93 Fed. Rep. 862; *Delaware & Lackawanna R. R. Co.* v. *Frank*, 110 Fed. Rep. 689.

It appears from the pleadings in this case that the right to the trade mark itself was put in issue by the defendants, and that the right of the complainants to enjoy and protect their trade mark, if they have any—without which it would be valueless—is challenged by charging them with the most atrocious frauds.

It is clear, therefore, that the matter in dispute, the value of which determines the jurisdiction of the court, is the trade mark itself and the right to its enjoyment. Even, therefore, if, in a case such as was suggested on the argument, where only one bottle was sold, there might be some doubt whether an allegation that the trade mark was worth more than $2000 would be sufficient, if, on the coming in of the answer, it appeared that there was no denial of the right of complainants to their trade mark, but that the only question to be litigated was whether or not defendant had made such sale, such doubt cannot exist in this case, where the defendant challenges the right of complainants to their trade mark and their right to enjoy

and protect it, without which it would be valueless, where the protection of such right is the object of the suit and where the injury and damage to complainants, were the contention of defendants to prevail, would be the loss of such trade mark, the value of which is alleged to exceed $2000.

Mr. Charles F. Tuttle for appellee.

The certificate contains matters other than questions of jurisdiction. The so-called certificate does not contain a single, definite, clear, specific question of jurisdiction.

It is so broad as to require a search of the record by this court to ascertain what particular question of jurisdiction was involved.

This court will not make such a search, nor follow counsel in such a search.

If this court will make such a search no particular, specific and definite question of jurisdiction will be found.

No mere suggestion that the jurisdiction of the court was in issue will answer.

Proceedings to this court were here dismissed for lack of a proper presentation of a single, precise, specific question of jurisdiction in the following cases and they are favorably decisive of all the above contentions: *Maynard* v. *Hecht*, 151 U. S. 324; *Moran* v. *Hagerman*, 151 U. S. 329; *In re Lehigh Co.*, 156 U. S. 322; *Sheilds* v. *Colman*, 157 U. S. 168; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *Van Wagenen* v. *Sewall*, 160 U. S. 369; *Chappell* v. *United States*, 160 U. S. 499; *Davis* v. *Geissler*, 162 U. S. 290; *Huntington* v. *Laidley*, 176 U. S. 668-676.

The first point made in the brief of appellants is that "the Circuit Court erred in holding that the jurisdictional facts as to the complainants' citizenship were not properly alleged."

If such a question arose on the trial it is not properly presented in this court.

However, if a search of the record be made, it will be found that no such question was the real and substantial ground of the decree and the assignment for that reason should not be considered.

If, however, the assignment be considered it may be observed

that the jurisdictional facts as to the alienage of complainants and their alleged partnership are not properly pleaded. *Stuart* v. *Easton*, 156 U. S. 46

The second point made in the brief of appellants that "the court erred in holding that it was incumbent upon the complainants to prove the allegation of citizenship," like the first point, is not properly presented for determination by this court. It does not appear that the point was of *controlling* force in the trial court and should not be considered. But if considered it will be found untenable, for the reason that, under the Code of Nebraska, the answer takes the place of all pleas, whether general or special, in abatement or to the merits and the general denial of appellee's answer put in issue appellants' jurisdictional averments. *Roberts* v. *Lewis*, 144 U. S. 653.

The third assignment of error in appellants' brief that the court erred in passing upon the merits of the case is not within the field of this appeal. It does not involve any question touching the jurisdiction of the Circuit Court. The assignment is one not contemplated by the act granting the right of appeal from Circuit Courts direct to this court.

The evidence before the trial court is not preserved in proper form and is not before this court in any form.

The errors, if any, were without prejudice.

The decree rests upon an independent ground, broad enough to maintain it, in which no question of jurisdiction was involved.

The decree is grounded upon the merits of the cause. The evidence is not before this court. The opinion not being properly authenticated is no part of the record. No complaint is made that on the evidence the bill should not have been dismissed. The merits of the controversy appearing to have been fully heard and determined against the appellants the decree therefore rests upon questions of fact and principles of law independent of and not involving a determination of jurisdictional questions.

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

This was a bill alleging that complainants were "all of Cog-

nac in France, and citizens of the Republic of France," and that defendant was a citizen of Nebraska, and a resident of the judicial district thereof; that complainants owned and employed a certain trade mark for Hennessy brandy, (which they produced, bottled and sold,) of a value exceeding two thousand dollars, which trade mark had been properly registered in the Patent Office under the act of Congress of March 3, 1881; and that defendant was selling an imitation "Hennessy brandy," using facsimiles of complainants' trade name, devices and labels. Injunction, profits, and damages were prayed for.

The case was brought to issue, heard on pleadings and proofs, and dismissed, it being held that the court had no jurisdiction because "complainants' citizenship or alienage is not alleged, as required;" and also that the case was with defendant on the merits.

The decree stated among other things: "And the court finds that neither the bill, nor the bill as amended nor the evidence shows the citizenship of complainants, or any of them so as to confer jurisdiction upon this court. And the court further finds with and for the defendants and against the complainants on the evidence, and that the bill as amended is without equity. And for both and all reasons hereinbefore recited," the bill was dismissed.

The court then granted a certificate in these words: "It is certified that the question of jurisdiction referred to in the opinion was passed upon—but that the case was also determined upon its merits. The question of jurisdiction set forth in the opinion filed herein together with the question of the merits of the case is hereby certified to the Supreme Court, all of which are shown by the decree and the opinion."

An appeal was taken directly to this court under the first of the classes of cases enumerated in section five of the judiciary act of March 3, 1891, and we are shut up to the consideration of the question of jurisdiction alone. We do not understand that the amount in controversy was treated below as having any bearing in respect of that question. The act of March 3, 1881, provides for jurisdiction "without regard to the amount in controversy," and the averment here was that the

value of the trade mark exceeded two thousand dollars. The point, however, was not relied on, and we confine ourselves to the question of jurisdiction as dependent on citizenship.

By the Constitution, the judicial power of the United States extends to controversies between citizens of a State, "and foreign States, citizens or subjects." And by statute, Circuit Courts of the United States have original cognizance of all suits of a civil nature, at common law or in equity, in which there is "a controversy between citizens of a State and foreign States, citizens, or subjects." 25 Stat. 433, c. 866.

In *Stuart* v. *Easton*, 156 U. S. 46, it was held that by the description of plaintiff as "a citizen of London, England," the fact that he was a subject of the British Crown was not made affirmatively to appear as required; but, in the case at bar, complainants described themselves as "all of Cognac in France, and citizens of the Republic of France," and this was sufficient.

No averment of alienage was necessary. It is true that by section 6 of the judiciary act of March 3, 1891, the judgments and decrees of the Circuit Courts of Appeals were made final in cases, among others, in which the jurisdiction was dependent entirely on the opposite parties to the suit or controversy being citizens of different States, or "aliens and citizens of the United States." But the word "aliens" as there used embraces subjects or citizens of foreign countries, and not merely persons resident in this country, who owe allegiance to another. And the language of the Constitution and of the act determining the jurisdiction of the Circuit Courts is explicit.

In *Chisholm* v. *Georgia*, 2 Dallas, 419, 456, Mr. Justice Wilson said that under the Constitution of the United States "there are citizens, but no subjects. 'Citizens of the United States.' 'Citizens of another State.' 'Citizens of different States.' 'A State or citizen thereof.' The term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed."

The Supreme Court of North Carolina in *State* v. *Manuel*, 4 Dev. & Bat. 20, 26, (quoted in *United States* v. *Wong Kim Ark*, 169 U. S. 649,) said: "The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common

law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the King' is now 'a citizen of the State.'"

In that view the people of France are properly described as citizens of that Republic.

As complainants were citizens of a foreign State and defendant was a citizen of Nebraska, as affirmatively appeared from the pleadings, no issue of fact arising in that regard, the Circuit Court had jurisdiction.

Decree reversed and cause remanded for rehearing on the merits.

HENNESSY *v.* MOISE, No. 204. HENNESSY *v.* MAY, No. 205.

MR. CHIEF JUSTICE FULLER. These cases must take the same course as that just decided, and the same decrees will be entered.

KIRWAN *v.* MURPHY.

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

No. 161. Argued January 30, 1903.—Decided April 6, 1903.

Even if the making of a government survey, which could be made without any material injury to soil or timber, involved a trespass, it would be of so fugitive and temporary a character as to lack such elements of irreparable injury as would furnish the basis for equity interposition. Nor will a bill of peace lie where the legal remedy is adequate, and where the persons directly interested are not made parties, are not numerous, and assert separate rights.

The administration of public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer outside of his authority and in violation of the statute. The courts can neither correct nor make surveys. The power to do so is in the political department of the government, and the Land Department must primarily determine what are public lands subject to sur-

vey and to disposal, and as it is possessed of this power in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action.

A bill in equity cannot be maintained to enjoin the officers of the Land Department from surveying land which years before had been omitted from an alleged survey, the complainants having purchased lands under such alleged survey, which did not include that in question. The remedy for any infringement of complainant's rights is at law after the administrative action of the government has been concluded.

MURPHY and others filed their bill of complaint in the United States Circuit Court for the District of Minnesota against Kirwan, as United States surveyor general for that district, and Thomas H. Croswell, as deputy surveyor, to enjoin them from surveying, by direction of the Commissioner of the General Land Office, certain lands claimed by the Land Department to be unsurveyed public lands of the United States.

Complainants alleged that they owned lots 1, 2 and 3 of section 2; lots 1 and 2 of section 3; lots 1 and 8 and parts of lots 6 and 7 of section 4; and certain described parts of sections 9, 10 and 11, in township 57 north, range 17 west, fourth principal meridian, Minnesota, deriving title thereto through mesne conveyances and patents from the government; that the land was surveyed by Henry S. Howe in June, 1876, and record of the survey and field notes were approved by the surveyor general August 7, 1876, and a plat therefrom was by him duly made and submitted to the Commissioner of the General Land Office; that complaint was filed against the accuracy and good faith of the survey, which the Commissioner dismissed, and June 11, 1879, approved the survey and plat, which were duly filed and are the only survey and plat of the township ever made or adopted by the government, and according to them the government sold and disposed of all the land in the township; that the survey, field notes and plat were incorrect, and did not accurately show the location and subdivisions of the land and water of the township, for that Cedar Island Lake is smaller than delineated, and several of the complainants' fractional lots are larger, and others are smaller, than shown on the plat; that complainants purchased said lands for value as extending to the lake upon an estimate of the timber thereon without knowledge

of the inaccuracy or fraud of the survey; that the principal consideration inducing such purchase was that the land bordered on the lake and they owned other timber lands, the timber from which could be brought to market by floating through the lake and its outlet down the St. Louis River, then the only means of transport; that in 1892, five certain settlers, knowing complainants' rights and claims, petitioned for a survey of said lands, which the surveyor general recommended to the Commisioner of the General Land Office should be allowed, but the petition was disallowed, whereupon on appeal to the Secretary of the Interior such proceedings were thereafter had that in October, 1895, the Commissioner of the General Land Office directed the United States surveyor general of the district of Minnesota to make a resurvey, which order was ratified and confirmed in November, 1896; that the contract for the resurvey of said land had been let by the surveyor general to Croswell and the survey was about to commence.

The bill averred that "by a new survey of said lands your orators will be put to great and vexatious litigation in making proof of their title in actions against parties who are wholly irresponsible; that a very large amount of the timber standing as aforesaid on the land of your orators and owned by them will be destroyed in the making of such proposed survey and the remainder thereof exposed to damage by fire by reason of said resurvey and your orators will be thereby irreparably injured."

The prayer was that the "surveror general, his agents, attorneys, solicitors, and servants may be restrained by the order and injunction of this honorable court from entering into any contract for the survey of the lands herein described, or from surveying the same, or from taking any action for a survey of said lands or any part thereof, and that boundaries of said lands of your orators may be defined and set out in the decree and order of this honorable court and that all necessary direction may be given them for that purpose and to establish the boundaries of said lands, and that your orators may be protected in the use and enjoyment of such lands so owned by them as aforesaid extending to and including the shores of said Cedar Island

Lake and to the center of said lake, and that said defendant and his successors in office may be perpetually enjoined from letting said contract for the survey of said land or any part thereof, and from surveying the same or any part thereof, and that your orators may have such other and further relief as to this court may seem meet."

Argument was had on the application for a temporary injunction and the matter taken under advisement, whereupon defendants filed their joint answer to the bill.

Defendants admitted the making of a contract of survey of the unsurveyed lands in these sections lying between Howe's purported meander line and Cedar Lake; that in 1876 a contract was made with Howe for the survey of the township, and that he returned the field notes of a pretended survey from which a plat was made and approved, but defendants averred that Howe surveyed only the exterior lines of the township, and in fact made no subdivision thereof, nor surveyed the lands within it; that his field notes were false, fraudulent and fictitious, and the plat made therefrom was false and incorrect; they admitted that the survey and plat were approved by the Commissioner of the General Land Office after complaint to him of its inaccuracy, but not until after withdrawal of the charge of inaccuracy by the person making it. They admitted that an exhibit attached to the bill was a true copy of such approved plat; they denied that all of the lands were disposed of by the government, and alleged that about 1200 acres in these sections were never disposed of and were still unsurveyed, lying between Cedar Lake and the lots described, all of which unsurveyed land is the land referred to, and is by the plat made from Howe's field notes indicated as part of Cedar Island Lake; they allege that no lots conveyed to the complainants were smaller than shown on the plats; that the true relative size of the lake to that shown in the plat was that shown on an exhibit attached, and that the land between the lake and the boundary line of the fractional lots was 1200 acres of unsurveyed government land as referred to; defendants denied the good faith of complainants and alleged complainants' full participation in the contest proceedings resulting in the decision and order for the survey

of these lands, and that the Commissioner and the Secretary of the Interior had full jurisdiction to pass on the question and to make the decision and order. The answer denied that the timber on complainants' land would be destroyed or damaged in making such survey, and denied every averment of the bill except as in the answer averred or denied.

The Circuit Court granted the preliminary injunction, and its order was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 83 Fed. Rep. 275. An appeal was taken to this court and dismissed. 170 U. S. 205.

The cause then went to final hearing, and the Circuit Court found the facts as follows:

"1. On or about April 26, 1876, a contract for the survey of all lands in township 57 north, of range 17 west, in Saint Louis County, Minnesota, was made by the government of the United States with one Henry S. Howe, as a deputy surveyor of the United States, and thereafter said Howe made and filed what purported to be field notes of a survey of said township, from which a purported official plat of said township was thereafter made and approved by the surveyor general of the United States for the District of Minnesota and by the Commissioner of the General Land Office, of which plat Exhibit A attached to the bill of complaint is a substantially correct copy.

"2. There is no evidence, nor any marks upon the ground, to indicate that any actual survey of said township 57 was ever made by said Howe, as required by his said contract, and by the rules and regulations of the General Land Office, or at all, beyond the running and due marking of the exterior boundary lines of said township, where the section, quarter, and other posts and markings established by him are and always have been clear, distinct, and readily found and traced. There is no evidence on the ground that section lines were ever run by him in or across said township, or section corner posts or quarter posts ever located or set by him, except a corner post at the northwest corner of section thirty-six (36) and a quarter post in the western line of said section thirty-six (36), and there is no evidence that witness trees were ever blazed or marked by him.

"3. Cedar Island Lake is a navigable, deep, and permanent body of water, fed principally by springs, having an area of about nine hundred (900) acres, instead of about eighteen hundred (1800) acres as described in the field notes of Howe and shown on said official plat of said township. Instead of the shores of said lake being low and swampy as stated in said field notes, the banks are generally high and sloping lands, suitable for agriculture, extending around the lake, and support a good growth of pine and other forest trees large enough for lumbering, such as will not grow in water. The condition was the same in 1876, and no material part of the land surrounding the lake is accretion. Southerly and westerly of said Cedar Island Lake are five other deep, navigable, and permanent lakes in the same township, none of which are shown by the field notes of Howe's survey or upon said government official plat of said township, and all of which have, since the making of said official plat, been sold and patented by the government as land according to said plat.

"4. There is no evidence upon the ground that any meander line of said Cedar Island Lake was ever surveyed by said Howe, or any meander posts placed by him about said lake, except one where the north line of said township encounters said lake. And the outlet of said lake is at a different place from that described in said field notes and shown upon said official plat. After the making of the said survey and plat and before its approval, complaints touching the accuracy thereof were made to the Commissioner of the General Land Office, but on the withdrawal of such complaints the said survey and plat were approved.

"5. The land lying between the actual water line of said Cedar Island Lake and the meander line of that lake, as delineated on said official plat of said township, comprises the land in controversy in this suit, and is the same land directed to be surveyed by the Commissioner of the General Land Office and referred to in the surveyor's contract, which is attached as Exhibit A to the answer in this suit, being therein described as 'the public lands situate in secs. 2, 3, 4, 9, 10, and 11, in township No. 57 N., R. 17 W., of the 4th principal meridian, lying

between the "old meander boundary of Cedar Island Lake," as given by the original field notes of Henry S. Howe, U. S. deputy surveyor, approved by the surveyor general of Minnesota, Aug. 19, 1876, and the shore line of said Cedar Island Lake.'

"6. Prior to the commencement of this suit the United States has sold, and by its patents has conveyed to the purchaser, according to said official plat made from said Howe survey, all the land in said township 57, as the same appeared upon said plat; to which plat all of said patents expressly referred; it being then and still the only government plat of said township.

"7. The complainants are the grantees and owners by mesne conveyances from the patentees of the record title to the following-described fractional lots in said township, to wit: Lots one (1), two (2), three (3), in section two (2); lots one (1) and two (2), in section three (3); lots one (1) and eight (8), and portions of lots three (3), five (5), and six (6), in section four (4); lots one (1), two (2), three (3), and four (4), in section nine (9); lots one (1), two (2), three (3), and four (4), in section ten (10); and lot three (3) in section eleven (11), being the same lands which are more particularly described in complainants' bill; and each of which fractional lots appear and are represented on said official plat as bounded by and upon said Cedar Island Lake.

"8. So far as appears none of the patentees of said lands had any notice or knowledge of any fraud or misconduct on the part of said Howe in or about the making of said survey and field notes, and all were purchasers in good faith of said lands.

"9. Complainants purchased said fractional lots of land of the patentees or their grantees for the pine timber thereon, and the convenience of landing the same in the said Cedar Island Lake, to be driven to the place of manufacture; and before such purchase, in the year 1883, caused said lands to be explored and examined by an experienced timber estimator, who in making such examination used, as is customary in such cases, a copy of said official plat of said township which did not have upon it in any statement of the acreage or amount of

land in any of the subdivisions; and who reported to the complainants his estimate of the amount of pine timber on said lands, and the general character of said land, and the riparian character thereof as bounded upon said Cedar Island Lake; but did not discover or report any fraud or error in the survey of said township, or any error or mistake in the said official plat. And the said complainants purchased, paid for and took conveyances of said lands in good faith, and without any notice or knowledge of any such fraud, error, or mistake.

"10. The other permanent lakes in said township, not shown upon such official plat, but appearing thereon as land, and since sold and patented by the government as land according to such official plat, include areas equal to the area of said Cedar Island Lake; and portions of such lakes were purchased by complainants as land with their other purchases in said township.

"11. The survey sought to be restrained in this suit was ordered by the Commissioner of the General Land Office, upon the direction of the Secretary of the Interior, in a proceeding instituted by certain settlers upon the land in controversy; of which proceedings the complainants had due notice, and in which they appeared."

And the Circuit Court decreed:

"That the complainants are the grantees and owners, by mesne conveyances from the patentees, of the title of record and, in fact, to the following-described fractional lots, situate in township fifty-seven (57) north-range seventeen (17) west, in the county of St. Louis, State of Minnesota, to wit:" [Here follows description of lots,] "being the same lands which are more particularly described in the complainants' bill of complaint herein; and that said above-described fractional lots extend to and are bounded by and upon the actual waters of Cedar Island Lake.

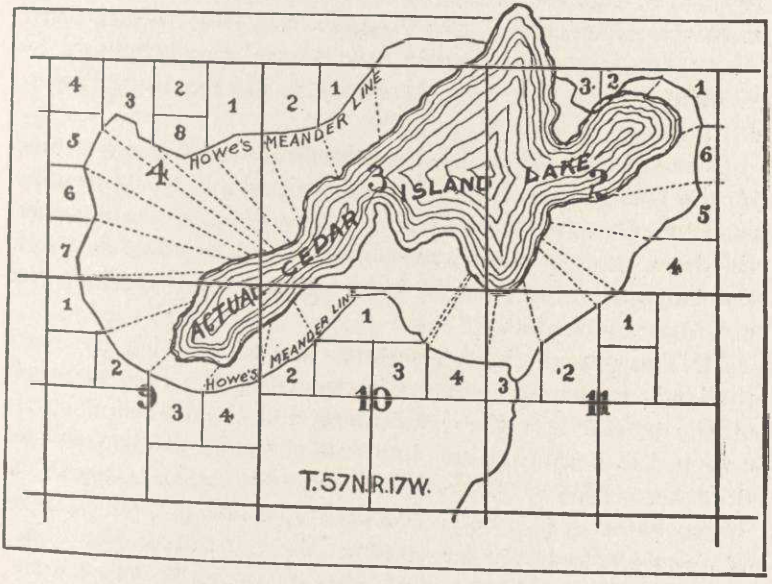
"It is further ordered, adjudged, and decreed that the defendants have no jurisdiction or authority to meddle with said lands or to make the survey complained of in the bill of complaint herein; and

"It is further ordered, adjudged, and decreed that the in-

junction heretofore issued in this cause be and the same is hereby made perpetual, and that the said defendants and their successors, representatives, and assigns be and they are hereby severally and perpetually restrained and enjoined from surveying or causing to be surveyed the lands hereinbefore described, or any part thereof." And for costs.

Appeal was then taken to the Circuit Court of Appeals and the decree affirmed. 109 Fed. Rep. 354. Thereupon the case was brought to this court.

The following drawing taken from petitioners' brief sufficiently illustrates the situation:



Mr. Assistant Attorney General Van Devanter for appellants. *Mr. Assistant Attorney Webster* was with him on the brief.

Mr. Benton Hanchett and *Mr. M. H. Stanford*, with whom *Mr. S. D. Luckett* was on the brief, for appellees.

I. The reference in the patents to the plat makes the plat as much a part of the patent as it would be had the plat been incorporated into and made, in fact, a part of the patent itself.

By the plat designating the lots as bounded by the lake showing the lake to be the boundary of the lots, the effect to be given to the patent is the same as it would be if the description of the lots in the patent had in express language said that the lots extend to and are bounded by the shore of the lake. The lake is thus made a designated natural object constituting a boundary of the lots. It is a boundary monument of the lots. *Lincoln* v. *Wilder*, 29 Maine, 169; *Erskine* v. *Moulton*, 66 Maine, 276; *Davis* v. *Rainsford*, 17 Massachusetts, 207; *Whitman* v. *Boston & Maine R. R. Co.*, 3 Allen, 133, 139; *Boston Water Power Co.* v. *Boston*, 127 Massachusetts, 374; *Morgan* v. *Moore*, 3 Gray, 319, 321, 322; *Murdock* v. *Chapman*, 9 Gray, 156; *Rodgers* v. *Parker*, 9 Gray, 445; *Fox* v. *Union Sugar Refinery*, 109 Massachusetts, 292; *Parker* v. *Bennett*, 11 Allen, 388; *Masterson* v. *Monroe*, 105 California, 431; *Cragin* v. *Powell*, 128 U. S. 691.

In the patents by which these lots in question are conveyed by the United States there is no description of the lands other than by reference to the plat. Under the above authorities, the description by the plat is to have the same effect as though the language of the patent in terms stated that the lake is a boundary of the lots.

II. The patents, by reference to the plat, having described the lands as extending to and bounded by the lake, conveyed all the land within the descriptions, and the United States is estopped to deny that the lots extend to and are bounded by the lake. *Thomas* v. *Poole*, 7 Gray, 83; *Parker* v. *Smith*, 17 Massachusetts, 411, 415; *O'Linda* v. *Lothrop*, 21 Pick. 292; *Rodgers* v. *Parker*, 9 Gray, 445; *Fox* v. *Union Sugar Refinery*, 109 Massachusetts, 292; *Farnsworth* v. *Taylor*, 9 Gray, 162; *Stetson* v. *Dow*, 16 Gray, 372; *Lunt* v. *Holland*, 14 Massachusetts, 149.

Estoppel applies against the United States as it applies under like circumstances against a private person. As under the above authorities a private person conveying the lands by reference to such plat would be estopped to deny that the land extended to and was bounded by the lake, so is the United States estopped to deny the same facts. *Lindsey* v. *Hawes*, 2

Black, 554, 560; *Woodruff* v. *Trapnall*, 10 Howard, 190, 207; *Branson* v. *Wirth*, 17 Wall. 32, 42; *Clark* v. *United States*, 95 U. S. 539, 544; *Pengra* v. *Munz*, 29 Fed. Rep. 830, 836; *Hough* v. *Buchanan*, 27 Fed. Rep. 328, 331; *Indiana* v. *Milk*, 11 Fed. Rep. 389, 396, 397; *United States* v. *Military Road Co.*, 41 Fed. Rep. 493, 501; *United States* v. *McLaughlin*, 30 Fed. Rep. 147, 161, 162; *Commonwealth* v. *Philadelphia &c. Turnpike Co.*, 153 Pa. St. 47; *State* v. *Janesville Water Power Co.*, 92 Wisconsin, 496; *Michigan* v. *F. & P. M. R. R. Co.*, 89 Michigan, 481; *Michigan* v. *Jackson, L. & S. R. Co.*, 69 Fed. Rep. 116, 120, 121, 123; *Commonwealth* v. *Heirs of Andre*, 3 Pick. 224; *Menard's Heirs* v. *Massey*, 8 How. 293, 313, 314.

Under the above authorities, the United States, in a suit brought in its behalf, would be estopped to deny that Cedar Island Lake was the boundary of the lots conveyed by the patents.

III. The descriptions of these fractional lots contained in the patents, being lots as they appear by their numbers, and by their boundaries designated on the plat, and the lake itself being made the boundary, the boundary by the lake thus made governs the description, notwithstanding no courses, distances, nor computed contents correspond with such boundary. This is clearly decided by the following cases, even though it may be found that no survey of the lots had in fact been made. *Newsome* v. *Pryor's Lessee*, 7 Wheat. 7; *McIver's Lessee* v. *Walker*, 9 Cranch, 173, 179; *Preston's Heirs* v. *Bowmar*, 6 Wheat. 580; *Higueras* v. *United States*, 5 Wall. 827, 835, 836; *Morrow* v. *Whitney*, 95 U. S. 551; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 62, 63; *Murdock* v. *Chapman*, 9 Gray, 156; *Bishop* v. *Morgan*, 82 Illinois, 351; *Shufeldt* v. *Spaulding*, 37 Wisconsin, 662, 668; *Gove* v. *White*, 20 Wisconsin, 425, 432; *Graves* v. *Fisher*, 5 Maine, 69; *Horne* v. *Smith*, 159 U. S. 40; *Niles* v. *Cedar Point Club*, 175 U. S. 300.

Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Hence, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this "marsh" as he called it. These surveys were approved and a plat prepared, which

was based upon the surveys and field notes, and showed the limits of the tracts which were for sale. The patents referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh.

By the plat in the case which is now before the court, the meander line is fixed upon the shore of the lake, and the lake is delineated and named on the plat.

The intention plainly expressed by the patent and plat is that the meander line and shore of the lake coincide, and that the lake itself is the boundary of the land conveyed.

In this manner the lake is made the boundary of the land within the decisions in *Horne* v. *Smith*, and *Niles* v. *Cedar Point Club*, because the plat shows that the lake is intended as the boundary.

IV. Defendants contend that a patent of unsurveyed lands conveys no title, and that, therefore, no title passed from the United States to the lands in controversy, because it was not, in fact, surveyed by Deputy Surveyor Henry S. Howe, and cite to sustain this position the expression of the court in the case of *Horne* v. *Smith*, 159 U. S. 40.

That case does not hold, as claimed by defendants' counsel, that land which is not surveyed cannot pass by patent. See also *Mitchell* v. *Smale*, 140 U. S. 406; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272.

V. The patents having included the lands in controversy within the descriptions of the lands conveyed, the validity of the patents cannot be questioned in this suit.

1st. If there was mistake or fraud in the issue of the patents, it can be corrected only by a suit brought by the United States, which shall set forth the facts which constitute the basis or ground for such correction.

The survey of the public lands is vested in the Land Department, and it is within the jurisdiction of that department to determine when the lands have been properly surveyed, so that a patent may be issued for them.

The action of the Land Department upon this subject is judicial, and is "unassailable, except by a direct proceeding for its

correction or annulment." *Smelting Co.* v. *Kent*, 104 U. S. 636, 640; *United States* v. *Minor*, 114 U. S. 233, 241, 243; *Moffat* v. *United States*, 112 U. S. 24, 30; *United States* v. *Schurz*, 102 U. S. 378, 396; *United States* v. *Stone*, 2 Wall. 525, 535; *Erhardt* v. *Hogaboom*, 115 U. S. 67; *Johnson* v. *Towsley*, 13 Wall. 72, 83; *Noble* v. *Union River Logging R. R.*, 147 U. S. 165, 175; *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167.

To assail these patents on the ground of fraud, or to correct them in respect to the lands in controversy, the suit would have to be instituted by the United States, since the controversy would be between it and the complainants, no other parties having obtained any claim to the lands from the United States. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273.

The complainants cannot bring suit against the United States in this court, or elsewhere, to establish the complainants' title to the lands.

They must rest upon the patents for their title until the United States sees fit to attack the patents. *United States* v. *Schurz*, 102 U. S. 378, 404.

The United States has not appeared in this suit, and the court had no jurisdiction to bring it into the case, and no decree which may be made will be of any effect against the United States.

The attack upon the validity of the patents by the defence in this suit is a collateral attack, and is not available to the defence.

2d. In the suit instituted by the United States, to avoid or correct the patent on the ground of the alleged false character of the field notes and plat, the complainants would have the right to set up as their defence an estoppel against the United States.

The authorities above cited establish that the defence of estoppel would be available in such suit to the complainants.

3d. The complainants would also be in position to defend against the United States in such suit upon the ground of their being *bona fide* purchasers of the lands, and in such suit the United States would be required by its pleading to state

clearly the facts upon which the charge of fraud or mistake was based, and the burden would be upon it to sustain the charge by clear and convincing proofs, even though to do so would require the proof of the negative. A preponderance of the evidence merely would not sustain it. *Maxwell Land Grant Case*, 121 U. S. 325, 379, 381; *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 313, 314; *United States* v. *Burlington &c. R. R. Co.*, 98 U. S. 334, 342; *United States* v. *California &c. Land Co.*, 148 U. S. 31, 40; *United States* v. *Winona &c. R. R. Co.*, 165 U. S. 463, 478; 67 Fed. Rep. 948, 960.

VI. The court has jurisdiction to enjoin the acts of the defendants in making a survey of the lands.

1st. The survey is made under such a contract that the lands in controversy may be treated as government lands, open for homestead or other claims, or for purchase, under the laws governing the disposition of the government lands.

These proceedings of survey, field notes, and plat, will constitute a cloud upon the complainants' title to the land.

Under the general equity powers of the Federal courts, they have jurisdiction to quiet title to lands in favor of the party in possession, having the title, against a party not in possession, who sets up a claim to the land which constitutes a cloud upon the possessors' title. *Peirsoll* v. *Elliott*, 6 Pet. 95; *McConihay* v. *Wright*, 121 U. S. 201; *Frost* v. *Spitley*, 121 U. S. 552; *United States* v. *Wilson*, 118 U. S. 86.

The reason why the general jurisdiction of courts of equity is limited to cases in which the complainants are in possession of the lands is, that, if not in possession they have an adequate remedy at law by ejectment; the further reason applicable to the Federal courts is that the right to trial by jury is preserved in those courts in all cases in which the conditions are such that the matter in controversy may be tried in a suit at law by a jury.

In those States where, by statute, a right is given to a party to maintain a suit in equity to quiet title to land owned by him, which is vacant or unoccupied, that right may be enforced in the Federal courts. The right is held to be the creation, by statute, of an equitable right, which right, by reason of the de-

fendant not being in possession, cannot be tried in an action at law; there is therefore no infringement in such case of the right to trial by jury. *Clark* v. *Smith*, 13 Pet. 195; *Holland* v. *Challen*, 110 U. S. 15, 20–25; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 410, 411; *United States* v. *Wilson*, 118 U. S. 86; *Rich* v. *Braxton*, 158 U. S. 375, 405; *Dick* v. *Foraker*, 155 U. S. 404, 414, 415; *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Cowley* v. *Northern Pac. R. R. Co.*, 159 U. S. 569, 582, 583; *Smyth* v. *Ames*, 169 U. S. 466, 517.

The statutes of the State of Minnesota provide as follows:

"Sec. 2. *Action to Determine Adverse Claims.* An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien, or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and of the rights of the parties, respectively." Stat. Minnesota, 1878, c. 75, § 2, p. 814. This statute of Minnesota is substantially the same as the statute of Indiana, referred to in the case of *Reynolds* v. *Crawfordsville Bank*. Under this statute, the Circuit Court in which this suit was brought, sitting in Minnesota has jurisdiction to remove the cloud from the complainants' title to the lands in controversy, which lands, in respect to the parties to this suit, are vacant and unoccupied.

2d. Where courts in equity have jurisdiction to remove a cloud from title to lands, they have jurisdiction to prevent, by injunction, the proceedings for the creation of a cloud, and suit in any such case is in the character of a bill *quia timet*. 1 High on Injunctions, sec. 372 (2d ed.); 3 Pomeroy Eq. J. secs. 1345 and 1398, note; 1 Story Eq. J. sec. 700; *Petit* v. *Shephard*, 5 Paige, 493, 501, 502; *Oakley* v. *The Trustees of Williamsburgh*, 6 Paige, 262; *O'Hare* v. *Downing*, 130 Massachusetts, 16; *Peirsoll* v. *Elliott*, 6 Pet. 95; *Sharon* v. *Tucker*, 144 U. S. 533, 547; *Briggs* v. *French*, 1 Sumn. 504; *Union Pac. R. Co.* v. *Cheyenne*, 113 U. S. 516, 526, 527.

The right to maintain suit and prevent the creation of a cloud upon the title in case of vacant or unoccupied lands is clearly within the intent and purpose of the statute of Minnesota, and would be enforced in the courts of that State.

But the jurisdiction of the courts, either State or Federal, does not depend in such case upon the state statute. Remedy to prevent the wrong or injury threatened or intended by the proceedings to create a cloud upon the title exists in equity, because the only effective remedy is by injunction to stay the proceedings.

The right to trial by jury is not invaded, since there is no opportunity at law to try the controversy.

3d. In order that the complainants be remitted to their remedy at law, it must appear that such remedy is plain and adequate in the sense that it is "as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity," and the circumstances of the case must determine whether there is such remedy at law. *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Watson* v. *Sutherland*, 5 Wall. 74, 78; *Payne* v. *Hook*, 7 Wall. 425, 430; *United States* v. *Union Pac. R. R. Co.*, 160 U. S. 1, 51; *Oelrichs* v. *Spain*, 15 Wall. 211, 228; *McConihay* v. *Wright*, 121 U. S. 201, 205, 206; *Holland* v. *Challen*, 110 U. S. 15, 24.

If the proceedings sought to be enjoined in this case are allowed to be completed the inevitable result will be various claims made for the lands as government lands. The very object of the survey is to open lands to such claimants, and in order that the complainants defend and maintain their title a multiplicity of suits will be the result.

No action at law is adequate to the complainants' protection.

Under these conditions the court will enjoin the acts of the defendants to prevent a multiplicity of suits. Pomeroy, Eq. J. secs. 243, 245, 267, 268; *Livingston* v. *Livingston*, 6 Johns. Chy. 497; *DeForest* v. *Thompson*, 40 Fed. Rep. 375 (opinion by Judge Jackson, Mr. Justice Harlan concurring); *Osborne* v. *Wisconsin Cent. R. Co.*, 43 Fed. Rep. 824 (opinion by Mr. Justice Harlan); *Crews* v. *Burcham*, 1 Black, 352, 358; *Louisville &c. R. Co.* v. *Ohio &c. Co.*, 57 Fed. Rep. 42; *New York &c.*

R. Co. v. *Schuyler*, 17 N. Y. 592; *Supervisors* v. *Deyoe*, 77 N. Y. 219.

4th. To make the intended survey of the lands it would be necessary to cut down a considerable quantity of the pine timber standing upon the lands, and by the cutting of such timber, the remainder of the valuable pine timber would be exposed to destruction by fire. An irreparable injury is threatened.

It is an undisputed fact that the chief value of the lands in controversy consists in the pine timber standing upon them.

It is a fact of common knowledge that the felling of timber in the pine forests in the northern States is a source of special and great danger to the *remaining* pine timber standing upon the lands. Fires are easily kindled, and there is constant likelihood of their being kindled, in the dry tops and refuse of the fallen trees; having gained force from the quantity of refuse the fires spread rapidly and for long distances. The standing timber is not destroyed by being burned up, but the heat about the roots of the trees kills the trees and destroys their value.

The cutting of the timber by the defendants will not be confined to one place, but will be along the different lines running through the forests upon which the survey is made. In this manner an exposure to the danger of fire will be made to large portions of the lands.

The court has jurisdiction, by injunction, to prevent the cutting of timber and the threatened danger of its destruction. *Wilson* v. *City of Mineral Point*, 39 Wisconsin, 160; *Butman* v. *James*, 34 Minnesota, 547; *Smith* v. *Roc*, 59 Vermont, 232; *West Point Iron Co.* v. *Reymert*, 45 N. Y. 703; *Camp* v. *Dixon, Mitchell & Co.*, 112 Georgia, 872; *Erhardt* v. *Boaro*, 113 U. S. 537; *North Pac. R. R. Co.* v. *Hussy*, 61 Fed. Rep. 231; *Oolagah Coal Co.* v. *McCaleb*, 68 Fed. Rep. 86; *Buskirk* v. *King*, 72 Fed. Rep. 22; *Dimick* v. *Shaw*, 94 Fed. Rep. 266.

5th. The fact that the defendants are acting under the direction of the Land Department does not deprive the court of jurisdiction to restrain acts done by them which are injurious to the complainants, and which are unlawful acts.

The title of the United States to the lands in controversy having been conveyed by the patents under which the complain-

ants obtained that title, the Land Department has no authority, either upon the ground of fraud, or mistake in the survey of the lands, to interfere with the complainants' title, or ownership or possession of the lands.

The defendants have no more right to enter upon the lands to resurvey them than they have to enter upon and resurvey any lands owned by private parties.

Before any entry can be made upon the lands by them, under a claim that they are government lands, the patents must be set aside, or declared void by the court in a suit instituted for that purpose on the part of the United States.

This position is clearly maintained by the decisions of this court. *Moore* v. *Robbins*, 96 U. S. 530; *Cragin* v. *Powell*, 128 U. S. 691, 699, 700; *United States* v. *Schurz*, 102 U. S. 378, 401, 402; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Widdicombe* v. *Childers*, 124 U. S. 400; *Hardin* v. *Jordan*, 140 U. S. 371, 401; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 175; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589; *McCormick Machine Co.* v. *Aultman*, 169 U. S. 606; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 282; *United States* v. *Winona & St. Peters R. Co.*, 67 Fed. Rep. 948, 959 (Court of Appeals).

The defendants, in attempting to survey the lands, are acting without right and without lawful authority from any source.

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

The bill prayed for injunction and the establishment of the boundaries of complainants' lands. The decree granted a perpetual injunction, and, describing the fractional lots, adjudged that they "extend to and are bounded by and upon the actual waters of Cedar Island Lake." The deflection of the lines required by the decree is indicated on the diagram.

Sections 2395, 2396 and 2397 of the Revised Statutes specify the manner of making surveys of public lands, and prescribe the rules by which the form and boundaries of the tracts are determined. In this case no survey was in fact made, no meander line was in fact run, and no body of water in fact

existed near the false meander line indicated. The line purporting to delimit the lake was from one mile to a quarter of a mile from the lake, and ran over high agricultural land, covered with ancient trees, which could not have grown in water. The theory of the decree is that the government is estopped by the pretended survey and plat to deny that these lots were bounded by the lake.

The Land Department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved. The department has held that the land lying between the alleged meander line and the lake, some 1200 acres, is government land, and has ordered it to be surveyed. *In re Burns*, 20 L. Dec. 28, 295; 23 L. Dec. 430. The execution of that order was restrained by the preliminary injunction herein, and that has been made perpetual by the decree.

We are confronted on the threshold with two objections to the maintenance of this bill, namely, the want of jurisdiction in equity, and the want of jurisdiction thus to interfere with executive administration.

Equity jurisdiction was invoked on the ground of lack of adequate remedy at law in that irreparable injury in the destruction of timber and exposure to fire by the survey, and multiplicity of suits were threatened.

In our opinion complainants failed to make out a case of liability to irreparable injury. The township was resurveyed by a county surveyor in 1893; defendant Croswell has made surveys in the township, locating the actual meanders of the lake; and he testified that this survey could be made by him "without any material injury to the soil or timber;" and that he would not "have to cut very much valuable timber." If complainants as owners of the 859.38 acres contained in their fractional lots became through that ownership owners of the 1202 acres lying between those lots and the lake, the proposed survey would be but a fugitive and temporary trespass, lacking the elements of irreparable mischief, and of such long continuance as to become a nuisance.

And bills of peace will not lie where the legal remedy is otherwise adequate, and where the persons directly interested are not made parties, are not numerous, and assert separate and independent rights. *Hale* v. *Allinson*, 188 U. S. 56; *Cruickshank* v. *Bidwell*, 176 U. S. 73.

But, in the next place, was the Circuit Court justified in thus arresting the action of the Land Department in proceeding with a survey under the circumstances? In other words, can the Land Department be stayed in the discharge of a duty, not ministerial, but involving the exercise of judgment and discretion, on the ground that its jurisdiction has been lost by estoppel? We do not think so, and hold that complainants' contention that they are entitled to bound upon the lake involves a legal right, which cannot be properly passed on until after the department has acted.

Having participated in the proceedings before the department, complainants, after survey was ordered, obtained this injunction against further administrative action, on the ground of absolute want of power, and not of error in its exercise.

The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. *Whiteside* v. *United States*, 93 U. S. 247; *Moffat* v. *United States*, 112 U. S. 24; *Hume* v. *United States*, 132 U. S. 406, 414. The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. *Brown* v. *Hitchcock*, 173 U. S. 473.

In *Litchfield* v. *The Register and Receiver*, 9 Wall. 575, Litchfield sought an injunction to restrain the register and receiver of the United States land office at Fort Dodge, Iowa, from entertaining and acting upon applications made to them to prove preëmptions to certain lands which lay within the

land district for which they were respectively register and receiver. The bill averred that complainant was the legal owner of the lands; that they were not public lands, and were in no manner subject to sale or preëmption by the government or its officers. The bill was dismissed for want of jurisdiction in equity, and this court affirmed the decree. Mr. Justice Miller said: "The principle has been so repeatedly decided in this court, that the judiciary cannot interfere either by mandamus or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here." *Gaines* v. *Thompson*, 7 Wall. 347; *The Secretary* v. *McGarrahan*, 9 Wall. 298.

It was held that the fact that complainant asserted himself to be the owner of the tract of land, which the officers were treating as public lands, did not take the case out of that rule, where it was the duty of these officers to determine, upon all the facts before them, whether the land was open to preëmption or sale; and further, that if the court could entertain jurisdiction, the persons asserting the right of preëmption would be necessary parties to the suit.

Mr. Justice Miller further said: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for preëmption, the courts can then in the appropriate proceeding determine who has the better title or right."

And: "It appears on its face, that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preëmpt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establish-

ing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform."

The case has been frequently cited, and in, among others, *Carrick* v. *Lamar*, 116 U. S. 423, an application to the Supreme Court of the District of Columbia for a mandamus to the Secretary of the Interior to order the survey of an island in the Mississippi River, opposite the city of St. Louis, by an alleged settler thereon, who averred that he had applied to the department for a survey of the island, so that it might be brought into the market, and that on the hearing of the application the city contended that the island had been surveyed and set apart to it, under certain acts of Congress, which he denied, because, as he insisted, the island surveyed was then located above this island. The court refused to grant the writ, and its judgment was affirmed, this court holding that the question how far the title of the city to the island was affected by its being carried down river by the action of the current, required consideration and judgment on the part of the Secretary.

Noble v. *Union River Logging Company*, 147 U. S. 165, is not to the contrary, for that was a case where the executive department had confessedly finally acted, and then attempted to resume jurisdiction, and an injunction was sustained. But the government raised no point as to the form of the remedy; deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was threatened; and it appeared that the only remedy was through equity interposition. *Cruickshank* v. *Bidwell*, 176 U. S. 73, 80. In this case, whether the lands lying between the alleged meander line and the lake were public lands, or not, was for the Land Department to determine in the first instance, and if error was committed, this is not the way to correct it.

In our judgment the Circuit Court should not have taken jurisdiction, and therefore the

Decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause remanded to that court with a direction to dismiss the bill.

BRILL v. PECKHAM MOTOR TRUCK AND WHEEL COMPANY.

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

No. 181. Argued March 2, 3, 1903.—Decided April 6, 1903.

Where in a patent case a preliminary injunction has been granted by a Circuit Court on the strength of a previous adjudication by the same court over the same patent, the case involving questions of fact in respect of anticipation and infringement, and not being ripe for final hearing, it is error for the Circuit Court of Appeals on an appeal from the interlocutory order to direct a dismissal of the bill. *Mast Foos Company* v. *Stover Manufacturing Company*, 177 U. S. 485, applied.

THIS was a bill in equity filed in the Circuit Court of the United States for the Southern District of New York by John A. Brill and The J. G. Brill Company against The Peckham Motor Truck and Wheel Company and others, praying for injunction and accounting for infringement of letters patent No. 478,218, for an improvement in car trucks, issued July 5, 1892.

The J. G. Brill Company was a manufacturer of street cars and trucks at Philadelphia, and The Peckham Motor Truck and Wheel Company was a manufacturer of trucks at Kingston, New York.

The bill was filed October 15, 1900, and a motion for preliminary injunction on behalf of complainants on claims one and two of the patent in suit was heard by Judge Lacombe on October 26, 1900, on affidavits previously served by complainants, including the record of an adjudication in the Circuit Court in the case of *Brill* v. *Third Avenue Railroad Company*, in which the opinion of Judge Shipman was filed July 9, 1900. 103 Fed. Rep. 289.

Defendants filed affidavits at the hearing, which had been sworn to October 25 and 26, and which complainants had apparently had no opportunity to inspect before the argument. These affidavits set up two patents, (Manier of August 27, 1889,

No. 409,993, and Peckham, of January 21, 1890, No. 419,876), which had also been before Judge Shipman in the prior case, and defendants contended in view of these two patents that the two claims in controversy must be limited in their scope, and that there had been no infringement of the claims as thus limited. Judge Lacombe held that as there was no prior patent before him which had not been before Judge Shipman, and as the combination, which Judge Shipman described as the gist of the invention, was undoubtedly in defendants' structures, complainants were entitled to a restraining order under "well settled rules of practice." 105 Fed. Rep. 626. The preliminary injunction was therefore granted. From this interlocutory order defendants took an appeal to the Circuit Court of Appeals for the Second Circuit, and on a hearing there the order granting the preliminary injunction was reversed, and the cause remanded to the Circuit Court with instructions to dismiss the bill with costs. 108 Fed. Rep. 267. A petition was filed for a rehearing and denied. 110 Fed. Rep. 377. This writ of certiorari was then granted. 183 U. S. 698.

Mr. Francis Rawle and *Mr. Frederick P. Fish* for petitioners. *Mr. Joseph L. Levy* was with them on the brief.

Mr. William A. Megrath and *Mr. Charles H. Duell* for respondent.

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

The Circuit Court for the Southern District of New York, Shipman, J., presiding, in July, 1900, entered a decree in the case of *Brill* v. *Third Avenue Railroad Company*, adjudging the letters patent to George M. Brill of July 5, 1892, No. 478,218, for improvements in car trucks, as to claims 1, 2, 9, 10, 11, 12, 14 and 27 thereof, to be good and valid, and that defendant, as the purchaser of one hundred and eighty-one trucks of the Bemis Car Box Company, had infringed the exclusive rights of complainant thereunder; and for injunction, accounting, and

recovery of damages. And a final decree was entered in the cause October 1, 1900. This bill was filed October 15, 1900, in the same court, against another truck building company, and a motion for preliminary injunction was heard in that court before Lacombe, J., and sustained on the strength of the previous adjudication. The patent related to the construction of non-pivotal electric street railway trucks, and the invention was intended to remedy oscillation.

Judge Lacombe, in ordering the preliminary injunction, said:

"The only question presented is whether defendant's structure infringes. That involves the construction of the claims declared on, and, for the purposes of this motion, the construction already adopted by this court on final hearing in the *Third Avenue* case, 103 Fed. Rep. 289, should be followed; for there is no prior patent, no prior use, proved here, which was not before Judge Shipman. It is true that in that case the defendant's device was a much closer copy than the one now under consideration, containing, as it did, the feature that the spiral springs came first into play, and the further feature of depending caps, in which the leaves of the elliptical springs play vertically, but the court most carefully indicates that the leading feature of the invention lies outside of these details; that the 'gist of the invention consists in combining with the frames of the truck and the spiral springs other springs, viz., elliptical springs, between the car body and the extensions of the independent frame,' the object being to break the rhythm of the springs, and thus do away with the galloping or rocking motion. The defendant here insists that there is no rhythm broken, indeed, that there is no rhythm to break, and that the combination of the quotation does not do away with the galloping motion. On those points, however, this court should follow the earlier decision. There are additional rods, and also spirals, below the frame, which apparently in defendant's structure do their share in eliminating galloping; but the combination which Judge Shipman described as the gist of the invention is undoubtedly in defendant's structure, and, under well settled rules of practice, complainant is entitled to a restraining order until final hearing."

The rule of practice for one member of a court to regard the prior decision of another, in cases of this kind, as to be followed until otherwise authoritatively adjudicated, seems to be justified in the orderly conduct of proceedings, and the Circuit Court of Appeals did not hold that the Circuit Court had improvidently exercised its discretion in granting the preliminary injunction in accordance with its own prior decision and decree, which decree was not the subject of the appeal. But the court proceeded to dispose of the case upon its merits as one in which it was apparent complainant could not ultimately prevail, and relied on *Mast, Foos and Company* v. *Stover Manufacturing Company*, 177 U. S. 485, as authorizing the pursuit of that course.

It was contended there that the Circuit Court of Appeals for the Seventh Circuit erred in refusing to follow the opinion of the Circuit Court of Appeals for the Eighth Circuit in respect of the validity and scope of a patent, and in reversing the order of the Circuit Court, which, on the ground of comity, had done so, and we held that the obligation was not imperative, but that the Circuit Court of Appeals for the Seventh Circuit was at liberty to exercise its own judgment.

In doing so the Court of Appeals directed the dismissal of the bill, before answer filed or proofs taken, on an appeal from an order granting a temporary injunction, and its action in that regard was a principal question discussed in this court.

It should be observed that in that case complainant was served with defendant's affidavits before the argument below, and was permitted to put in rebuttal affidavits. The merits of the case were fully before the court, and the patent in suit related to the use in a windmill of an old and simple mechanical device for the purpose of converting a rotary into a reciprocating motion. It was held that the case fell within the rule sometimes applied where there is no dispute upon the facts, and there appears to be no reasonable possibility that complainant may succeed. But this court took care to define the class of cases in which that might be done, and speaking through Mr. Justice Brown said:

"Does this doctrine apply to a case where a temporary injunction is granted *pendente lite* upon affidavits and immediately

upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed. Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity causes. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giving them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the court should not only overrule the order for the injunction, but dismiss the bill."

In the present case the notice of the motion for preliminary injunction was returnable October 19, and due service of complainants' affidavits was made; the hearing was adjourned to October 26 on defendants' application; and on that day defendants' affidavits were presented and the hearing proceeded, complainants not having been afforded previous opportunity to inspect these affidavits, and not being granted leave to rebut them.

The record does not show that leave was asked, but if so, it would naturally be denied because in the opinion of the Circuit Court its previous decision necessarily required the granting of the preliminary injunction. In any view the effect was that complainants, although they were prepared to go on with the

motion they had made, were subjected on appeal to the same consequences as if the preliminary hearing had been a final one.

Complainants, if the case had been retained for final hearing, could have cross-examined defendants' *ex parte* witnesses as to the actual construction of defendants' various trucks containing the combination of spiral and elliptical springs of the patent in suit; the actual operation of defendants' devices; whether defendants' devices in fact infringed claims 1 and 2 of complainants' patent if limited; or claims 9, 10, 11 and 14 thereof; or whether the devices of the Peckham patent, No. 419,876, were in fact incapable of practicable use, or were ever in fact used; and could have introduced evidence on these subjects, as also on the question whether complainants' invention antedated the Peckham and Manier patents; to establish the utility and value and adoption and use of the combination of claims 1 and 2; and that defendants' trucks were not "radically different, both in construction and mode of operation from that of the patent in suit," as alleged by defendants' counsel to have been shown by the experiments set up in defendants' affidavits.

Those experiments were performed by respondents and their experts between the filing of the bill and the hearing of the motion, some eleven days, and counsel say that "these experiments would seem to demonstrate conclusively that Peckham's elliptic springs do not perform the function claimed for the elliptic springs in the patent in suit. Indeed, as far as galloping goes, their introduction into the Peckham truck is demonstrated to be a positive disadvantage; and the only beneficial function they can perform—the only reason for their continued use all these years is that stated by the respondents, *i. e.*, to prevent the lateral swaying of the car body."

This is said in support of the contention, on which counsel lay great stress in this court, that respondents lessen oscillation by the use of an underlying tension spring, and use elliptical springs merely for bracing the car body.

Counsel also say: "That all of these matters in reference to the functions of the springs, and whether they operated ac-

cording to the theories of the petitioners or the belief of the respondents; and incidentally whether respondents' trucks did really embody the alleged invention of the patent in suit; were susceptible of absolute, practical demonstration."

Clearly complainants were entitled to test these experiments by cross-examination and to introduce evidence on their part as to the operation of the springs.

If Judge Shipman's definition of claims 1 and 2 was correct, no question of infringement would arise, but the Court of Appeals held that his interpretation was incorrect, and on reference to Manier, No. 409,993, and Peckham, No. 419,876, that the claims, as they read and as Judge Shipman construed them, must be limited. Yet it is admitted by counsel that the date of the conception of the invention of the patent in suit was prior to the dates of both the patents of Manier and Peckham, but it is argued that the inventor was not sufficiently diligent in reducing his invention to practice. If the matter of delay were of importance, as assumed, it was open to the inventor to explain the reason of the delay, if any, and complainants were entitled to make proof of such explanation.

Again, in respect of "the actual operation of defendants' devices as compared with the devices of the patents in suit," and "the question whether defendants' devices do, in fact, infringe claims 1 and 2, if said claims are to be limited as held by the court below," respondents' counsel contend that this issue was tendered by respondents and decided by the Circuit Court of Appeals, and that the case ought not to be "reopened" to permit petitioners to introduce additional proofs. The difficulty is, however, that the issue was only tendered on the preliminary application, and the hearing was not in itself a final hearing. If complainants in every case must understand that a motion for preliminary injunction requires the same showing as on final hearing, very few motions of that sort would be made.

We think the case comes within the exceptions pointed out in the *Mast, Foos & Company* decision, 177 U. S. 485, and are impressed with the conviction that complainants have not had their day in court and that it ought to be accorded them. At

the same time we do not wish to go into the case so far as to indicate any opinion as to the proper construction of claims 1 and 2 or on the question of infringement. There should be a hearing below after the case is made ripe for it unaffected by any intimations from us.

The situation then is this: The order for a preliminary injunction was reversed as part of the decree directing the dismissal of the bill, and not independently of the grounds on which that conclusion rested. But the Court of Appeals had the power to vacate the preliminary injunction, and had only this been done, an appeal to this court could not have been taken, nor would a certiorari ordinarily have been granted in such circumstances.

Considering the peculiar attitude in which the case is presented, we prefer not to discuss the question how far the appellate courts are justified in reversing orders of the Circuit Courts granting preliminary injunctions, when their discretion has not been improperly exercised, and the order will be

Decree of the Circuit Court of Appeals reversed, and cause remanded to the Circuit Court with a direction to proceed to final hearing in due course; the latter court being left at liberty to deal with the preliminary injunction as it otherwise might but for this decree.

TENNESSEE *v.* CONDON.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 209. Argued March 12, 13, 1903.—Decided April 6, 1903.

It is the duty of this court to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

When, pending an appeal, it becomes, without any fault on the part of the defendant, impossible for this court to grant any effectual relief to the plaintiff in error even if it should decide the case in his favor, the appeal will be dismissed. *Mills* v. *Green*, 159 U. S. 651, followed.

THIS was a bill filed in the Chancery Court of Knox County, Tennessee, under the statute in that behalf, in the name of the State, "on the information of" T. A. Rambo and G. L. Maloney, G. H. Strong, S. L. England, Sam Vance, J. F. C. Harrell and R. L. Peters against Stephen P. Condon, T. T. McMillan and James Rich, and H. C. Anderson, representing "that at the January term, 1898, G. H. Strong and T. A. Rambo were duly and legally elected by the County Court of Knox County, Tennessee, members of the pike commission of Knox County for the term of four years, which would make their terms of office expire in January, 1902, and G. L. Maloney, who is the judge of Knox County, Tennessee, is by operation of the law *ex officio* chairman of said commission. The said Sam Vance and J. F. C. Harrell were duly elected members of the said workhouse commission by the said County Court of Knox County, Tennessee, at its January term, 1901, which would make their terms of office expire in 1903. The said S. L. England and I. N. White were duly elected workhouse commissioners of Knox County, Tennessee, at its January term, 1900, which would make their terms of office expire in 1902, and the said G. L. Maloney as judge of the county is *ex officio* chairman of the said commission. The said R. L. Peters was elected superintendent of the workhouse in January, 1898, which would make his term of office expire in January, 1902. All of said officers were duly and legally elected and inducted into their respective offices and assumed the duties thereof, and up to the time of the qualification of defendants, to wit, on March 2, 1901, continued to perform the duties and exercise the functions and receive the emoluments pertaining to said offices."

The bill then averred that, on February 8, 1901, an act of the General Assembly of the State of Tennessee was approved by the governor, and went into effect, entitled: "An act to create a board of public road commissioners, to regulate the laying out and working of public roads in this State, in counties having a population of not less than 70,000 and not more than 90,000, under the Federal census of the year 1900, or any subsequent Federal census, and to provide a method for the management

and control of county workhouses in counties coming under the provisions of this act."

That in pursuance of the act, the governor of Tennessee, on February 16, 1901, appointed Stephen P. Condon, James Rich and T. T. McMillan as the board of public road commissioners; that Condon was appointed superintendent of public roads, and the other two associate members of the road commission; that the governor had issued to defendants commissions as such public road commissioners; and that they gave bond and qualified March 2, 1901, "and are now attempting to perform the duties of the said offices."

That defendants had in fact ousted the pike commissioners, the workhouse commissioners and superintendent from their respective positions, and deprived them of their privileges and powers; and that H. C. Anderson had been elected by defendants manager of the workhouse.

Complainants further represented that the act of February 8, 1901, was in plain violation of the constitution of the State of Tennessee; illegal, null and void; and "not effective to deprive the said parties of the several offices aforesaid, to which they were regularly elected, or of the rights, powers, privileges and emoluments thereof," and that defendants "are unlawfully holding and exercising said offices of public road commissioners and superintendent of roads and associate members, and that they are usurpers of said offices."

The prayer was (1) for process; (2) "that the said defendants may be enjoined from holding the said offices of public road commissioners or superintendent of public roads or associate members of said road commission, or manager of the workhouse, or from exercising any of the powers and rights which the said act of February 8, 1901, attempts to confer upon them, and that they may be enjoined from receiving any of the emoluments appertaining to the said offices under and by virtue of the said unconstitutional and void act, and that upon final hearing said injunction may be made perpetual;" (3) that the defendants be required to execute a bond to indemnify and hold harmless; (4) "that upon final hearing a decree may be rendered declaring that the said act of Febru-

ary 8, 1901, is unconstitutional, null and void, and that the same confers no right upon the defendants, and that the defendants are not entitled to exercise any of the powers and privileges therein contained, or to enjoy any of the rights and emoluments therein given to them, and that they be required to surrender same and turn over all the powers, property and privileges thereof to the rightful owners aforesaid;" (5) and for general relief.

On March 21, 1901, an application for injunction was denied, and on March 23d the bill was amended by striking out the third clause of the prayer. Defendants filed a demurrer March 29, 1901, which, on the next day, was sustained and the bill dismissed. The case was then carried to the Court of Chancery Appeals, and it was there contended, on errors assigned, that the act of February 8, 1901, was invalid because in violation of the Fourteenth Amendment to the Constitution of the United States as well as of the state constitution. The Court of Chancery Appeals affirmed the judgment of the chancellor, August 29, 1901, and an appeal was prosecuted to the Supreme Court of the State, where it was again alleged in the assignment of errors that the act in question was in violation of the state constitution and of the Fourteenth Amendment. The Supreme Court held, on November 15, 1901, that the statute was not in violation of either, and affirmed the decrees of the chancellor and of the Court of Chancery Appeals. 108 Tennessee, 82. Thereupon a writ of error was sued out from this court, and the record was filed and the cause docketed December 10, 1901. No motion was made to advance the case, and it came on for argument and was argued March 12 and 13, 1903.

Mr. G. W. Pickle for plaintiffs in error. *Mr. J. W. Green* was with him on the brief.

Mr. Joshua W. Caldwell for defendants in error. *Mr. Charles T. Cates, Jr.*, was with him on the brief.

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

This was a proceeding under provisions of the Code of Tennessee authorizing a bill in equity to be filed "whenever any person unlawfully holds or exercises any public office or franchise within this State." Shannon's Tenn. Code, (1896) § 5165, cl. 1; § 5167.

By sections 5168 and 5169 it is provided that the suit may be brought "by the attorney general for the district or county, when directed so to do by the General Assembly, or by the governor and attorney general of the State concurring;" or "on the information of any person, upon such person giving security for the costs;" when the attorney general for the district or county may institute the proceeding without direction. *State* v. *Campbell*, 8 Lea, 74, 75.

Such was this suit, which was not brought by direction of the General Assembly, or of the governor and attorney general of the State; but was instituted at the instance of persons superseded in public office by an act of the General Assembly (approved by the governor and carried into effect by him) which they charged was unconstitutional. Acts 1901, c. 8.

The question of constitutionality had been raised in an application for mandatory injunction to compel the county judge to approve the bonds of the persons appointed commissioners under the act, the writ had been awarded and obeyed, and the decree was affirmed and the act sustained by the Supreme Court at the same time that the decree in this case, subsequently brought, was affirmed. *Condon* v. *Maloney*, 108 Tennessee, 75, 82. But the Supreme Court also ruled in the prior case that as the writ had been obeyed, it had spent its force, so that even if they differed with the chancellor as to the use of the particular process, an objection therein urged, a reversal of his decree "could not undo what had been done," and to enter it, "would be an idle ceremony."

In the circumstances this case assumed the aspect of a civil contest between individuals, and not of a prerogative writ to correct usurpation of office.

Sections 5175, 5176, 5177 and 5180 are as follows:

"5175. Whenever the action is brought against a person for usurping an office, in addition to the other allegations, the

name of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and the trial should, if practicable, determine the right of the contesting parties.

"5176. If judgment is rendered in favor of such claimant, the court may order the defendant to deliver to him, upon his qualifying as required by law, all books and papers belonging to the office in his (defendant's) custody, or under his control, and such claimant may thereupon proceed to exercise the functions of the office.

"5177. Such claimant, in this event, may also, at any time within one year thereafter, bring suit against the defendant, and recover the damages he has sustained by reason of the act of the defendant."

"5180. When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs."

In *State ex rel. Curry* v. *Wright*, 5 Heiskell, 612, it was held that the bond given in case of appeal in an action for usurpation of office need be only for costs, and the court, after referring to sections 5176, 5177 and 5180, (by the prior numbers,) said:

"These provisions are specific and clear that the matter in contest to be decided is the usurpation of the office or franchise; and the judgment, exclusion from that office or franchise; and the money judgment to be given is for costs, and the damages, if any have accrued, are provided for in another suit to be brought within a year after the judgment.

"The provision, 'that the suit will be conducted as other suits in equity,' only means that it shall be conducted as such a suit, to the attainment of the results above indicated, but cannot be held to include an inquiry into the damages sustained."

The present case was argued March 12 and 13, and it appears on the face of the bill that the terms of office of all the relators, except the county judge, expired before that day. And this was true as to him because we find, by reference to

Articles VI and VII of the constitution of Tennessee, and *State* v. *Maloney*, 92 Tennessee, 62, that his then term of office as county judge terminated in 1902.

As to the defendants the bill shows that defendant Anderson was merely a subordinate appointee of his co-defendants, and that they had been appointed by the governor commissioners under the act of February 8, 1901. That act provided for the appointment of three commissioners, to "hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election." The next general election of county officers referred to was held, according to section 1154 of the Code, in August, 1902, so that these commissioners were appointed to serve until that date, and their temporary commissions then terminated.

We cannot assume that relators, who were originally elected by the county court, would hold over, and manifestly the provisional title of defendants has determined. It follows that the relief as prayed cannot now be granted.

There are cases in *quo warranto* in which judgment of ouster has been entered although the term of the person lawfully entitled had expired, and also where informations have been retained, when the statute provided for fine or damages, but here the proceeding cannot now be maintained as on behalf of the public, and considered, as counsel insists it should be, as merely a contest between two sets of officials and not between the State and its officials, the state courts would be at liberty to treat it as abated, and the mere matter of costs cannot be availed of to sustain jurisdiction. See *Boring* v. *Griffith*, 1 Heiskell, 456, 461; *State* v. *McConnell*, 3 Lea, 332; *Williamson County* v. *Perkins*, 39 S. W. Rep. 347; *State* v. *Lindsey*, 103 Tennessee, 625, 635.

Doubtless the question of the validity of the act of 1901 is of importance, but it has been upheld by the highest judicial tribunal of the State of Tennessee as consistent with the state constitution, and it affects only the citizens of that State.

If we were to hold that the act could be subjected to the test of the Fourteenth Amendment and that it could not stand that

test, we should do nothing more than reverse the decree below and remand the cause, and as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Mr. Justice Gray, *Mills* v. *Green*, 159 U. S. 651, 653.

We think this writ of error comes within the rule thus declared, and it is therefore

Dismissed without costs to either party.

UNION AND PLANTERS' BANK *v.* MEMPHIS.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Nos. 67, 221. Submitted March 20, 1903.—Decided April 13, 1903.

Where diversity of citizenship does not exist and the jurisdiction of the Circuit Court rests solely on the ground that the cause of action arose under the Constitution of the United States, an appeal lies directly to this court, under section 5 of the Judiciary Act of 1891, and if an appeal should be presented to the Circuit Court of Appeals and there go to decree, this court will reverse the decree, not on the merits, but by reason of want of jurisdiction in that court. It is not the intention of the Judiciary Act of 1891 to allow two appeals in cases of that description.

The doctrine of *res judicata* under the decisions of the highest court of Tennessee is not applicable to taxes for years other than those under consideration in the particular case. The effect of a prior judgment of a state court as *res judicata* is a question of state, and not of Federal, law.

Where a former judgment pleaded has no force or effect in the state courts of Tennessee as exempting a corporation from certain taxes other than as a bar to the *identical* taxes litigated in that suit, the courts of the United States can accord it no greater efficacy.

THE Union and Planters' Bank of Memphis was incorporated under a charter granted by the General Assembly of the State of Tennessee in 1858, which contained the following provision: "That said company shall pay an annual tax of one half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes." The corporation was located in the city of Memphis, Shelby County, Tennessee, and that city, pursuant to an act of the legislature of Tennessee, assessed an *ad valorem* tax for the year 1899, for municipal purposes, on the capital stock of the bank. The bank, thereupon, filed its bill in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, in which it was alleged that the law under which the assessment was made impaired the obligation of the contract created by the above-quoted clause of the charter. The bill further averred that in a former litigation between the bank and the city, wherein it was sought to enforce a municipal assessment of taxes on the capital stock of the bank for the years 1888, 1889 and 1890, it was adjudged by the Supreme Court of Tennessee that by the provision aforesaid the capital stock of the corporation was exempt from all general taxation. The record and judgment in that suit were set out in full, and pleaded as a final judicial determination of the bank's exemption from the payment of *ad valorem* taxes on its capital stock; and it was averred that the judgment so pleaded was based on the identical claim of exemption now asserted, and on identically the same facts and conditions under which this assessment was made.

The prayer was that the assessment be cancelled and complainant be declared to be exempt from the payment to the city of *ad valorem* taxes on its capital stock.

Defendants demurred, and the demurrer was sustained and the bill dismissed, November 6, 1900, whereupon complainant prayed and perfected an appeal to, and also took a writ of error from, the United States Circuit Court of Appeals for the Sixth Circuit, and the case was docketed there on or about November 27, 1900.

On February 11, 1901, complainant prayed and was granted an appeal from the decree of the Circuit Court directly to this court, the record was filed here, March 23, 1901, and the case is now No. 67.

The case in the Circuit Court of Appeals was heard June 10, 1901, and the decree below was affirmed October 21, 1901. 111 Fed. Rep. 561. Thereupon complainant, appellant in that court, prosecuted an appeal from its decree to this court, and the case was docketed here January 13, 1902, and is now No. 221.

Both cases were submitted, as one case, on printed briefs.

Mr. William H. Carroll and *Mr. Tim E. Cooper* for appellant.

Mr. Luke E. Wright and *Mr. John H. Watkins* for appellees.

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

Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals. *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277. Nevertheless an appeal having been prosecuted to the latter court and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by section six of the act. But the case being here, and the jurisdiction of the Circuit Court having

depended on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the Circuit Court of Appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case notwithstanding, as we have repeatedly held, that such was not the intention of the act. *Robinson* v. *Caldwell*, 165 U. S. 359; *Loeb* v. *Trustees*, 179 U. S. 472; *American Sugar Refining Company* v. *New Orleans*, *supra*.

In *Pullman's Palace Car Company* v. *Central Transportation Company*, 171 U. S. 138, an appeal was taken to this court and also to the Circuit Court of Appeals, and a motion was made in each court to dismiss the appeal, whereupon, by reason of the circumstances, we granted a writ of certiorari and brought up the record from the latter court before it had proceeded to decree. The question as to which was the correct route to reach this court became immaterial, and we disposed of the case on its merits. But in the present case the Circuit Court of Appeals went to decree, and we are obliged to deal with the appeal therefrom, in doing which the jurisdiction of that court necessarily comes under review.

The questions on the merits are, however, presented for disposition on the direct appeal from the Circuit Court.

In *Shelby County* v. *Union and Planters' Bank*, 161 U. S. 149, (1895,) it was decided that the capital stock of the bank was not exempt from *ad valorem* taxation by the provision of the charter in question and was liable to be taxed as the State might determine. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134.

But the bank objects that notwithstanding this court has thus held that the exemption asserted does not exist, it must nevertheless be recognized, in this case, as existing, because it was so determined by the judgment pleaded as *res judicata*. The judgment thus relied on as a bar to this assessment is reported in *Memphis* v. *Union and Planters' Bank*, 91 Tennessee, 546, (1892,) which involved the assessment of municipal taxes, for the years 1887 to 1891 inclusive, on the capital stock of the bank, and a privilege tax for the years 1889, 1890 and 1891.

The Supreme Court of Tennessee there held in deference to the supposed scope of the decisions of this court in *Farrington* v. *Tennessee*, 95 U. S. 679, (1877,) and in *Bank* v. *Tennessee*, 104 U. S. 493, (1881,) that the bank was exempted by the charter from being assessed by the State, county, or municipality, for any taxes except as specified.

In *Bank* v. *Memphis*, 101 Tennessee, 154, (1898,) the conclusion announced in *Shelby County* v. *Bank*, 161 U. S. 149, was followed, and it was held to be the settled rule in Tennessee that the plea of *res judicata* is only applicable to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years. *State* v. *Bank*, 95 Tennessee, 221, 231.

As the judgment relied on as *res judicata* was not so regarded in *Shelby County* v. *Bank*, it could not be properly so regarded in the present case; but, apart from that, it is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a state court shall have as *res judicata* is a question of state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. *Phœnix Fire and Marine Insurance Company* v. *Tennessee*, 161 U. S. 174.

In *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, referred to by appellant's counsel, no claim was made that the judgment relied on would not have been *res judicata* in the state courts, and attention was particularly called to the fact that the rule in Louisiana was in accord with the conception of *res judicata* expounded in that case.

As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can accord it no greater efficacy. *Cooper* v. *Newell*, 173 U. S. 555; *Metcalf* v. *Watertown*, 153 U. S. 671; *Chicago & Alton R. R. Co.* v. *Wiggins Ferry Co.*, 108 U. S. 18; Rev. Stat. § 905.

The litigation over the alleged exemption has been protracted, and many decisions have been rendered in this court and in the highest tribunal of Tennessee in respect of it. They are re-

viewed by Lurton, J., in the Circuit Court of Appeals, 111 Fed. Rep. 561.

Decree of the Circuit Court in No. 67 affirmed.
Decree of the Circuit Court of Appeals in No. 221 reversed with a direction to dismiss the appeal and writ of error.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, *v.* DUTHIE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 336. Submitted March 23, 1903—Decided April 13, 1903.

Under section 954, Rev. Stat., the Circuit Court has power in its discretion to allow plaintiff to amend his petition after judgment has been entered in his favor, but while the court still has control of the record, and it is not an abuse of such discretion to permit an amendment setting up plaintiff's citizenship, the fact being established and residence only having been pleaded, and where it appears that had the amendment not been made as it was the Circuit Court of Appeals would have been constrained to reverse and remand with leave to make the amendment.

THE case is stated in the opinion of the court.

Mr. Aldis B. Browne, *Mr. Alexander Britton* and *Mr. Eben Richards* for plaintiff in error.

Mr. Leigh Clark for defendant in error.

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

Duthie brought suit for the recovery of damages for personal injuries in the Circuit Court of the United States for the Western District of Texas against the Mexican Central Railway Company, Limited; and in his original complaint averred that he "resides in El Paso, in El Paso County, State of Texas,

in the Western District of said State;" and that defendant was a citizen of the State of Massachusetts. The cause was tried before a jury and resulted in a verdict and judgment thereon April 10, 1902. The record shows "that no further proceedings were had in said cause after the entry of said judgment until, to wit, the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition," to the effect "that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And is a citizen of said State and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso County, State of Texas.'" In support of the motion plaintiff stated under oath "that he is now and was at the date of the filing of his original petition herein, and was on the 22d day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the State of Texas." The court granted leave to so amend and defendant excepted. Thereupon defendant applied to the court to certify to this court the question of jurisdiction to amend, and to retain the judgment after such amendment; and a certificate was accordingly granted.

If the complaint or petition had remained as it was originally framed, and the case had then been carried to the Circuit Court of Appeals, that court would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend. *Metcalf* v. *Watertown*, 128 U. S. 586; *Horne* v. *Hammond Company*, 155 U. S. 393.

But plaintiff, discovering the defect in the averment before the case had passed from the jurisdiction of the Circuit Court, applied and obtained leave to amend, and made the amendment. So that the only question is whether the Circuit Court had power to allow the amendment.

By section 954 of the Revised Statutes it was provided that the trial court might "at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe;" and since the trial court in the present case still had control of the record, it had jurisdiction to act, and we may

add that we do not perceive that there was any abuse of discretion in permitting the amendment in the circumstances disclosed. *Mexican Central Railway Company* v. *Pinkney*, 149 U. S. 194, 201; *Tremaine* v. *Hitchcock*, 23 Wall. 518. If the statutes of Texas forbade such an amendment, the law of the United States must govern. *Phelps* v. *Oaks*, 117 U. S. 236; *Southern Pacific Company* v. *Denton*, 146 U. S. 202.

The suggestion that defendant was cut off from trying the fact as to plaintiff's citizenship is without merit. The record does not disclose that defendant sought to contest plaintiff's affidavit, and for aught that appears the fact may have been conceded.

Judgment affirmed.

JAQUITH *v.* ALDEN.

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

No. 516. Submitted January 12, 1903.—Decided April 27, 1903.

Payments on a running account, in the usual course of business, by a person whose property had actually become insufficient to pay his debts, where new sales succeeded payments and the net result was to increase his estate, and the seller had no knowledge or notice of the insolvency and no reason to believe an intention to prefer, are not preferences, which must be surrendered as a condition to the allowance of proof of claim, under the bankruptcy act of 1898.

Pirie v. *Chicago Title and Trust Company*, 182 U. S. 438, in which the decision proceeded on the finding of facts made pursuant to clause 3 of General Orders in Bankruptcy, XXXVI, distinguished.

F. N. WOODWARD *et al.* filed their petition in bankruptcy and were adjudicated bankrupts November 26, 1901. They had become insolvent August 15, and on that day were not indebted to G. Edwin Alden, who, afterwards, in ignorance of the insolvency, made sales to Woodward *et al.* and received payments from them therefor in the regular course of business,

and without any idea or intention on the part of Alden of obtaining a preference thereby, the sales and payments being as follows:

"*Sales.*

"Aug. 17, 1901.	Rubber		$289 46
28, "	"		657 89
Sept. 30, "	"		644 28
Oct. 18, "	"		535 99
Oct. 18, "	Cartage		50
31, "	Asbestine		10 40

"*Payments.*

"Sept. 4, 1901.	Payment of bill	Aug. 17 . . .	$289 46
28, "	" " "	28 . . .	657 89
Oct. 29, "	" " "	Sept. 30 . . .	644 28"

The merchandise sold Woodward *et al.* was manufactured by them, and the result of the transactions was to increase their estate in value. Alden petitioned to be allowed to prove his claim of $546.89.

The referee disallowed the claim unless at least the amount of $633.88 was surrendered to the estate. The District Judge reversed the judgment of the referee and allowed the claim, and the decree of the District Court was affirmed by the Circuit Court of Appeals, 118 Fed. Rep. 270, on the authority of *Dickson* v. *Wyman*, 111 Fed. Rep. 726. Thereupon an appeal to this court was allowed and a certificate granted under section 25, *b*, 2.

Mr. H. J. Jaquith, appellant, *pro se.*

Mr. Eugene M. Johnson, *Mr. Arthur T. Johnson* and *Mr. Alonzo R. Weed* for appellee.

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

The facts found established that on August 15 the aggregate

of the property of the bankrupts was not, at a fair valuation, sufficient in amount to pay their debts, but that Alden was ignorant of this, and in good faith and in the regular course of business sold material to the bankrupts, and received payment therefor, several times between August 15 and November 26, when the petition was filed, on which day the amount of $546.89 for material delivered shortly before had not been paid. All the material so sold to them was manufactured by the bankrupts and increased their estate in value.

The question is whether the payments made to Alden (or either of them) were preferences within section 60 of the bankruptcy act of 1898, which must be surrendered under section 57*g*, before his claim could be allowed.

Provisions of the act bearing on the subject are given below.[1]

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[1] "SECTION 1*a*. The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . . (9) 'creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) 'date of bankruptcy,' or 'time of bankruptcy,' or 'commencement of proceedings,' or 'bankruptcy,' with reference to time, shall mean the date when the petition was filed; (11) 'debt' shall include any debt, demand, or claim provable in 'bankruptcy'; . . . (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

"SEC. 3*a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

"SEC. 60*a*. A person shall be deemed to have given a preference if, being

In *Pirie* v. *Chicago Title & Trust Company*, 182 U. S. 438, the Circuit Court of Appeals for the Seventh Circuit had affirmed an order of the District Court for the Northern District of Illinois, rejecting a claim of Carson, Pirie and Company against the estate of Frank Brothers, bankrupts, and the case was then brought to this court on findings of fact and conclusions of law of the Circuit Court of Appeals made and filed "pursuant to the requirements of subdivision 3, Rule 36 of General Orders in Bankruptcy." The three first of the findings were as follows:

"First. That on February 11, 1899, August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, were duly adjudged bankrupts.

"Second. That for a long time prior thereto appellants carried on dealings with the said bankrupt firm, said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4403.77.

"Third. That said appellants in the regular and ordinary

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insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"*b*. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

"*c*. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"Sec. 57*g*. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"Sec. 68*a*. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

course of business, and within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers, the sum of $1336.79, leaving a balance due, owing and unpaid, amounting to $3093.98."

It was further found that at the time this payment was made Frank Brothers were hopelessly insolvent to their knowledge; but that Carson, Pirie and Company had no knowledge of such insolvency nor had reasonable cause to believe that it existed, nor did they have reasonable cause to believe that the bankrupts by the payment intended thereby to give a preference; and that they had refused to surrender to the trustee the amount of the payment made to them by the bankrupts as a condition of the allowance of their claim. Upon the facts the Circuit Court of Appeals concluded as matter of law that the payment made "at the time and in the manner above shown," constituted a preference, and that by reason of the failure and refusal of Carson, Pirie and Company to surrender the preference they were not entitled to prove their claim.

The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within section 60*a*, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class.

In the present case all the rubber was sold and delivered after the bankrupts' property had actually become insufficient to pay their debts, and their estate was increased in value thereby to an amount in excess of the payments made. The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of $546.89, and a loss to the seller of that amount less such dividends as the estate might

pay. In these circumstances the payments were no more preferences than if the purchases had been for cash, and, as parts of one continuous *bona fide* transaction, the law does not demand the segregation of the purchases into independent items so as to create distinct preëxisting debts, thereby putting the seller in the same class as creditors already so situated, and impressing payments with the character of the acquisition of a greater percentage of a total indebtedness thus made up.

We do not think the slight variation in the dates of sales and payments affords sufficient ground for the distinction put forward by counsel between the payments of September 4 and 28 and the payment of October 29 (which he concedes should be upheld) in their relation to the rubber furnished August 17 and 28 and September 30. All the material was sold and delivered after August 15, and neither of the items can properly be singled out as constituting outstanding indebtedness, payment of which operated as a preference.

The facts as found in *Pirie* v. *Trust Company* were so entirely different from those existing here that this case is not controlled by that. In view of similar vital differences it has been held by the Circuit Court of Appeals for the First Circuit, *Dickson* v. *Wyman*, 111 Fed. Rep. 726; Second Circuit, *In re Sagor and Brother*, 9 Am. Bank. Rep. 361; Third Circuit, *Gans* v. *Ellison*, 114 Fed. Rep. 734; Eighth Circuit, *Kimball* v. *Rosenham Company*, 114 Fed. Rep. 85, that payments on a running account, where new sales succeed payments and the net result is to increase the value of the estate, do not constitute preferential transfers under section 60*a*.

Judgment affirmed.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, not being able to concur in the reasons by which the court in the opinion just announced distinguishes this case from that of *Pirie* v. *Chicago Title & Trust Co.*, and deeming the latter case controlling in this, dissent.

In re KEY.

ORIGINAL.

No. 13. Argued April 6, 1903.—Decided April 27, 1903.

Judgment before a justice of the peace of the District of Columbia against Key and Scott, and appeal to the Supreme Court of the District with a Guaranty Company as surety on the undertaking on appeal. Judgment in the latter court in favor of Scott, and against Key and the Guaranty Company. Appeal to the Court of Appeals by Key alone without summons and severance or any equivalent, and motion to dismiss for want of parties, and want of jurisdiction of such an appeal. Dismissed on the latter ground in accordance with previous ruling.

Held: That an application to this court for a writ of mandamus to the Court of Appeals to reinstate the appeal and decide the case on the merits must be denied.

THE case is stated in the opinion of the court.

Mr. Frederic D. McKenney for petitioner. *Mr. Henry P. Blair* and *Mr. John Spalding Flannery* were on the brief.

Mr. William C. Prentiss for respondents.

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

William F. Roberts brought an action against J. S. Barton Key and James P. Scott, in February, 1901, before a justice of the peace of the District of Columbia, and recovered judgment for $196.30, whereupon Key and Scott carried the case by appeal to the Supreme Court of the District of Columbia, giving an undertaking on appeal with the United States Fidelity and Guaranty Company as surety. The case was tried in the District Supreme Court and resulted in a judgment in favor of Scott and against Key and the Guaranty Company. From this judgment Key alone prosecuted an appeal to the Court of Appeals of the District of Columbia, without summons and severance or any equivalent. Roberts moved to dismiss on two

grounds: (1) The want of parties, *Mason* v. *United States*, 136 U. S. 581; *Hardee* v. *Wilson*, 146 U. S. 179; (2) That the Court of Appeals had no jurisdiction on appeal from the judgment of the court below in such cases.

The Court of Appeals had held in *Groff* v. *Miller*, 30 Wash. Law Rep. 434, that such an appeal could not be maintained, and accordingly dismissed the appeal in this case on the second ground. 30 Wash. Law Rep. 436. Key then applied to this court for leave to file a petition for mandamus requiring the Court of Appeals to reinstate the appeal and proceed to a hearing and determination of the same on the merits. Leave was granted, and due return has been made to a rule entered on the petition thereupon filed.

The case could not have been brought here on appeal or writ of error. Code Dist. Col. § 233. And no application for certiorari was made under § 234. Act of March 3, 1901, 31 Stat. 1189, c. 854.

The controversy in respect of appeals to the Court of Appeals from judgments in the Supreme Court of the District in cases appealed from justices of the peace, raised under sections 82 and 226 of the act of 1901, was not only disposed of by the Court of Appeals in *Groff* v. *Miller*, but determined by the repeal of section 82 by the act of June 30, 1902. 32 Stat. 520, c. 1329.

The writ of mandamus cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. It is not granted in doubtful cases, or where there is another adequate remedy, and whether it shall go or not usually rests in the sound discretion of the court. If sometimes demandable *ex debito justitiæ*, it is certainly not on a record like this. *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 379; *In re Rice, Petitioner*, 155 U. S. 396, 403; High on Extr. Remedies, 3d ed. § 9.

Tested by these well settled principles,

The rule must be discharged and the petition dismissed.

THE JAPANESE IMMIGRANT CASE.[1]

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

No. 171. Argued February 24, 1903.—Decided April 6, 1903.

1. As the existing treaty with Japan expressly excepts from its operation any regulation relating to police and public security, and as the various acts of Congress forbidding aliens of whatever country to enter the United States who are paupers or persons likely to become a public charge, are regulations for police and public security, aliens from Japan of the prohibited class have no right to enter or reside in the United States.

Quære, Whether, even in the absence of such a provision in the treaty, the "full liberty to enter, reside," etc., clause refers to that class in either country who from habits or conditions are the object of police regulations designed to protect the general public against contact with dangerous or improper persons.

2. It has been firmly established by numerous decisions of this court that it is within the constitutional power of Congress to exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations to executive officers, without judicial intervention.

3. An administrative officer, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles of due process of law as understood at the time of the adoption of the Constitution. Nor is it competent for any executive officer, at any time within the year limited by the statute, to arbitrarily cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although illegally here, to be arrested and deported without giving such alien an opportunity, appropriate to the case, to be heard upon the questions involving his right to be and remain in the United States.

Where, however, the alien had notice, although not a formal one, the courts cannot interfere with the executive officers conducting it. The objections of the alien to the form of the investigation could have been presented to the officer having primary control of the case, or by an appeal to the Secretary of the Treasury, and the action of the executive officers is not subject to judicial review.

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[1] Docket title—*Yamataya* v. *Fisher*.

189 U. S. Statement of the Case.

THIS case presents some questions arising under the act of Congress relating to the exclusion of certain classes of alien immigrants.

On the 11th day of July, 1901, appellant, a subject of Japan, landed at the port of Seattle, Washington; and on or about July 15, 1901, the appellee, an Immigrant Inspector of the United States, having instituted an investigation into the circumstances of her entering the United States, decided that she came here in violation of law, in that she was a pauper and a person likely to become a public charge—aliens of that class being excluded altogether from this country by the act of March 3, 1891, 26 Stat. 1084, c. 551.

The evidence obtained by the Inspector was transmitted to the Secretary of the Treasury, who, under date of July 23, 1901, issued a warrant addressed to the Immigrant Inspector at Seattle, reciting that the appellant had come into the United States contrary to the provisions of the above act of 1891, and ordering that she be taken into custody and returned to Japan at the expense of the vessel importing her.

The Inspector being about to execute this warrant, an application was presented in behalf of the appellant to the District Court of the United States for the District of Washington, Northern Division, for a writ of *habeas corpus*. The application alleged that the imprisonment of the petitioner was unlawful, and that she did not come here in violation of the act of 1891 or of any other law of the United States relating to the exclusion of aliens.

The writ having been issued, a return was made by the Inspector stating that he had found upon due investigation and the admissions of the appellant that she was a pauper and a person likely to become a pubic charge, and had "surreptitiously, clandestinely, unlawfully and without any authority, come into the United States;" that "in pursuance of said testimony, admissions of the petitioner, Kaoru Yamataya, evidence, facts and circumstances," he had decided that she had no right to be within the territory of the United States and was a proper person for deportation; all which he reported to the proper officers of the Government, who confirmed his decision,

and thereupon the Secretary of the Treasury issued his warrant requiring the deportation of the appellant. That warrant was produced and made part of the return.

The return of the Inspector was traversed, the traverse admitting that the Inspector had investigated the case of the petitioner and had made a finding that she had illegally come into this country, but alleging that the investigation was a "pretended" and an inadequate one; that she did not understand the English language and did not know at the time that such investigation was with a view to her deportation from the country; and that the investigation was carried on without her having the assistance of counsel or friends or an opportunity to show that she was not a pauper or likely to become a public charge. The traverse alleged that the petitioner was not in the United States in violation of law.

A demurrer to the traverse was sustained, the writ of *habeas corpus* was dismissed, and the appellant was remanded to the custody of the Inspector. From that order the present appeal was prosecuted.

Mr. Vere Goldthwaite, with whom *Mr. Harold Preston* and *Mr. Walter A. Keene* were on the brief, for the appellant.

This appeal raises the question of the constitutionality of the act of March 3, 1891, in relation to immigration and the importation of aliens under contract or agreement to perform labor, 26 Stat. 1084, and also involves the application of the Fifth Amendment to the Constitution of the United States to the facts presented by the record.

We contend: 1. The provisions of the act of 1891 giving to inspection officers plenary power over the classes of aliens therein referred to, should be construed to extend only to aliens who have not effected an entrance into the United States. 2. The act of 1891 is unconstitutional. 3. Appellant is being deprived of her liberty without due process of law.

I. The lower court followed *United States* v. *Yamasaka*, 100 Fed. Rep. 404, but the facts in the case at bar clearly distinguish it therefrom. It is not necessary for us on this appeal to go so far as to contend that the Constitution requires that

an alien shall have a "judicial trial before a *court*" before he may be deported; but the question here presented is whether an alien who does not belong to any of the prohibited classes, who has lawfully entered the United States and is entitled to remain therein, may be arrested by a ministerial officer and deported, without notice of any investigation against him or opportunity to be heard in any form of proceeding whatsoever.

Is it not entirely clear from the plain reading of this statute that Congress intended to make a distinction between aliens who had not and those who had effected a landing in the United States? If no such distinction was intended, why did Congress use language which has and can be given no other meaning?

While a Japanese subject remains on board a Japanese vessel he is, in contemplation of law, on Japanese territory. When he lands on American soil he is subject to our laws and entitled to the protection of our Constitution. The word "person" as used in the Constitution includes aliens as well as citizens. *Re Ah Fong*, 3 Sawyer, 144; *Re Parrott*, 1 Fed. Rep. 481; *Ho Ah Kow* v. *Nunan*, 5 Sawyer, 552; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

Under the treaty between the United States and Japan, November 22, 1894, and sec. 1977, Rev. Stat., when an alien of Japan effects a landing and is found dwelling in this country, he has, so far as concerns his life and liberty, all the rights of an American citizen. In recognition of this fact, Congress, when giving certain arbitrary powers to inspection officers, limited the exercise of these powers to the case of aliens who had not effected a landing.

II. The act of 1891, above referred to, is unconstitutional, in that it operates to deprive appellant of her liberty without due process of law.

While it may be difficult, if not impossible, to frame a definition of due process of law, it is nevertheless easy to point out certain requisites which must always be found in order to constitute due process of law, and foremost among these is the requirement that a person shall have notice and an opportunity to be heard in any proceeding affecting his rights. *Holden* v. *Hardy*, 169 U. S. 366; *Greene* v. *Briggs*, 1 Curtis, 311; *Scott*

v. *Toledo*, 36 Fed. Rep. 385; *Railroad Tax Cases*, 13 Fed. Rep. 722; *Myers* v. *Shields*, 61 Fed. Rep. 713; *Railway Co.* v. *Iowa*, 160 U. S. 389; *Hovey* v. *Elliott*, 167 U. S. 409; *McVeigh* v. *United States*, 11 Wall. 259; *Charles* v. *City of Marion*, 98 Fed. Rep. 166; *Stuart* v. *Palmer*, 74 N. Y. 183; 2 Kent's Comm. 13; *Hagar* v. *Reclamation District*, 111 U. S. 708.

It is useless to multiply authorities upon this proposition; but we content ourselves with the statement that in the wilderness of authority upon this subject not one case can be found holding that where a person's liberty is involved notice and an opportunity to be heard is not necessary in order to constitute due process of law.

As the act of 1891 fails to provide for the giving of notice to or an opportunity to be heard by the persons whose right to liberty are thereby affected, the same is, therefore, unconstitutional and void.

III. Whatever may be the ruling of this court as to the constitutionality of the act of 1891, it is contended by appellant that she is, as appears by the record, being deprived of her liberty in violation of the Fifth Amendment to the Constitution of the United States, in that she was not given any notice or opportunity to be heard in the proceeding in which her right to liberty was tried. The authorities hereinbefore cited sustain this contention. Here is a person found dwelling within the United States; she is arrested and imprisoned by a ministerial officer; she is not permitted to see her friends or to consult with her attorneys; she is unable to speak or understand our language, and is ignorant of the cause of her imprisonment, and ignorant of the fact that any investigation is being made concerning her right to liberty. The officer does not give her any notice of the proceedings nor any opportunity to be heard, but goes about secretly collecting evidence against her, considering only such evidence as when unexplained, will suit his purpose. He takes advantage of her ignorance of our language and makes her give unintentional answers to questions which she does not understand. He states that he is holding her to appear as a witness in a criminal case against another party, thus deceiving her attorneys as to his intention. As the

result of the investigation made by this ministerial officer in his combined capacity of prosecutor, judge and jury, he makes a finding against appellant. Thereafter he removes his decision to a higher tribunal, to wit, the Secretary of Immigration, and has it there affirmed. From here he takes another appeal to the Secretary of the Treasury and has his decision again affirmed, and a warrant of deportation issued. Of all these proceedings appellant is ignorant. A few hours before the sailing of the vessel upon which it was intended by respondent to deport her, it is by chance learned that such a step is contemplated. It is confidently asserted that our records will be searched in vain for authorities sustaining such a proceeding, and its only parallel must be sought for in the history of the times antedating *Magna Charta.* Will the highest court of the land hold this proceeding to be due process of law? It seems to us that to do so would be to strike a blow at the very foundation of free government. The appellant has, by treaty between our Government and the Empire of Japan, all the rights accorded by us to the citizens and subjects of the most favored nation. If respondent has the power which he has assumed to exercise with reference to appellant, then he may exercise the same power with reference to a citizen or subject of Great Britain, of Germany or of any other nation. By sec. 1977, Rev. Stat., as above stated, appellant has, so far as any questions involved in this appeal is concerned, the same rights as an American citizen. *Yick Wo* v. *Hopkins*, 118 U. S. 369.

It is pleaded that appellant failed to prosecute any appeal from the decision of appellee, and is for that reason precluded from having such decision reviewed in any other manner, since the act provides that the decision of inspection officers touching the right of an alien to land shall be final unless appeal be taken to the Secretary of the Treasury.

It appears from the record not only that appellant was not given any notice of the proceedings taken against her, or any opportunity to be heard thereat, but that she had no knowledge whatever that an investigation had been conducted, that a finding had been made, or that the same had been carried to

the Secretary of the Treasury and there affirmed, until long after such steps had been taken and the Secretary had issued his warrant of deportation, and she was, within the space of a few hours' time, to be deported. Can it be urged before this court that under such circumstances appellant's only means of redress was by appeal to the Secretary of the Treasury after the Secretary had himself heard and decided the matter against her and issued his warrant of deportation, that by failing to appeal from a decision of which she had absolutely no knowledge, or means of knowledge, she is thereby forever deprived of her rights? It is believed that the only precedent which appellee can find for such a contention is that which history records of the ruler who posted his decrees so high that his subjects were unable to read them, yet enforced strict compliance therewith.

Mr. Assistant Attorney General Hoyt for the appellee.

The law provides (act of March 3, 1891, 26 Stat. 1084) that all paupers or persons likely to become a public charge shall be excluded from the United States. The law provides among other things for the inspection of alien immigrants upon their arrival; that all aliens who may unlawfully come into the United States shall be sent back on the vessel by which they arrive, if practicable; and that any alien who comes into the United States in violation of law may be returned at any time within a year. In the present case the girl came into the United States in violation of law if she was a pauper or likely to become a public charge, and so she was found to be by the inspector who investigated the case and whose decision, under the act of August 18, 1894, was final unless reversed on appeal to the Secretary of the Treasury.

The general theory of *habeas corpus* submits only a naked question of law upon admitted facts. Necessarily, when the instance court takes such action as in this case, the meaning is that the official obedience to the law and orderly process sufficiently appear; that the action was with warrant of law, leaving the mere naked question of constitutionality; and therefore that the counter allegations or matters of confession and avoid-

ance have been regarded by the instance court as untrue, or not sufficiently appearing, or immaterial.

The present case was necessarily ruled below by the *Yamasaka* case, 100 Fed. Rep. 404. That decision held flatly that an alien landing surreptitiously may, within a year, be arrested and deported by the Secretary of the Treasury without judicial proceeding before a court. Counsel does not demand a *court*, but makes the old plea, familiar in all such cases, that here was an arbitrary arrest by a ministerial officer, and deportation without notice, hearing or due and just investigation. But the ministerial officer has been clothed with authority to determine and act, and this court has, in numerous cases, decided that the executive determination is final. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Wong Wing* v. *United States*, 163 U. S. 228; *Fok Yung Yo* v. *United States*, 185 U. S. 296. Where the charge is that of delusive investigation and unfair and arbitrary decision, the court will not interfere. The presumption is that the result is proper. *Lee Lung* v. *Patterson*, 186 U. S. 193.

The act of 1891 does not deprive persons of life, liberty or property without due process of law. Congress has the right to expel as well as to exclude aliens. Deportation merely enforces the withholding of the privilege of coming or remaining here, which Congress has denied in its sovereign capacity for reasons of policy, founded in national self-protection.

The authorities cited by counsel are wholly inapplicable. They relate to taxing laws, property rights, state charges, and assessments of various kinds, without due notice and proceedings. The court has held time and again that the executive proceeding in these cases is due process of law, and that the exclusion and expulsion of aliens are the exercise of constitutional power. *Nishimura Ekiu* v. *United States*, 142 U. S. 651. Judicial statements as to property and liberty under entirely different circumstances do not remotely affect the present case. So long as the national policy and law as to immigration stand, there is no reason for opposing argument.

The treaty with Japan of 1894, Art. I, 29 Stat. 848, is nec-

essarily subject to the special exceptions and qualifications of our immigration laws relative to excluded classes of aliens.

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

It will conduce to a clear understanding of the questions to be determined if we recall certain legislation of Congress relating to the exclusion of aliens from the United States, and to the treaty of 1894 between Japan and the United States.

By the Deficiency Appropriation Act of October 19, 1888, c. 1210, it was provided that the act of February 23, 1887, c. 220, amendatory of the act prohibiting the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia, 24 Stat. 414, be so amended "as to authorize the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant within period of one year after landing or entry, to be taken into custody and returned to the country from whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person previously contracting for the services." 25 Stat. 566.

By the first section of the act of Congress of March 3, 1891, c. 551, amendatory of the various acts relating to immigration and importation of aliens under contract or agreement to perform labor, it was provided: "That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on

special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of February twenty-sixth, eighteen hundred and eighty-five, (23 Stat. 332.) . . . " 26 Stat. 1084.

By the eighth section of that act it was provided: "That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. . . . The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record. During such inspection after temporary removal the superintendent shall cause such aliens to be properly housed, fed, and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection. All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment. . . . " 26 Stat. 1085.

By the tenth section it is provided that "all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in."

The eleventh section of the same act provided: "That any alien who shall come into the United States in violation of law may be returned as by law provided, at any time within one year thereafter, at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien into the United States, and if that cannot be done, then at the expense of the United States; and any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing therein shall be deemed to have come in violation of law and shall be returned as aforesaid." 26 Stat. 1084.

In the Sundry Civil Appropriation Act of August 18, 1894, c. 301, was the following provision: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." 28 Stat. 372, 390.

Then came the treaty between the United States and the Empire of Japan, concluded November 23, 1894, and proclaimed March 21, 1895, and which by its terms was to go into operation July 17, 1899. By the first article of that treaty it was provided: "The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property." 29 Stat. 848. But by the second article it was declared: "It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries." 29 Stat. 849.

1. From the above acts of Congress it appears that among

the aliens forbidden to enter the United States are those, of whatever country, who are "paupers or persons likely to become a public charge." We are of opinion that aliens of that class have not been given by the treaty with Japan full liberty to enter or reside in the United States; for that instrument expressly excepts from its operation any ordinance or regulation relating to "police and public security." A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security. Aside from that specific exception, we should not be inclined to hold that the provision in the treaty with Japan that the citizens or subjects of each of the two countries should have "full liberty to enter, travel or reside in any part of the territories of the other contracting party," has any reference to that class, in either country, who from their habits or condition are ordinarily or properly the object of police regulations designed to protect the general public against contact with dangerous or improper persons.

2. The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Wong Wing* v. *United States*, 163 U. S. 228; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305.

In *Nishimura's* case the court said: "The supervision of the admission of aliens into the United States may be entrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed

acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs and to inspectors acting under their authority." After observing that Congress, if it saw fit, could authorize the courts to investigate and ascertain the facts on which depended the right of the alien to land, this court proceeded: "But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted. *Martin* v. *Mott*, 12 Wheat. 19, 31; *Philadelphia & Trenton Railroad* v. *Stimpson*, 14 Pet. 448, 458; *Benson* v. *McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Murray* v. *Hoboken Co.*, 18 How. 272; *Hilton* v. *Merritt*, 110 U. S. 97."

In *Lem Moon Sing's* case it was said: "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." And in *Fok Yung Yo's* case, the latest one in this court, it was said: "Congressional action has placed the final determination of the right of admission in executive officers, without judicial

intervention, and this has been for many years the recognized and declared policy of the country."

What was the extent of the authority of the executive officers of the Government over the petitioner after she landed? As has been seen, the Secretary of the Treasury, under the above act of October 19, 1888, c. 1210, was authorized, within one year after an alien of the excluded class entered the country, to cause him to be taken into custody and returned to the country whence he came. Substantially the same power was conferred by the act of March 3, 1891, c. 551, by the eleventh section of which it is provided that the alien immigrant may be sent out of the country, "as provided by law," at any time within the year after his illegally coming into the United States. Taking all its enactments together, it is clear that Congress did not intend that the mere admission of an alien, or his mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the Government. On the contrary, if the Secretary of the Treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could at any time within a year after the landing cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officer if within a year he was found to have been wrongfully admitted into or had illegally entered the United States. These were substantially the views expressed by the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Yamasaka*, 100 Fed. Rep. 404.

It is contended, however, that in respect of an alien who has already landed it is consistent with the acts of Congress that he may be deported without previous notice of any purpose to deport him, and without any opportunity on his part to show by competent evidence before the executive officers charged with the execution of the acts of Congress, that he is not here in violation of law; that the deportation of an alien without provision for such a notice and for an opportunity to be heard

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was inconsistent with the due process of law required by the Fifth Amendment of the Constitution.

Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed, we have to say that the rigid construction of the acts of Congress suggested by the appellant are not justified. Those acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right. It was held in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280, 281, 283, that "though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer and a trial according to some course of judicial proceedings, yet this is not universally true;" and that "though, generally, both public and private wrong are redressed through judicial action, there are more summary extra-judicial remedies for both." Hence, it was decided in that case to be consistent with due process of law for Congress to provide summary means to compel revenue officers—and in case of default, their sureties—to pay such balances of the public money as might be in their hands. Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, 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." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547. But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant. Besides, the record now before us shows that the appellant had notice, although not a formal one, of the investigation instituted for the purpose of ascertaining whether she was illegally in this country. The traverse to the return made by the Immigration Inspector shows upon its face that she was before that officer pending the investigation of her right to be in the United States, and made answers to questions propounded to her. It is true that she pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a

"pretended" one; and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts. They could have been presented to the officer having primary control of such a case, as well as upon an appeal to the Secretary of the Treasury, who had power to order another investigation if that course was demanded by law or by the ends of justice. It is not to be assumed that either would have refused a second or fuller investigation, if a proper application and showing for one had been made by or for the appellant. Whether further investigation should have been ordered was for the officers, charged with the execution of the statutes, to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard. And as no appeal was taken to the Secretary from the decision of the Immigration Inspector, that decision was final and conclusive. If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by *habeas corpus*. We perceive no ground for such intervention—none for the contention that due process of law was denied to appellant.

The judgment is

Affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

OREGON AND CALIFORNIA RAILROAD COMPANY *v.* UNITED STATES. No. 1.

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

No. 186. Argued March 4, 1903.—Decided April 6, 1903.

In a suit brought under the act of Congress of March 3, 1887, c. 376, to compel the reconveyance of lands covered by patent issued February 20, 1893 on the ground that it included land to which there were adverse claims of settlers to the land on which they respectively resided and which the United States now claimed for them, *Held:*

(1) That under the land grant acts the railroad company did not acquire and could not have acquired an interest in specific sections of land within the indemnity limits specified in the grant before their actual and approved selection under the direction of the Secretary of the Interior, prior to the date of occupancy by the respective settlers.

(2) No right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary of the Interior.

(3) The rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the land by the railroad company—the settler having, after the lands were surveyed, promptly taken the necessary steps to protect his rights under the homestead law. In such case, the entry made under these laws relates back to the date of the settlement of the lands.

(4) It cannot be claimed that *all* the lands within the indemnity limits were required to supply deficits, when there had been no adjustment and determination of the amount of lieu lands required prior to his *bona fide* occupancy of the land.

THE case is stated in the opinion of the court.

Mr. Maxwell Evarts for appellant.

Mr. Assistant Attorney Russell for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

By the act of Congress of March 3, 1887, c. 376, it was pro-

vided that if, at the completion of the adjustments of land grants thereby directed to be made, or sooner, it appeared that lands had been from any cause erroneously certified or patented to or for any company claiming by, through or under grant from the United States to aid in the construction of a railroad, it should be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if the company did not reconvey within ninety days after demand made, it should thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel the patents, certification or other evidence of title theretofore issued for the lands, and to restore the title thereof to the United States. 24 Stat. 556, c. 376.

In *United States* v. *Missouri &c. Railway*, 141 U. S. 360, 380, 382—which was an action brought by the United States after the passage of the above statute to have certain patents for land cancelled—this court, after observing that as to some of the lands the United States appeared to have a direct interest in them, said: "As to others, it is under an obligation to claimants under the homestead and preëmption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title, by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the Government owed as well to the public as to the individuals who acquired rights, which the patents, if allowed to stand, may defeat or embarrass." Reference was made in that case to *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 286, in which it was held that the United States could sue to set aside a patent improperly issued, where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own; also, to *United States* v. *Beebe*, 127 U. S. 338, 342, in which it was

held that patents procured by fraud could be cancelled at the suit of the United States where that was necessary to be done in order that it might fulfill its obligations to others. The court then observed: "These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice." See also *United States* v. *Oregon &c. Railroad Co.*, 176 U. S. 28.

In this state of the law, the present suit was brought by the United States against the Oregon and California Railroad Company in order to obtain a decree cancelling certain patents for lands, which, it was alleged, had been illegally and by mistake issued in the name of the United States to that company, which succeeded to the rights of the Oregon Central Railroad Company.

The case was heard upon a stipulation as to evidence, from which the following facts appear:

By the act of Congress of July 25, 1866, c. 242, 14 Stat. 239, the California and Oregon Railroad Company, and such company organized under the laws of Oregon as the Legislature of the latter State designated, were authorized to locate, construct and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad Company in California.

For the purpose of aiding in the construction of that line, Congress granted to those companies, their successors and assigns, every alternate odd-numbered section of public lands, not mineral, to the amount of twenty sections per mile, (ten on each side,) of the railroad line. But the act provided that when any of the alternate sections or parts of sections should be found "to have been granted, sold, reserved, *occupied by homestead settlers*, preëmpted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, near-

est to and not more than ten miles beyond the limits of said *first-named* alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein *granted* on each side of said railroad, so far as located and within the limits before specified. . . . Settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

The Oregon Central Railroad Company was designated by the Oregon Legislature as the company organized under the laws of Oregon, entitled to receive the granted lands in Oregon, and the benefits and privileges of the above act of 1866.

Prior to October, 1869, that company definitely fixed on the ground and surveyed the first section of the railroad in Oregon. That section extended from Portland to Jefferson, and comprised not less than sixty continuous miles from the northern terminus of the road; and on October 25, 1869, the company filed in the office of the Secretary of the Interior, and on January 29, 1870, the Secretary duly accepted and approved, a map of the survey and definite location of that section.

During the year 1869 and the months of January and February, 1870, the company definitely fixed on the ground and surveyed the second section of its road, which section comprised not less than 124 continuous miles from Jefferson; and on March 26, 1870, filed in the office of the Secretary, and on March 29, 1870, that officer accepted and approved, a map of the survey and definite location of that section.

On the 7th of April, 1870, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, withdrew all the odd-numbered sections of land lying within thirty miles on each side of the railroad (as shown on the map of survey and definite location filed with the Secretary on March 26, 1870,) from sale or location, preëmption or home-

stead entry; and that withdrawal remained continuously thereafter in force, except so far as, if at all, it was affected by an order of the Secretary made August 15, 1887, revoking the order of April 7, 1870, as to the odd-numbered sections lying within the *indemnity* limits of the grant made in 1866, and declaring the odd-numbered sections, lying within such *indemnity* limits, to be restored to the public domain, subject to preemption and homestead entry, as well as to the provisions of the above grant. The lands so withdrawn April 7, 1870, were within the jurisdiction of the district local land office at Roseburg, and notice of such withdrawal was received at that office on April 25, 1870.

During the years 1868 and 1869, and prior to December the 25th, 1869, the Oregon Central Railroad Company constructed and fully equipped the first twenty miles of the railroad contemplated by the act of 1866, commencing at Portland and extending along the line shown upon the map filed in the office of the Secretary of the Interior on October the 29th, 1869. And in the years 1869 and 1870, and prior to September the 1st, 1870, the above two companies fully equipped the second twenty miles of the railroad, commencing at the end of the first constructed twenty miles and extending along the line shown on the map to a point distant forty miles from the commencement of the railroad at Portland—a portion of the second twenty miles having been constructed by the Oregon Central Railroad Company, the remainder by the defendant.

The whole line of railroad contemplated by the act of 1866, commencing at the end of the second constructed twenty miles, was constructed by the defendant company during the years 1870, 1871 and 1872; and prior to December the 4th, 1872, the entire line from Portland to Roseburg was continuously operated for all the purposes contemplated by Congress.

Commissioners were appointed by the President to examine the railroad as constructed from Portland to Roseburg. That duty was performed, and they reported to the President, under oath, that the railroad between those points had been completed and equipped in all respects as required, and was ready for the service contemplated by the act of 1866. Those reports were

duly accepted and approved by the President. The report as to the seventh, eighth and ninth sections, including the last seventy-eight miles of the road from Portland to Roseburg, was made on July 10, 1878, and the next day was accepted and approved.

The remaining part of the road in Oregon, extending from Roseburg to the southern boundary of that State, was constructed, fully equipped and made ready by the defendant company during the years 1878 to 1889, inclusive, and all prior to the year 1900. It was duly examined by commissioners who reported thereon, and their reports were accepted and approved.

All the lands described in the bill of complaint are distant more than twenty miles from but lie within thirty miles on one side of the road extending from Jefferson to Roseburg, shown on the map filed March 26, 1870; and they were all included and embraced by the withdrawal made by the Secretary on the 7th of April, 1870.

No part or portion of the lands described in the bill of complaint are mineral lands, nor are they included by any exception or reservation from the indemnity land grant in Oregon, made by the act of 1866, except so far as, if at all, they were excepted or reserved therefrom by reason of the settlements and facts hereinafter to be referred to.

On August 16, 1892, all the lands described in the bill were free and clear for selection by the defendant company as part and parcel of the *indemnity* lands granted by the act of Congress, except so far as, if at all, they were excepted or reserved by those settlements and facts.

On the 16th of August, 1892, and the 19th of October, 1892, the defendant company filed with the register and receiver of the United States Land Office at Roseburg its several lists selecting the lands in question as indemnity lands in lieu of lands of equal area, parts of odd-numbered sections within the primary limits of the grant made in 1866 and otherwise disposed of by the United States prior to the passage of that act. Those lists were accompanied by the fees, costs and charges required by law, and in all respects conformed to the directions, rules, regulations and requirements of the Secretary of the Interior and of the Com-

missioner of the General Land Office. They were severally approved and certified by the register and receiver, and the defendant company had not then, nor has it subsequently, selected or received lands in lieu of those therein described as the basis of selections by it made, other than the lands so selected by said lists.

In the following years the following persons, each being a duly qualified entryman under the homestead laws of the United States, settled upon the lands respectively claimed for them in this suit, to wit: 1869, Louis [Charles] Heller; 1878, J. R. Peters; 1878, John Sapp; 1882, George C. Peck; 1883, Uriah W. Wren; 1885, Baxter W. Jenkins; 1885, Charles E. Barton; 1888, Joseph A. Cox; 1889, Charles W. Seeley; 1889, John W. Carey; 1890, F. W. Huddleston; 1890, Alfred R. Young; 1890, Abraham M. Peck. Each person made his settlement with the intention of making a homestead entry of the lands, whenever that could be done under the acts of Congress. After the date of settlement each settler continuously resided and made improvements upon his land in the way of a dwelling house, barn, outhouses, fencing, clearing and planting of trees. And on October 27, 1892, within ninety days after the official plat of the survey of the lands was filed in the United States Land Office at Roseburg, each settler, in good faith, filed a formal application in the land office for a homestead entry of and for the lands upon which he settled and improved and upon which he continuously resided after the date of his first occupancy.

On the 20th of February, 1893, the Commissioner of the Land Office and the Secretary of the Interior having approved the selections made by the railroad company, a patent was issued conveying to it all the lands in dispute. But when the company's lists were approved neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the above settlers to the lands upon which they respectively resided, and which the United States now claims for them.

On the 27th day of October, 1893, the land grant made by the act of 1866 being still unadjusted, the Commissioner of the Land Office demanded of the railroad company a reconveyance of the lands covered by the patent of 1893 upon the ground

that the patent to it had been erroneously issued. The company refused to reconvey, and claims to be the owner of such lands. Hence the present suit to have that patent cancelled.

The Circuit Court, upon final hearing, found the equities of the case to be with the United States, and a decree was entered cancelling the patent issued to the Oregon and California Railroad Company. That decree was affirmed by the Circuit Court of Appeals, 109 Fed. Rep. 514.

1. Some of the questions referred to in argument as bearing upon the issues presented by the record have been determined by decisions of this court rendered since this litigation commenced.

In *Hewitt* v. *Schultz*, 180 U. S. 139, which related to the grant of lands made to the Northern Pacific Railroad Company, by the act of July 2, 1864, c. 217, 13 Stat. 365, this court accepted the construction of that act as adopted and adhered to by the Land Department, and held that the Secretary of the Interior had no power, simply upon the *definite location* of the Northern Pacific Railroad, to withdraw from the operation of the preëmption and homestead laws lands within the *indemnity* limits of the road as defined by Congress. *Northern Pacific Railroad Co.* v. *Miller*, 7 L. D. 100, 125; *Northern Pacific Railroad Co.* v. *Davis*, 19 L. D. 87, 90. In the present case, the line of the railroad, opposite to which are the lands here in dispute, was definitely located in 1870, while (with the exception of one tract, about which the railroad company makes no question) the lands in dispute were not settled upon until after that year. We have seen that upon acceptance of the map of definite location the Secretary of the Interior, according to the stipulated facts, made an order (which was duly received at the local land office) withdrawing all the odd-numbered sections within thirty miles on each side of the road shown on the map of survey and definite location, from sale or location, preëmption or homestead entry. That withdrawal included the odd-numbered sections in the indemnity limits, within which the lands in dispute were situated. We hold on the authority of *Hewitt* v. *Schultz* that it was beyond the power of the Secretary to make such an order in respect of lands within the indemnity

limits of the grant made by the act of 1866. The reasoning in that case, touching this proposition, applies to the case now before us. In 1887 the Secretary, as if to remove the apparent obstacle placed in the way of preëmption and homestead settlers created by the order of 1870, made an order revoking the previous one of withdrawal so far as it related to indemnity limits, and declaring the odd-numbered sections lying within the entire indemnity limits of the grant restored to the public domain and subject to preëmption and homestead entry, as well as to the provisions of the act of 1866. We need not discuss here the question of the power of the Secretary of the Interior to revoke an order of withdrawal once legally made, notice whereof had been given at the local land office. It is sufficient to say that the railroad company did not by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered sections within those limits; nor did that order prevent the *bona fide* occupancy by settlers of odd-numbered sections *within such limits* up to the time of the approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits.

In *Nelson* v. *Northern Pacific Railway*, 188 U. S. 108, decided at the present term of the court, it was held that the act of 1864 making a land grant to the Northern Pacific Railroad Company, and the act of May 14, 1880, c. 89, for the relief of settlers on the public lands, recognized the right at any time prior to definite location to settle upon the unsurveyed public lands embraced by the grant of 1864, notwithstanding there was, at the time, in existence an order of withdrawal, based only upon a map of general route not issued pursuant to any express direction of Congress; provided such settlement was accompanied by residence on the land, in good faith, with the intention on the part of the settler to avail himself of the benefits of the homestead law as soon as the lands were surveyed. This decision rested mainly on the ground that Congress intended by the act of 1864 to protect the right of *bona fide* settlers acquired before the railroad company had, by an accepted map of definite location, obtained a vested interest in particular odd-numbered sections granted.

These principles are applicable to the present case if, as contended by the United States, the railroad company did not acquire, and could not have acquired, an interest in specific sections of lands within the *indemnity* limits before their actual and approved selection, under the direction of the Secretary prior to the date of occupancy by the respective settlers.

2. We have seen, from the stipulated facts, that it was not until 1892 that the railroad company made its selection of lands within the indemnity limits to supply deficiencies in its place or granted limits. But this occurred after each one of the entrymen, whose rights the Government is now seeking to protect, had made his settlement with the intention to follow it up by a *bona fide* entry under the homestead laws. In other words, the lands were "occupied by homestead settlers" (to use the words of the granting act of 1866) at the time they were selected by the railroad company. Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make. In *Ryan* v. *Railroad Company*, 99 U. S. 382, which was a contest as to lands within the indemnity limits, this court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." And the reason given was that "when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." In *St. Paul Railroad* v. *Winona Railroad*, 112

U. S. 720, 731, the court, referring to this principle, said: "The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or preëmption. It may be still longer before a selection is made to supply this loss." After observing that twenty years expired in that case after the location of the road before any selection of lieu lands was made, the court added: "Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?" To the same effect are the following cases: *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Cedar Rapids Railroad* v. *Herring*, 110 U. S. 27; *Kansas Pacific* v. *Atchison Railroad*, 112 U. S. 414, 421; *Sioux City &c. Railroad* v. *Chicago &c. Railroad*, 117 U. S. 406, 408; *Barney* v. *Winona &c. Railroad*, 117 U. S. 228, 232; *Wisconsin Railroad* v. *Price County*, 133 U. S. 496, 508, 513; *Nelson* v. *Northern Pacific Railway*, above cited. Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

3. But it is contended that as the selection by the company (except as to the tract which was occupied in 1869, before any

selection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the Government for him to do so, and by the fact that, within ninety days after these lands were surveyed, he filed in the proper office his application to enter them under the homestead laws of the United States. He moved with due diligence to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson* v. *Northern Pacific Railway*, above cited; *Ard* v. *Brandon*, 156 U. S. 537, 543; *Tarpey* v. *Madsen*, 178 U. S. 215, 219. In the *Ard* case the court said: "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." In the *Tarpey* case it was said that "the right of one who has actually occupied [public lands], with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent;" that if a settler was in possession before definite location, "with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." So, if the condition of the lands, being unsurveyed, prevents the making by a *bona fide* occupant of a proper application of record to enter them under the homestead laws his rights will not be lost, if, after the lands are surveyed,

he applied in due time to enter the lands under those laws. And such has been held to be the object and effect of the act of May 14, 1880, c. 89, 21 Stat. 140. We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a *bona fide* settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands were surveyed, promptly taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws, relates back to the date of settlement on the lands. It was so substantially held in *Nelson* v. *Northern Pacific Railway*, above cited.

4. It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition prior to definite location by sale and otherwise of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect of place limits. In any event, no such adjustment having taken place prior to the date of the settler's *bona fide* occupancy, his rights, based upon such occupancy, would not be affected by the fact, subsequently appearing, in whatever way, that all the odd-numbered sections within the indemnity limits were needed to supply deficiencies in place limits. At the time the settler went upon the land, in good faith, to make it his home and to perfect his title under the homestead laws, there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws.

Other points were made in the argument of the case, but they need not be specially noticed, as what we have said re-

quires, independently of those points, an affirmance of the decree of the Circuit Court and the Circuit Court of Appeals.

The decree is

Affirmed.

MR. JUSTICE BREWER took no part in the disposition of this case.

OREGON AND CALIFORNIA RAILROAD COMPANY *v.* UNITED STATES. No. 2.

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

No. 187. Argued March 4, 1903.—Decided April 6, 1903.

On the authority of the preceding case, *Held*, that where a duly qualified entryman made a *bona fide* settlement upon lands within the indemnity limit of the grant made by act of Congress of May 4, 1870, with the intention, whenever the way was opened by a survey, to enter the lands under the homestead laws, his rights were superior to those acquired, or that could have been acquired, by the railroad company under any selection by it of indemnity lands made after the date of such settlement.

THE case is stated in the opinion of the court.

Mr. Maxwell Evarts for appellant.

Mr. Assistant Attorney Russell for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The controlling question in this case is whether the United States in 1893 erroneously issued to the Oregon and California Railroad Company, which succeeded to the rights of the Oregon Central Railroad Company, a patent for certain lands in Oregon.

These lands are without the place and within the indemnity

limits of the grant made by the act of Congress of May 4, 1870, c. 69, granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon. 16 Stat. 94. The provisions of this act were substantially the same as those of the act of July 25, 1866, referred to in *Oregon and California Railroad Company* v. *United States*, case No. 186, just decided, except that the act of 1870 contains a provision not found in the act of 1866, to wit: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The line of the proposed road was definitely fixed and a plat thereof filed in the office of the Secretary of the Interior.

On the 16th day of February, 1872, the first twenty miles of the contemplated railroad were completed from Portland to a point near Forest Grove, in Oregon, and on the 23d of June, 1876, the road to the Yamhill River, near McMinnville, was completed, but it has never been constructed to Astoria, Oregon.

The final plat and survey of the township, in which the lands in dispute are situated, was not filed and approved until July 27, 1893; and on that day the company's list of selections of lands, which included the lands in question, were duly approved.

Prior to the year 1893, to wit, on the 12th day of January, 1891, Joseph H. Elison, a duly qualified entryman under the laws of the United States, settled upon the lands in dispute with the intention in good faith of "homesteading the same," and since that date he has continuously resided upon, cultivated and improved them; and within ninety days from the date of the filing of the township plat of survey he made application for "filing a homestead" covering these lands.

The selections by the company having been approved by the Land Department, a patent was issued to the Oregon and California Railroad Company on October 15, 1895. But it was issued without any knowledge at the time on the part of the Secretary or the General Land Office of the adverse claim of Elison, arising from his occupancy of the land.

For the reasons stated in the opinion just delivered in case

No. 186, we hold that, in virtue of Elison's *bona fide* settlement upon the lands in dispute in 1891, with the intention, whenever the way was opened by a survey, to enter the lands under the homestead laws, his rights were superior to those acquired or that could have been acquired by the railroad company under any selection by it of indemnity lands made after the date of such settlement. The company's selection did not displace or defeat the right which the settler acquired by his settlement made previously in good faith with the intention to avail himself of the benefits of the homestead laws within due time after the lands were surveyed.

The railroad company rests its claim to have a superior right to these lands on the ground in part of long delay by the Commissioner of the Land Office in having them surveyed, although it frequently requested the survey to be made. There is nothing of substance in this contention. The statute, it is true, required the lands to be surveyed with all "convenient speed." But the question as to the precise time the lands should be surveyed was exclusively for the Land Office to determine; and it was to be determined with reference to all the facts and circumstances connected with the surveying of the public lands under the direction of the Land Department. We cannot say from the record that the Land Office, in the matter of the surveying of the particular lands here in dispute, did not act with convenient speed. Besides, the railroad company accepted the grant of Congress subject to the possibility of delay in the surveying, as well as to the power of the Land Office to determine when the lands should be surveyed. The action or non-action of the Land Department in such a matter cannot be controlled by the judiciary, unless perhaps in a case in which it appeared, beyond question, that its refusal to order the survey was merely arbitrary and without any real excuse. It may be that in such a case the Commissioner could be compelled by judicial process to discharge the duty imposed upon him by statute. But upon that point we need not express a decided opinion, for no such case is presented by the record before us. The allegation in the defendant's plea is simply that the Commissioner neglected to perform his duty in the matter of the surveying. But the

facts constituting such alleged neglect are not stated. Besides, we may observe that since the right of the settler attached in virtue of his *bona fide* occupancy of these lands before the railroad company made its selection, that right could not be displaced by reason of any delay or negligence upon the part of the Commissioner to cause a survey of the lands. The act contains no provision that requires a contrary view. The court must determine the rights of the settler according to the facts as they existed at the time his occupancy in good faith began. The statute does not otherwise declare. In that view, as already suggested, the settler's right was superior to any right acquired by the company, after the date of his occupancy, in virtue of its selection of these lands to supply a deficiency in the place limits.

Upon the authority of the case just decided, the decree of the Circuit Court of Appeals must be

Affirmed.

MR. JUSTICE BREWER took no part in the disposition of this case.

DE CAMBRA *v.* ROGERS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 170. Argued and submitted February 24, 1903.—Decided March 16, 1903.

In an ordinary contest between two applicants for preëmption, in which the officers of the Land Department have decided upon the testimony in favor of one and against the other, the decision of the Land Department on questions of fact is conclusive upon the courts.

When the Secretary of the Interior has made a decision in such a contest the courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.

ON April 28, 1897, Hannah Rogers and Frank J. Rogers, holders of the legal title to a tract of land in Alameda County,

commenced in the Superior Court of that county an action in ejectment against Manuel S. De Cambra and others. The defendants answered with a general denial, and, as authorized by the practice in California, De Cambra filed a cross complaint in equity, alleging that the plaintiffs had obtained the legal title wrongfully and held it in trust for him, and prayed a decree quieting his title to the land. A demurrer to this cross complaint was sustained, and upon a trial of the action a judgment was rendered in favor of the plaintiffs, which judgment was affirmed by the Supreme Court of California, 132 California, 502, and thereupon this writ of error was sued out.

Submitted by *Mr. J. C. Bates* for plaintiff in error.

Argued by *Mr. Franklin H. Mackey* for defendants in error.

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

The only question presented arises on the demurrer to the cross complaint. That cross complaint averred that in 1867 De Cambra purchased from one Hewett Steele the premises in controversy, with other adjoining lands, all of which were enclosed with fences and well-known exterior boundaries; that he entered into actual possession thereof, and has ever since continuously resided thereon; that in 1871 he sold an undivided half interest in the tract to Enos J. Rogers, the husband of Hannah and the father of Frank J. Rogers; that at that time the land was supposed to be a portion of a Mexican grant, and was within its exterior boundaries; that on August 10, 1878, the final official survey disclosed that there were more than three leagues of land within the exterior boundaries of said grant, and thereupon a part thereof, including the land in controversy, was restored by the United States to the public domain; that De Cambra and Rogers, who were brothers-in-law, agreed upon a division of the land excluded from the grant and restored to the public domain, De Cambra to take one portion, and that the tract in controversy, and Rogers the other; that

thereupon they went to the local land office to file their applications for entry; that De Cambra, being unable to read or write, and understanding the English language very imperfectly, trusted to Rogers to prepare the preëmption papers; that Rogers knowingly and fraudulently prepared the papers so as to make De Cambra an applicant for land upon which there was no dwelling house or other improvement, and only a small part of which was in his possession and three fourths of which was thoroughly worthless, Rogers himself filing a preëmption claim for the land which it had been agreed should be entered by De Cambra, the land which was his homestead and upon which his improvements had been made; that De Cambra did not discover this until December 29, 1883; that thereupon he made the proper application at the land office for this land; that a contest ensued, which was finally decided by the Secretary of the Interior in favor of Rogers, and the land patented to the plaintiffs, his widow and son. The cross complaint further averred that although the decision apparently rendered by the Secretary of the Interior was signed by him, yet in fact for want of time and opportunity the Secretary had not read or heard read the evidence in the contested case, and simply signed his name to a report prepared by one of the clerks in the department.

This cross complaint states no question of law decided in these contest proceedings in the Land Department adversely to De Cambra. Indeed, the grounds of the decision are not disclosed. There is no copy of the testimony given on the contest. It appears that De Cambra offered testimony showing his qualifications, settlement, occupation, etc., and it is stated that some evidence was given in support of the Rogers application. It is alleged that the land officers came to their conclusion "by the misconstruction of the evidence submitted to them and the misapplication of the law to the evidence, and in violation of the just and equitable rights and claims of Manuel S. De Cambra." For all that appears, the officers may have found the facts to be just the contrary to the averments in the cross complaint; and if they misapplied any rule of law to the testimony we are not advised of the rule they misapplied or

how they misapplied it. As it appears affirmatively that, before the contest, De Cambra was informed of the nature of the wrongs he alleges were perpetrated upon him by Rogers, it may be presumed that evidence was offered by both parties upon that question, and that it was decided adversely to his contention. Under those circumstances nothing is shown except an ordinary contest between two applicants for preëmption, in which the land officers upon the testimony decided in favor of one and against the other. But it is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts. *Burfenning* v. *Chicago &c. Railway*, 163 U. S. 321, 323, and cases cited; *Johnson* v. *Drew*, 171 U. S. 93, 99; *Gardner* v. *Bonestell*, 180 U. S. 362.

It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.

These are the only Federal questions presented, and their decision was unquestionably correct.

The judgment of the Supreme Court of California is

Affirmed.

EASTERN BUILDING AND LOAN ASSOCIATION *v.* WILLIAMSON.

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

No. 152. Argued January 28, 1903.—Decided March 23, 1903.

Courts of one State do not take judicial notice of the laws of another State, whether written or unwritten. Statutes and decisions must be proved as facts, but when proved their construction and meaning are for the consideration and judgment of the court, and the fact that an attorney of the enacting State has testified without contradiction as to the construction of a law of that State does not conclude the court and make it its duty to find as a fact that such was the true construction.

While this court does not take judicial notice of the decisions of the courts of one State in a case coming from the courts of another State, it may properly refer to the opinion of the highest court of a State as to the construction of a statute of that State when such statute is involved in a case before this court and this applies to a decision rendered after the judgment appealed from was rendered.

The construction given by the Supreme Court of South Carolina and by the Court of Appeals of New York to the building and loan law of New York to the effect that it does not relieve a building and loan association from an obligation to pay the full par value of certificates at a date stated therein whether earned or not commends itself to this court as a correct construction thereof.

THIS action was commenced on January 12, 1898, in the Circuit Court of Darlington County, South Carolina, by Bright Williamson against the Eastern Building and Loan Association of Syracuse, New York, to recover the face value of twenty-five shares of stock in the defendant association, less a sum theretofore borrowed by the plaintiff from the association. Judgment in his favor for the full amount claimed was rendered in the trial, affirmed by the Supreme Court of the State, 62 S. C. 390, and thence brought here on this writ of error.

The case is similar to that of *the same plaintiff in error* v. *Ebaugh*, 185 U. S. 114. Here, as there, the stock certificates contained an absolute promise to pay "the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof." Here, as there, circulars were shown to the plaintiff to induce his subscription, one of which contained this statement:

"For the investor.

"This association issues three classes of certificates, designated as instalment, paid-up and fully paid. All of which are guaranteed to mature in 6½ years.

"Amply secured by first mortgages on real estate.

"Paid-up stock doubles in 6½ years.

"Fully paid certificates guaranteed.

"Quarterly dividends, 7 per cent per annum.

"For the borrower.

"This association has no auction sales.

"No bidding for loans.

"And a definite time for repaying a loan."

Another, the following:

"Only association giving investor and borrower definite maturity contract in 78 months. Only association issuing definite contracts."

The defendant pleaded that there was no absolute promise to pay at the end of seventy-eight months, but only an estimate of the time at which the stock would mature; that an absolute promise to pay at the end of seventy-eight months was inconsistent with the nature of the corporation as a mutual company and against the provisions of its charter and by-laws, and also illegal by the laws of New York under which the company was incorporated.

On the trial before a jury, defendant, in support of its answer, introduced the charter and by-laws of the company, the statutes of New York under which it was incorporated, certain decisions of the courts of that State, and the testimony of the assistant secretary and actuary of the defendant that the shares of stock had not, in fact, matured; also the deposition of its general attorney, who, after affirming his familiarity with the law of that State regarding building and loan associations, of which, as he said, he had made a special study, testified that, under the defendant's articles of incorporation and by-laws, and the laws and decisions of New York, the heretofore referred to clause in the certificate of stock "is not to be construed or held as a guaranty period of maturity, but, on the other hand, an estimated period," and that the association is not required to pay the face value of the certificates until "the amount paid by the plaintiff on his shares of stock, augmented by the earnings apportioned and credited thereto, equal the par value." Upon this testimony the defendant asked the court to charge the jury that full faith and credit must be given to the laws of New York, as construed by its courts, and that by reason thereof, "under the terms of the contract of membership, and the contract of loan, by-laws and charter, the transaction between the plaintiff and defendant does not terminate merely upon making a fixed number of payments, but only when the dues paid in by

him, with the profits apportioned to his shares, make them equal their par value of $100.00 per share." Other instructions of a similar nature, or looking to the same result, were also asked, but all were refused.

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

Mr. H. E. Young for defendant in error.

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

The Federal question presented arises on the contention that the South Carolina courts did not give "full faith and credit . . . to the public acts, records and judicial proceedings" of the State of New York, as required by section 1, article IV, of the Constitution of the United States.

Courts of one State do not take judicial notice of the laws of another State, whether written or unwritten. They must be proved as facts. *Talbot* v. *Seeman*, 1 Cranch, 1, 38; *Livingston* v. *The Maryland Insurance Co.*, 6 Cranch, 274; *Ennis* v. *Smith*, 14 How. 400, 426; *Pierce* v. *Indseth*, 106 U. S. 546, 551; *Chicago & Alton Railroad* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622; *Lloyd* v. *Matthews*, 155 U. S. 222; *Building & Loan Association* v. *Ebaugh*, 185 U. S. 114, 121; *Nashua Savings Bank* v. *Anglo-American Co.*, *post*, p. 221.

The law of New York was so proved in this case, and the contention is that it was not rightly construed by the South Carolina courts; that the law of New York which entered into and formed a part of the contract sued on was not given by those courts the same force and effect that it had in New York, and that hence the rights secured by the Constitution of the United States to the plaintiff in error were denied. If it appeared that the South Carolina courts, without questioning the validity, simply construed a statute of New York, no Federal question would be presented. *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v.

Matthews, 155 U. S. 222; *Banholzer* v. *New York Life Insurance Co.*, 178 U. S. 402; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491.

But it is contended that the construction of the New York statutes as applicable to this contract was shown by the decisions of the courts of that State and the opinion of one learned in its laws; that there was no contradictory testimony, and, therefore, it was the duty of the South Carolina courts to find as a fact that such was the true construction.

The promise to pay one hundred dollars at the end of seventy-eight months is plain and unambiguous. It is a positive promise to pay at a fixed time. The circulars presented by the company to the plaintiff as an inducement for his subscription only emphasize the certainty of the promise. So, if the inquiry were limited to the mere language of the promise and the representations which led up to it, but one decision was possible. It is said that the promise made in the certificate is expressly based upon "full compliance with the terms, conditions and by-laws printed on the front and back of this certificate;" that one of the conditions expressed on the face of the certificate is: "The shareholder agrees to pay, or cause to be paid, a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn;" that it contained this further stipulation: "Payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached," and that these matters thus referred to had the effect of changing the absolute promise to a conditional one. All these were received in evidence, and when so received it became a matter of judicial construction to determine whether they had such effect, and that was a question which, nothing else being shown, was for the consideration of the courts in which the litigation was pending. In like manner, after the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other States are facts to be proved, yet when proved their construction and meaning are for the consideration and judgment of the courts

in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel, for, as he states, his opinion is based on the statutes, the articles of incorporation and the decisions admitted in evidence, together with similar decisions of other States under like statutes, articles of incorporation and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. *Laing* v. *Rigney*, 160 U. S. 531. The duty of the court to construe and decide remains the same. It must be remembered that the effort here made is to change the obligations which the defendant apparently assumed by the issue to plaintiff of its certificates of stock, and to justify such change by its articles of incorporation, the statutes of the State of New York under which it was created, and the decisions of the courts of that State. There is no suggestion of any peculiar local law in New York independent of that created by these articles and statutes and shown by its decisions, and their effect upon the terms of the contract was a matter for judicial construction by the courts of South Carolina. That the defendant so understood the matter is apparent from the instructions it asked.

The conclusion reached by the courts of South Carolina that the articles of incorporation and by-laws and the statutes of New York did not alter the apparent meaning of the contract was correct. The absolute promise was not so inconsistent with the articles of incorporation or by-laws as to be void. The by-laws at the time of making this contract contained no such provision as appears in *Daley* v. *People's Building &c. Association*, 172 Massachusetts, 533. There the provision was that "whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be canceled," and the shareholder "shall be entitled to receive . . . the par value of the shares named, . . . and no more." Here "all shareholders shall pay or cause to be paid a monthly instalment of seventy-five cents on each share named in their certificate, until the same shall be fully paid." Article 14, section 14. But in sections 21 and 22 of the same article are these provisions for a different mode and amount of payment:

"SEC. 21. And it is hereby expressly agreed between all shareholders and this association, that a payment of one hundred dollars per share, named in their certificate, that has been in force till maturity shall be accepted as full payment of all claims on their certificate or against this association.

"SEC. 22. Paid-up and non-assessable stock may be issued and sold at the price of fifty dollars per share, payable on date of issue. Any parties holding such paid-up stock, wanting to withdraw the same before maturity, may do so and receive six per cent annual interest from the date of issue of said stock."

Neither was the promise *ultra vires* the corporation. We are saved from the necessity of an extended discussion of these questions by a recent opinion of the Court of Appeals of New York in the case of *Vought* v. *this defendant, Eastern Building & Loan Association*, decided December 2, 1902, 172 N. Y. 508. It is true that the decision was not offered in evidence on the trial of this case in the South Carolina court. It had not then been announced. And it is also true that we do not take judicial notice of the decisions of the courts of one State in a case coming to us from the courts of another. *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Chicago & Alton Railroad* v. *Wiggins Ferry Co.*, 119 U. S. 615–622; *Lloyd* v. *Matthews*, 155 U. S. 222, 227. But nevertheless we may properly refer to the opinion as a construction of the law, and the views therein expressed not only commend themselves to our judgment as intrinsically sound, but also, as the views of the law of New York entertained by the justices of its highest court, have a peculiar and persuasive appropriateness. Referring to the contention that the terms of the articles of incorporation were inconsistent with the absolute promise contained in this certificate that court said:

"In other words, the defendant's contention is that those provisions were sufficient to change an absolute promise to pay into a conditional one dependent upon the success of its enterprise. We find nothing in these provisions which would justify any such conclusion. The provision in paragraph one that the plaintiff should pay until the share is paid or withdrawn, is entirely consistent with the agreement for absolute payment for the shares by the defendant at the time named, as by its con-

tract it agreed that the plaintiff's shares should mature at that time."

Again, referring to the contention that the absolute promise contained in such certificate was *ultra vires* the corporation, it observed:

"We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defence of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defence that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power. *Bissell* v. *Mich. So. & No. Ind. R. R. Cos.*, 22 N. Y. 258; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *Rider Life Raft Co.* v. *Roach*, 97 N. Y. 378; *Holmes, Booth & Haydens* v. *Willard*, 125 N. Y. 75, 80; *City of Buffalo* v. *Balcom*, 134 N. Y. 532; *Bath Gas L. Co.* v.

Claffy, 151 N. Y. 24; *Moss* v. *Cohen*, 158 N. Y. 240, 249; *Hannon* v. *Siegel-Cooper Co.*, 167 N. Y. 244."

We deem it unnecessary to add any observations of our own to these satisfactory declarations of the law of New York.

A single matter remains to be noticed. It is contended that the contract evidenced by the certificates was changed by a loan subsequently obtained by the plaintiff from the defendant upon the security of the shares—a loan obtained after the by-laws had been amended to make, as alleged, more clear the obligations assumed by the issue of share certificates. That amendment is found in section 3, article 8, which as amended reads:

"SEC. 3. Installment stock shall mature and be payable when the dues paid thereon with the profits apportioned and credited thereto shall equal one hundred dollars per share. Paid-up stock shall mature and be payable when the dues thereon with the profits apportioned and credited thereto in excess of any cash dividends, if any, that may be paid, shall equal one hundred dollars per share; and unless otherwise provided all other stock shall be payable as provided by the by-laws or certificates of shares."

But it is not shown that there was any express agreement between the parties to change the terms of the original contract; the amendment was clearly prospective in its operation, *Knights Templars' & M. L. Indemnity Co.* v. *Jarman*, 187 U. S. 197; and we are unable to perceive that the mere borrowing or the promise to return the money so borrowed had in themselves any effect upon the prior contract.

We see no error in the record, and the judgment of the Supreme Court of South Carolina is

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE concurred in the result.

BELL v. COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY.

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

No. 191. Submitted March 10, 1903.—Decided April 6, 1903.

Under section 828, Rev. Stat., and section 2 of the act of August 1, 1888, a corporation engaged in the business of insuring titles to real estate has the right, during office hours, to inspect and examine the indices and cross indices of the judgment records kept by the clerks of the Circuit and District Courts when such inspection and examination relate to current and depending transactions and are made at such times and under such circumstances that they do not interfere with the clerk or his assistant in the discharge of their duties or with the exercise of the right of other persons to have access to such indices and cross indices.

By section 828, Rev. Stat., clerks of the Circuit and District Courts are allowed certain fees for searching records for judgments, decrees, etc., and certifying the results of such searches. In the same section is this provision:

"All books in the offices of the clerks of the Circuit and District Courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor."

Section 2 of the act of August 1, 1888, 25 Stat. 357, reads:

"The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public."

On December 28, 1896, the Commonwealth Title Insurance and Trust Company commenced a suit in the Circuit Court of the United States for the Eastern District of Pennsylvania against Samuel Bell, clerk of that court. The company is engaged in the business of insuring titles to real estate, making

searches for liens and incumbrances upon the same, and issuing certificates in respect thereto, and sought a decree giving to it access to the judgment indices and cross indices kept by the clerk. The case proceeded to a decree as follows:

"And now this sixteenth day of January, 1901, this case having come on to be heard upon pleadings and proofs, and having been argued by counsel, it is ordered, decreed and adjudged that the respondent shall permit the properly authorized representatives of the complainant to inspect and examine the judgment indices and cross indices kept by the respondent, as clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, in such way and manner as will enable the complainant to prosecute its business as insurer of titles, but subject to the following restrictions:

"The inspection and examination must in each instance relate and be confined to a transaction or transactions which at the time being shall be current or depending; and such inspection and examination shall be made only at such times and under such circumstances as will not interfere with the respondent or his assistants in the discharge of their duties or with the exercise of the right of other persons to have access to said indices and cross indices."

This decree was affirmed on September 27, 1901, by the Circuit Court of Appeals. 110 Fed. Rep. 828. On December 2 of the same year the case was brought here on certiorari. 183 U. S. 699.

Mr. Solicitor General Richards and *Mr. Assistant Attorney General Beck* for petitioner.

Mr. John G. Johnson for respondent.

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

The question presented is to what extent a company engaged in the business of examining titles and certifying thereto may have access to and use the indices and cross indices of the

judgment records prepared by the clerks of United States courts. The statute declares that they "shall at all times be open to the inspection and examination of the public." This company as one of the public has a right to this inspection and examination. It has no monopoly therein and cannot interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to such inspection and examination. But this limitation is expressly provided for by the second of the two restrictions imposed in the decree. Under this decree the clerk, as custodian, can make such reasonable regulations as will secure to him and his assistants full use of all the books and records of his office—which, of course, is a primary matter to be considered—and also will guard against any tampering with or injury to those books and records, and at the same time give to the plaintiff and others access to the indices. From the testimony it is clear that there can be no difficulty on the score of time or otherwise in affording to this company and all others interested every proper facility for inspection and examination. Indeed, it is not contended that there is any trouble in that direction.

But the contention is that the office of clerk is not a salaried office; that he is paid by fees; that the fees for searches and certificates thereof have amounted to a very considerable sum, and in this office have resulted in a surplus above the maximum of compensation allowed by law to the clerk, which has gone into the Treasury of the United States, whereas if this plaintiff and other like companies situated in Philadelphia, which are monopolizing the business of examinations of title, should be permitted to make their own inspection and examination of these indices, a large part of the fees hitherto received by the clerk will be lost, his maximum of compensation will not be reached, and there will be no surplus to be paid into the Treasury of the United States. It is insisted that although by the terms of section 828 the judgment records are open to the inspection of any person without any fee or charge therefor, Congress, in directing the preparation of the indices and cross indices and that they should be open to the inspection and examination of the public, did not add thereto "without any

fee or charge therefor," and thus manifested its intent that they should not be so used as to interfere with the fees theretofore received by the clerk. We cannot so interpret the statute. If these indices were intended merely for the convenience of the clerk and to facilitate his work, the making of them would undoubtedly have been left to his discretion. The convenience of the public and assistance to those interested in the judgments were obviously in the thought of Congress, for it declared that they should be open to the inspection and examination of the public.

Very likely, at the time of the passage of the act, the monopolizing of the business of examining titles by one or two corporations was not contemplated. The work was scattered among the separate members of the bar, each one for his own client examining the title to property in which such client was interested. But if Congress provided and intended to provide that one, interested in the title to real estate and desiring an examination of judgment liens thereon, should, either by himself or agent, have access to these indices, that intent and that provision are not changed by the fact that the business has passed from the many to a few. The same right of inspection exists whether one is examining only the title to a single piece of real estate or the titles to a hundred. The inspection is an assistance to the examination of titles, and obviously Congress intended that these indices should be open to the inspection of those rightfully making such examinations.

Whether parties have a right to make copies in full of these indices is not a question before us, for the decree carefully limits the right of inspection to a transaction or transactions at the time current or depending. So that all that this plaintiff is allowed by this decree is an inspection and examination of these indices, so far as may be necessary to assist in the examination of a title for which it is then employed.

We see no error in the decree, and it is

Affirmed.

FIDELITY AND DEPOSIT COMPANY *v.* L. BUCKI & SON LUMBER COMPANY.

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

No. 220. Argued March 20, 1903.—Decided April 6, 1903.

Where it has been declared by the highest court of a State that liability for counsel fees is a part of the obligation assumed by the obligor in an attachment bond, such liability should be enforced in every court in which an action on such bond is brought. Where a liability can be enforced in the state court in which an action is originally brought that liability cannot be taken away by removing the case to a Federal court.

Where as the result of an attachment against a lumber company there was an interruption of business for a certain time, and the plaintiff in the action thereafter refused to deliver materials to the lumber company, the sureties on the attachment bond are liable for the damages directly attributable to attachment, but not for any of the damages caused by the plaintiff's failure to deliver materials or for the reflection on the credit of the lumber company by the bringing of the action in which the attached bond was given.

A postponement or continuance is largely within the discretion of the court, and unless such discretion is shown to have been abused there is no ground for reversal in a refusal to postpone.

On October 1, 1897, the Atlantic Lumber Company commenced two actions at law in the Circuit Court of Duval County, Florida, against The L. Bucki & Son Lumber Company. In each of these actions a writ of attachment was issued, The Fidelity and Deposit Company of Maryland being the surety on the attachment bonds. Both of the attachments were dissolved. Soon after such dissolution the Bucki Company brought the present action against The Fidelity Company upon the attachment bonds. The action was commenced in the Circuit Court of Duval County, Florida, but subsequently removed to the United States Circuit Court for the Southern District of Florida. On a trial in that court the Bucki Company obtained a judgment which by the Court of Appeals of the Fifth Circuit was modified, and as modified affirmed. 109

Fed. Rep. 393; 48 C. C. A. 436. Subsequently thereto each of the parties obtained a writ of certiorari from this court. 184 U. S. 698.

Mr. Richard H. Liggett for The Fidelity and Deposit Company. *Mr. Winfield Liggett* was with him on the brief.

Mr. H. Bisbee for The L. Bucki & Son Lumber Company. *Mr. George C. Bedell* was with him on the brief.

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

The principal question arises in the claim to recover counsel fees incurred in securing the dissolution of the attachments. The reasonable value of such fees was specially found by the jury to have been $7500. The Circuit Court refused to include this in its judgment, but the Court of Appeals ruled otherwise, and ordered judgment for that sum in addition to the amount of the general verdict.

By the law of Florida counsel fees incurred in securing the dissolution of an attachment are recoverable in actions upon attachment bonds. This was distinctly ruled in *Gonzales* v. *De Funiak Havana Tobacco Company*, 41 Florida, 471, in which the second headnote recites that "attorney's fees and other expenses incurred in relation to the attachment, or in procuring its dissolution, are properly allowed as elements of damage in actions upon attachment bonds." And this is conclusive, for by McClellan's Dig. 345, sec. 21, it is provided that "the judges of the Supreme Court of this State shall, in deciding cases, prepare and make a syllabus or statement of the points and principles intended to be decided by the court, which shall be published in the reports in lieu of that usually prepared by the reporter." *Hart, Ex., et al.* v. *Stribling et ux.*, 25 Florida, 435. It is true, as contended by counsel, that the case in 41 Florida was not decided until after the bonds sued on in this case had been executed, but the decision declares the law of the State, and that, in the absence of statutes affecting the ques-

tion, must be taken to have been always the law. And in its opinion the court refers as authority, among other cases, to *Wittich* v. *O'Neal*, 22 Florida, 592, 599, (decided in 1886,) in which it was held that "in a suit on the bond given to obtain a temporary injunction, counsel fees incurred by the defendant in the suit to dissolve such injunction are damages that may be recovered if covered by language of the bond." In the opinion in that case the court, while conceding that other appellate courts had ruled differently, (among them this court in *Oelrichs* v. *Spain*, 15 Wall. 211,) declined to follow such ruling, and said:

"It seems just and right that where a party asks the interposition of the power of the courts, in advance of a trial of the merits of the cause, to deprive the defendant of some right or privilege claimed by him, even though temporarily, that if on investigation it is found that the plaintiff had no just right either in the law or the facts to justify him in asking and obtaining from the court such a harsh and drastic exercise of its authority, he should indemnify the defendant in the language of his bond for 'all damages he might sustain,' and that *reasonable* counsel fees necessary to the recovering of such injunction are properly a part of his damage."

The promise in the bonds sued on here is like that referred to in the language just quoted, and was "to pay all costs and damages which the said L. Bucki Lumber Company may sustain in consequence of it, the said Atlantic Company's improperly suing out said attachment." Liability for these counsel fees being, as declared by its highest court, a part of the obligation assumed by the obligor in an attachment bond given in the courts of Florida, should be enforced in every court in which an action on such a bond is brought. This action was commenced in a Circuit Court of the State, and if it had proceeded there to judgment unquestionably a liability for counsel fees would have been sustained, and it cannot be that by removing the case to the Federal court such liability has been taken away. In *Tullock* v. *Mulvane*, 184 U. S. 497, 505, we held that when a bond had been given in a case pending in the Federal court and an action was thereafter brought in the state court on such

bond, the rule of liability was that existing in the Federal court in which the bond was given, and said:

"It is clear that if it be true that the bond given in a Federal court of equity on the granting of an injunction is not to be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various States, which would imply that the parties did not contract with reference to any definite rule of liability." See also *Missouri, Kansas &c. Railway Company* v. *Elliott*, 184 U. S. 530.

In reference to the other alleged errors, the Court of Appeals, without referring to them in particular, said, "on the fullest consideration of the whole case we conclude that the record presents no error on the part of the trial judge for which the judgment should be reversed."

We do not wonder at this observation of the Court of Appeals, as we find from the record that the plaintiff filed in that court thirty-seven assignments of error covering seventeen printed pages, and the defendant thirty-nine such assignments. It may be true, as the Scriptures have it, that "in the multitude of counsellors there is safety," but it is also true that in a multitude of assignments of error there is danger.

Perhaps it is well to first briefly outline the case and the testimony. Prior to October, 1897, the Atlantic Company had under contract been engaged in furnishing the Bucki Company with logs with which to operate its sawmills, at the rate of 2,000,000 feet per month. It canceled its contract on account of an alleged breach of the Bucki Company and brought the two actions at law, one for $200,000 damages, resulting from such breach, and the other for $9980.80, claimed to be due for logs delivered, and in these actions sued out the two attachments. They were levied upon the mill plant, the logs, lumber, and all other personal property of the Bucki Company. While the personal property was taken into possession by the sheriff, the mill was a fixture, a part of the realty, and the writs did

not operate to dispossess the Bucki Company therefrom, but simply established a lien upon it. By forthcoming bonds the personal property was, after a few days, released, and subsequently the attachments were dissolved. On the trial the plaintiff was permitted to show the extent of its mill plant, the amount of business it had been doing in prior years, the net profits of such business during the nine or ten months preceding the levy of the attachments, the orders and contracts which it had on hand for timber and lumber, an alleged increase in the price of timber in the year succeeding the levy; there was testimony bearing upon the question of its ability to get logs elsewhere, the means of transporting them to its plant, and the existence of negotations for a loan of money secured by the material it then had on hand. There was evidence also tending to show the financial condition of the company, its default in certain payments and efforts it made to utilize its property subsequently to the attachments. After all the testimony had been presented the defendant made a motion in writing to exclude a number of items thereof from the consideration of the jury, upon which motion the court ruled as follows:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, any damages arising from the consideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing lumber and the supply of timber lands; all testimony to the damage to credit, loss of profits and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the profits plaintiff's mill had been making prior to October 1, 1897, be retained and considered only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment and the motion be denied in all other respects."

And in making this ruling it said:

"This order is made at this time only for the purpose of confining the argument to the jury upon these lines. I am fully

satisfied in my own mind that damages from the loss of profits arising from the subsequent or future business which might possibly have been carried on is under the evidence too remote and speculative for the testimony to go to the jury. Some courts have held that every fact should go to the jury to be considered, but the United States courts have uniformly held that where the testimony is such that any reasonable man, or any reasonable court could view it in but one light, the court may exclude it from the jury. In this matter I have admitted the testimony, but I fail to find that there is such evidence of damage from loss of future profits as should go to the jury. If there was no combination of circumstances other than the attachment; had a third party come in and levied an attachment and stopped the business, and there had been no suspension save by the attachment, then there might have been such testimony as would prove a loss of profits; but in this case the particular circumstances, the suspension of the contract for the delivery of logs and the bringing of the two common law suits, so changed the circumstances that there is no certainty that there could have been any profit.

"Every author of authority referred to, even by the plaintiff's attorney, says there must be some certainty.

"Now the certainty of profits here depends upon this: It is claimed that on account of these attachments the plaintiff's credit was injured; that had it not been for the attachments, money could have been borrowed, timber land or stumpage could have been procured, logs could have been procured profitably; if logs could have been procured profitably, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the court cannot say that there is sufficient to justify the jury in finding perhaps large damages against the defendant in this case on account of loss of credit and profit—from the levying of the attachments."

The plaintiff excepted on the ground of an invasion of the province of the jury, and because it was, as it alleged, misled by the rulings of the court in admitting such testimony, and therefore failed to introduce other testimony which it claimed

to possess and which upon another theory would have tended to show the damages it had sustained. Because it was so misled it also filed a motion to discharge the jury and postpone the trial of the case, which motion was denied and the case submitted to the jury. Many instructions were asked by counsel on both sides looking to the question of damages and exceptions were taken to the refusal of the court to give those instructions. In its general charge the court said:

"The only question is a clear-cut question; it is how much damages did the Bucki Company suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment. At the time the writs of attachment were levied there were two common law suits commenced, both of which have been terminated. That is one attending circumstance. The other is that the Atlantic Lumber Company cancelled its contract or considered it cancelled. That is, the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs and the common law suits unite in being the cause for subsequent suffering of damage by the Bucki Company.

* * * * * * * *

"But in this case the attachment did not cause the stoppage of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common law suits.

* * * * * * * *

"I have therefore, as you have seen in the course of the case, granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit.

* * * * * * * *

"I therefore instruct you gentlemen that the damage must be confined to the damages suffered by the detention of the mill for the time being; those damages that have arisen by the

detention of and taking the mill properties from the possession of the plaintiff."

Without further quotations, enough appears to show the general scope of the rulings of the court in reference to the measure of damages, and even conceding that its action, as said by the Court of Appeals, "is, in several particulars, subject to the criticism which is levelled at it by some of the other numerous assignments of error," we are of opinion that there was no such substantial error as justifies a reversal of the judgment. That there may be such certainty of profits as in some actions for breach of contract will justify their recovery is undoubtedly true. *Howard* v. *Stillwell & Bierce Manufacturing Company*, 139 U. S. 199, 206; *Cincinnati Gas Company* v. *Western Siemens Company*, 152 U. S. 200; *Anvil Mining Company* v. *Humble*, 153 U. S. 540, 549. If this action had been one by the Bucki Company against the Atlantic Company to recover damages for a breach of its contract to deliver logs, the inquiry as to profits might have been broader than was permitted in the present case. But, as pointed out in the charge of the court, the failure of the Atlantic Company to further deliver logs was not caused by or the direct result of the attachments. By signing these bonds the surety did not agree to become responsible for all the damages which the Bucki Company might sustain by every act of the Atlantic Company, but simply that it would be responsible for the damages resulting directly from the attachments. The direct result of the attachments was the placing of a lien upon the realty, and for a certain time interrupting the Bucki Company's business by taking possession of its personal property, and the damages which resulted directly from these alone were the damages which the surety company agreed to become responsible for. The court very properly admitted in evidence, and permitted the jury to consider the net profits which had been earned from the carrying on of the business in the few months prior, not as in and of itself constituting the measure of damages, but as tending to show what damages the Bucki Company sustained by the brief interruption of its business. When the lien on the realty was ended and the personal property restored, the atttachments

had spent their force and the surety company became responsible for all the damages attributable directly to the attachments. The failure to further deliver logs, and the reflection on the credit of the Bucki Company by the bringing of the actions may also have damaged or added to the damages of the Bucki Company, but such result was not due to the attachments. The Atlantic Company and not the surety company was the party responsible therefor.

Neither can we see that there was error in refusing to discharge the jury and postpone the trial. A postponement or continuance is largely within the discretion of the trial court, and unless that discretion is shown to have been abused there is no sufficient ground for reversal. It does not appear that any witness had been discharged or any books or documents in possession of the counsel sent away during the trial, and there was no offer then and there to present further testimony. It does not seem to us that the Bucki Company was prejudiced by the ruling of the court in this respect.

The liability for counsel fees and the true measure of damages are the main questions in the case. This latter question was presented in different forms and with various limitations, but we think the rulings of the trial court thereon were substantially correct. We see no error in the record which justifies a reversal of the judgment, and it is

Affirmed.

McCLUNG *v.* PENNY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 384. Argued March 6, 1903.—Decided April 6, 1903.

It must appear that this court has jurisdiction of the case before it can inquire whether the territorial court has committed any error in its decision or in permitting the action to be maintained, and such jurisdiction does not exist if the value of that which is in controversy does not exceed $5000.

Where it appears that the matter in dispute is only the possession of certain public land for which a contested entry has been made and it is clear from the facts that such possession is worth much less than $5000, the judgment of the territorial court will not be reviewed.

The relinquishment of rights under a homestead or preëmption entry opens the land to entry by another; and a second entryman may, if there has been no contest, perfect a title, but if the records show that there has been a contest and the successful contestant relinquishes, a party subsequently entering the land is charged with notice of the equitable rights of the unsuccessful contestant which can be enforced whenever the title passes from the government.

This was an action of forcible entry and detainer, commenced by Penny, the defendant in error, in the Probate Court of Kay County, Oklahoma Territory, a court adjudged by the Supreme Court of the Territory to have jurisdiction in such actions by virtue of sec. 4805, art. 13, chap. 67, and sec. 1562, art. 15, chap. 18, Rev. Stat. 1893. A judgment for the plaintiff was affirmed by the Supreme Court of the Territory, 11 Oklahoma, 474, and thereupon the case was brought here on a writ of error. The testimony on the trial developed these facts: The parties contested in the Land Department the right to enter the tract in controversy as a homestead. The plaintiff's contention was sustained, and he was permitted to make entry. Having received the homestead certificate, he commenced this action.

Mr. S. H. Harris for plaintiff in error. *Mr. J. J. Darlington* was with him on the brief.

Mr. A. G. C. Bierer for defendant in error. *Mr. Frank Dale* and *Mr. C. W. Ransom* were with him on the brief.

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

The defendant in error has filed a motion to dismiss the writ of error for want of jurisdiction, on the ground that the value of the matter in controversy does not exceed $5000, and in support thereof has filed the affidavits of himself and five

others that the reasonable rental value of the land is not more than $620 per annum. The plaintiff in error contends that the matter in dispute is in fact not the possession of the land but the ownership, and at the time the writ of error was allowed he filed the affidavits of four persons, one his counsel, who testified that the action involved both the possession and the ownership of the lands, that the matter in controversy exceeded in value the sum of $6000, that the value consisted in the right of possession and power to relinquish to the government the homestead entry; the others, who stated that the value of such relinquishment was $8000 or $8500. The record shows that in the answer was this averment: "That said land with the improvements of the defendant thereon is reasonably worth and the relinquishment thereof could be sold for the sum of $5000; that this defendant demands the right to remain in possession of said land by virtue of her vested interest therein, and as against the claims of said plaintiff under his void and unlawful homestead entry, in order to protect the limited title which defendant has acquired in said land, and to acquire a perfect legal title therein, under and by virtue of the laws of the United States;" and also that on the trial she testified that the value of the land was $5000. In her answer she set up facts which she insisted showed that she had an equitable right to the land, and averred that she intended as soon as the patent was issued to the plaintiff to begin an action in the proper court to have the same declared a title in trust for her benefit, and asserted that by reason thereof an action of forcible entry and detainer could not be maintained against her. The Supreme Court of the Territory, in affirming the judgment, held that the matter in controversy was simply the right of possession. It closed its opinion in these words:

"This court in the case of *Kirtley* v. *Dykes*, 10 Oklahoma, 18, says: 'When the matter was finally decided by the Land Department, and a judgment rendered in favor of the plaintiff, her right to the possession of the premises was completed.' *Armour Packing Co.* v. *Howe*, 64 Pac. Rep. 43; *Wideman* v. *Taylor*, 65 Pac. Rep. 615. The entire theory of this action is that it is purely possessory. That it deals with the possessory rights

and not the ultimate rights of the parties. Questions other than the immediate rights of the parties cannot be litigated in such action. If the party desires to have an adjudication on her right to a resulting trust in the land, she must resort to another forum, and another form of action."

Affidavits on the motion to dismiss show the value of possession to be not more than $640 per annum. Her own allegation in the answer is that the land and the relinquishment thereof were reasonably worth $5000. Her testimony on the trial, and there was none other, was that the land was worth $5000. Affidavits of witnesses assert that the ownership was in controversy and that the value of that ownership with the right of relinquishment was in excess of $5000.

Upon these facts we think the motion to dismiss should be sustained. The matter in dispute being only the possession, clearly the value of that possession was but a few hundred dollars. Even if the title had been in controversy, the record up to the time of the decision of the Supreme Court showed that there was not exceeding $5000 in controversy. The Supreme Court held that the matter in dispute was only the right of possession, and that right of possession was all that it decided. If the question of title was involved an action of forcible entry and detainer could not have been maintained, and the Probate Court had no jurisdiction of an action of ejectment. But before we can inquire whether the Supreme Court committed any error in its decision it must appear that we have jurisdiction of the case. Now whether the Supreme Court erred in permitting this forcible entry action to be maintained involves an inquiry whether it erred in permitting an action to be maintained in respect to something whose value is less than $5000. If that which alone could be in contest in the action and which alone was determined by the judgment is of a value less than $5000, then it is beyond our jurisdiction to inquire whether the court erred in permitting the action to be maintained.

Further, neither of the four witnesses whose affidavits were filed to secure the writ of error testified directly to the value of the land, and while they said that the value of the relinquishment was from $6000 to $8500, yet clearly the value of a re-

linquishment cannot be greater than that of the land itself. But what is the relinquishment to which these witnesses refer? When one has made a homestead or preëmption entry he may file in the land office a relinquishment of all rights obtained thereby, and if he does so the land becomes open to entry by another. If there has been no contest and the land records are free from any other claim than that which is relinquished, the second entryman may perfect a title. But if the records of the land office show that there has been a contest, and the successful contestant makes a relinquishment, a third party entering the land is charged with notice of the equitable rights of the unsuccessful contestant; and if, as a matter of law, those rights are entitled to protection, they can be enforced whenever the legal title has passed from the government. In other words, the relinquishment operates only against the party making the relinquishment and does not destroy any adverse rights of which there is in the land office an existing record. The plaintiff, although possession be obtained by him through this forcible entry and detainer action, cannot, by thereafter relinquishing his entry, and permitting some one else to make an entry, destroy the equitable rights, if any, which defendant possesses. Hence, as a relinquishment will not deprive the defendant of her equitable rights, and simply substitutes one party for another in any legal proceedings which she may hereafter institute to assert those rights, it is clear that it cannot have any such value as is ascribed to it in these affidavits.

The writ of error is

Dismissed.

WINEBRENNER *v.* FORNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 409. Argued March 6, 1903.—Decided April 6, 1903.

Where there is a seeming contradiction between two clauses in a proclamation opening lands for settlement, the first clause being a special description of a strip of land, and the second being found in a portion of the proclamation defining the purposes for which the strip is made, the first clause is entitled to preference.

The strip of land referred to in the President's proclamation of August 19, 1893, "one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," ran around and immediately within the outer boundaries of the body of lands opened for settlement, and not around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians.

THE appellee holds the government patent to the southwest quarter of section 19, township 26 north, range 1 east, of the Indian meridian in Kay County, Oklahoma Territory. The appellant claimed an equitable right to the land and brought this suit to have the defendant declared a trustee of the title for his benefit. A demurrer to a second amended petition was sustained by the trial court and a decree entered dismissing the suit. This decree was affirmed by the Supreme Court of the Territory, 11 Oklahoma, 565, and from that decision this appeal was taken. The tract is within that portion of the Cherokee Outlet opened to settlement by the President's proclamation of August 19, 1893, and the only question as agreed by counsel on both sides, is whether appellee was disqualified by reason of being within prohibited limits on September 16, 1893, the day on which by the President's proclamation the land was opened for settlement.

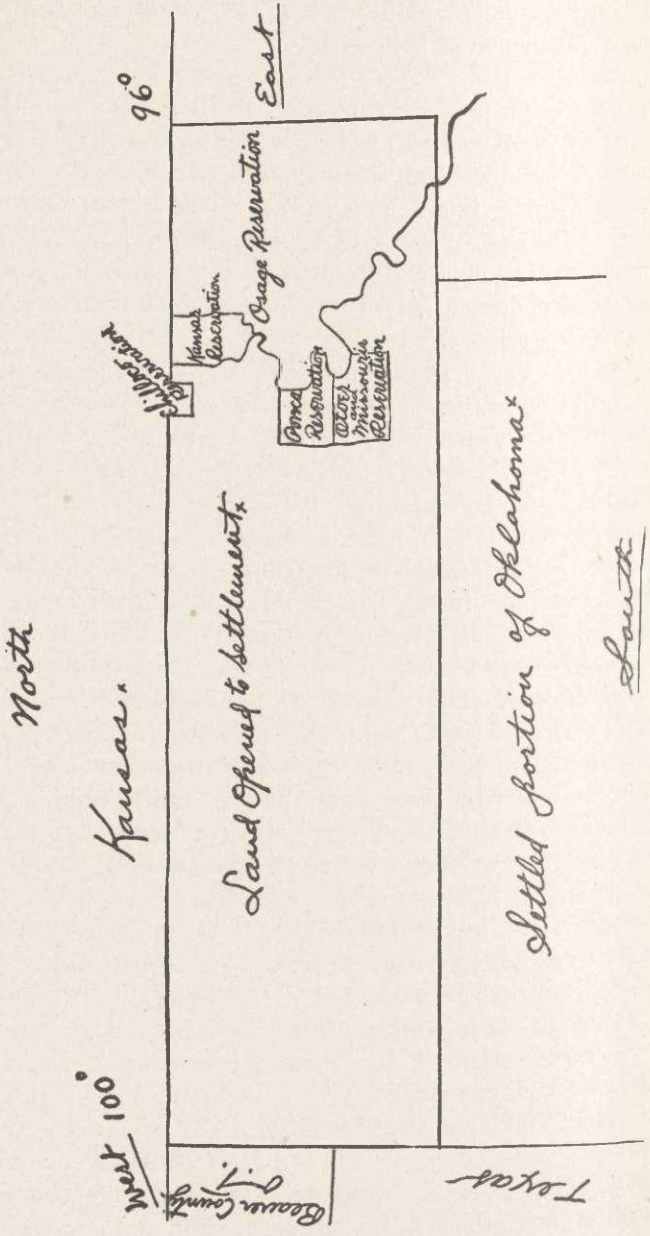
Mr. S. H. Harris for appellant. *Mr. J. J. Darlington* was with him on the brief.

Mr. A. G. C. Bierer for appellee. *Mr. Frank Dale* was with him on the brief.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The President's proclamation, after reciting that the Cherokee Nation of Indians had "ceded, conveyed, transferred, relinquished and surrendered all its title, claim and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth degree (100°) of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree (96°) of west longitude; and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe reservation created or defined by executive order dated August tenth, eighteen hundred and sixty-nine;" and also that Congress had passed an act authorizing the President of the United States to open to settlement any or all lands included in such cession not allotted or reserved, declared that on September 16, 1893, the lands so acquired would be open to settlement, saving and excepting certain specified tracts and portions, including in the latter the Osage, the Kansas, the Ponca, the Otoe and Missouri reservations. The diagram on the following page shows in a general way the land first above described as ceded and relinquished by the Cherokee Indians, the land opened to settlement, and the excepted reservations. The proclamation declared that the land should be opened to settlement "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this proclamation." The act of 1893, 27 Stat. 640, 643, which is one of the statutes referred to, contained this provision:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of


North
Kansas
Land Opened to Settlement
Kansas Reservation
Osage Reservation
Osage Reservation
Otoe Missouria Reservation
Settled portion of Oklahoma
Texas
Beaver County
West 100°
96°
East

said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

And in the President's proclamation it was declared:

"Said lands so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

"A strip of land, one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz.:

"Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

The defendant was on the day named, September 16, 1893, within the limits of the Ponca reservation, and from such reservation went into the territory, opened the settlement, and made his homestead entry.

The contention of the plaintiff is that the strip is to be taken as extending around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians, while the contention of the defendant is that it is to be considered as simply around the outer boundaries of the tract opened to settlement. If the contention of the plaintiff is correct the strip on the north, west and south would be immediately contiguous to the land opened to settlement, while on the east it would be a distance of many miles therefrom. If the contention of the defendant is correct it would on all sides be contiguous to such land. There is a manifest equity in the latter contention, especially when we consider the great multitude (according to reports 100,000 and over) who at the

appointed time surrounded this tract with a view of entering the same and obtaining homesteads. And such we think is the true construction of the proclamation. The strip is described as "around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation." If this were all there would be no doubt. The doubt arises from subsequent words, "said strip, the inner boundary of which shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." It is contended that what was known as the Cherokee Outlet extended from the ninety-sixth to the one hundredth degree of longitude and included the three or four Indian reservations east of the tract opened to settlement. Undoubtedly this entire tract was originally the Cherokee Outlet. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 206, and treaties cited. It was originally set apart for the use of the Cherokees as a sort of appurtenance to the 7,000,000 acres specifically granted as their reservation. Subsequently, by various treaties, portions of it were withdrawn from the Cherokees' possession and set apart as reservations for the various tribes named. Still the entire territory was commonly known as the Cherokee Outlet, and was referred to as such in the act of 1893, which ratified the settlement and relinquishment by the Cherokees and authorized the opening to settlement of such portions of the land so ceded and relinquished as the President should determine. There is thus a seeming contradiction between the two clauses of the proclamation. But the first is used in special description of the strip, while the second clause is found in that portion of the proclamation which defines the purposes for which the strip is to be used. As between the two clauses, therefore, the first is entitled to preference, as at that time the attention of the writer must be supposed to have been directed to the location of the strip. But there are other reasons which make more clear the true construction. In addition to the equity referred to heretofore these matters may be noticed: If the strip was within the tract to be opened to settlement it was public land, and the President might well set that apart for temporary occupancy by those who were designing to go into

the body of lands to be opened to settlement, whereas if the contention of the plaintiff is correct the President would be setting apart a strip 100 feet in width through lands reserved to certain Indian tribes and allowing a temporary occupancy thereof. We do not mean to deny the power of the President, but it is more reasonable to suppose that he was setting apart a strip of the public domain than a strip of Indian reservations for such temporary occupancy. Further, the last sentence in the paragraph from which the second clause is taken says that the occupancy of the strip "shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby" —language which is apt if it described a portion of the larger body of the public domain to be opened to settlement and not apt if it referred to a portion of Indian reservations. The significance of the description "around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement," is found in the purpose to prevent any one from being upon a railroad right of way running through the tract or upon any of the separate quarter sections or sections reserved by the proclamation for school and county purposes within the limits of the entire body. *Smith* v. *Townsend*, 148 U. S. 490; *Payne* v. *Robertson*, 169 U. S. 323.

Our conclusions, therefore, are that the contention of the defendant is correct, and that the strip was one which ran around and immediately within the outer boundaries of the entire body of lands opened to settlement.

Such conclusion is in accord with the rulings of the Land Department. It is true that at or about the time of the opening of the land to settlement there were one or two contradictory orders and dispatches sent out from that department, but these were simply responses to requests for information and made without any hearing from parties interested adversely, and it is also true that in the subsequent consideration of the question there were some differences of opinion between successive Secretaries of the Interior, but the final conclusions were in harmony with the views we have expressed. *Cagle* v. *Mendenhall*, 20 L. D. 446; 26 L. D. 177; *Welch* v. *Butler*, 21

L. D. 369; *Brady* v. *Williams*, 23 L. D. 533; 25 L. D. 55; 25 L. D. 402.

The judgment of the Supreme Court of Oklahama is

Affirmed.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.

SAWYER *v.* PIPER.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 225. Argued April 6, 7, 1903.—Decided April 27, 1903.

The mere averment of the existence of a Federal question is not sufficient to give this court jurisdiction, but as held in *Hamblin* v. *Western Land Company*, 147 U. S. 531, a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Where the only Federal question alleged is that the refusal of the state court to allow the plaintiff in error to file a supplementary answer in a suit, in which foreclosure and sale had been decreed and sustained by the highest court of the State, was a taking of property without due process of law, and a denial of the equal protection of the laws, and the trial court does not appear to have abused its discretion, there is no real Federal question involved and the writ of error will be dismissed.

ON April 27, 1897, Daniel S. Piper, the defendant in error, commenced a suit in the District Court of Steele County, Minnesota, against the plaintiffs in error and L. C. Woodman. The complaint alleged the ownership by the Sawyers of a tract containing 790 acres, upon which were several mortgages, all of them fully set forth and all belonging to the plaintiff. It also averred an agreement, made on February 19, 1895, by the terms of which the Sawyers were to pay plaintiff the sum of $20,400, with, in addition, monthly payments of $100; that the Sawyers were to convey the land to plaintiff; that he should execute a deed to them, the deed to be placed in escrow in the hands of Woodman, the other defendant, and to be delivered to them on full payment of the sums named; with a proviso that upon

failure of the Sawyers to make payment of the $20,400, with the monthly additions of $100, all their rights under the contract should cease and determine. The complaint further alleged a failure to make the monthly payments. The prayer was for a judgment of strict foreclosure of the contract unless redeemed within a year by the payment of the amount due with interest, or, in the alternative, if the court should deem it inequitable to adjudge a strict foreclosure, that the contract and all the mortgages be foreclosed by the sale of the mortgaged premises, and for such other and further relief as should seem just and equitable. The defendant Woodman, who held the deed in escrow, made no defence. The Sawyers answered, admitting the allegations of the complaint in respect to the mortgages and contract, and alleged that by such contract the amount due the plaintiff was fixed at $20,400, which included interest upon all the mortgages up to February 19, 1895. They also averred that the plaintiff had commenced in the same court an action of ejectment, which was still pending, and therefore this action should be abated. In his reply the plaintiff admitted the commencement of the action of ejectment, but alleged that it had been dismissed prior to this suit. On the trial the Sawyers offered the plaintiff a decree of foreclosure for the $20,400, named in the contract, and all unpaid monthly payments, which offer was declined. The court thereupon found the facts in respect to the mortgages and agreement as alleged in the complaint; ruled that such agreement did not extinguish by merger or otherwise the several mortgages, and that the plaintiff was entitled to foreclosure of each of the mortgages for the amount due thereon, and rendered judgment of foreclosure and sale accordingly. The case was taken to the Supreme Court of the State, which held, 73 Minnesota, 332, that the prior mortgages were merged in the agreement, which created an equitable mortgage on the land, and remanded the case with instructions to the court below to determine the amount due upon such equitable mortgage and amend its findings of fact and conclusions of law accordingly. On the second trial, the Sawyers applied for leave to file a supplementary answer, setting forth their offer on the first trial to let judgment and decree be entered for the fore-

closure of the equitable mortgage and the refusal of the plaintiff to accept such offer, and asserting that thereby the plaintiff had waived the lien of such equitable mortgage and precluded himself from foreclosing the same; and further, that a judgment in plaintiff's favor foreclosing said lien for any sum would deprive them of property without due process of law and deny to them the equal protection of the laws. The court declined to permit the filing of such supplementary answer, amended its findings of fact and conclusions of law, so as to show that the defendants had defaulted in the monthly payments referred to, and that therefore the equitable mortgage had become due, and entered a decree of foreclosure thereof and for the sale of the mortgaged premises. This decree was taken to the Supreme Court and affirmed, 78 Minnesota, 221, and thereupon this writ of error was sued out.

Mr. Joseph A. Sawyer for plaintiffs in error. *Mr. H. W. Childs* was on the brief.

Mr. Robert Taylor for defendant in error. *Mr. Frank B. Kellogg*, *Mr. Wesley A. Sperry* and *Mr. Lewis L. Wheelock* were on the brief.

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

In their application for leave to file a supplementary answer the plaintiffs in error averred that to render a decree foreclosing the equitable mortgage would, under the circumstances, be a taking of property without due process of law and denying to them the equal protection of the laws, and claimed "the protection guaranteed to all citizens of the United States by the provisions of section 10 of Article I of the Constitution of the United States and of section 1 of the Fourteenth Amendment to the Constitution of the United States." While they thus asserted the existence of a Federal question, yet it is well settled that the mere averment of such a question is not sufficient. As said in *Hamblin* v. *Western Land Company*, 147 U. S. 531, 532:

"A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millinger* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

See also *Wilson* v. *North Carolina*, 169 U. S. 586; *St. Joseph & Grand Island Railroad Co.* v. *Steele*, 167 U. S. 659; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336.

We think this case comes within that rule. Rulings in respect to the amendment of pleadings are largely within the discretion of the trial court, and unless a gross abuse of that discretion is shown there is no ground for reversal. *Gormley* v. *Bunyan*, 138 U. S. 623. Here the trial court refused to permit any amendment of the pleadings, for a supplementary answer is substantially such an amendment. We cannot see that the trial court abused its discretion, even if that were a Federal question and properly before us for consideration. All the facts in reference to the original mortgages and the agreement were set forth in full in the original complaint, and relief was asked in the alternative—either a strict foreclosure of the agreement, or, if that were deemed inequitable, a foreclosure of the original mortgages. The defendants in their answer set up all their defences to plaintiff's claim of relief upon the facts stated in the complaint. That at the hearing they offered to consent to a decree of foreclosure of the equitable mortgage created by the agreement (which offer was declined by the plaintiff) did not pay the debt or release the property from the liens. Debts are not paid nor liens cancelled in that way. A defendant cannot by offering on a trial to consent to a judgment or decree for a part of the claim sued on, prevent the plaintiff from subsequently obtaining the judgment or decree demanded by the facts of the case, although it be that which had been offered and also declined. All the facts were before the trial court as

well as the Supreme Court, and the decision was that which right and justice demanded. There is no merit in the defence which was sought to be interposed, and certainly nothing which calls upon this court to interfere with the decision of the state court.

The writ of error is

Dismissed.

THE OSCEOLA.

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

No. 98. Argued December 2, 1902.—Decided March 2, 1903.

1. The law both in England and America is settled as to the following propositions:
   (1) That a vessel and her owners are liable, in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
   (2) That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to such ship.
   (3) That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
   (4.) That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received from negligence or accident.
2. Section 3348, Rev. Stat. of 1898 of Wisconsin, providing that every ship, boat or vessel used in navigating the waters of that State shall be liable for all damages arising from injuries done to persons or property thereby, and that the claim therefor shall constitute a lien upon such ship, boat or vessel, is confined to cases where the damage is done by those in charge of a ship, with the ship as the "offending thing." Cases of damages done *on board* the ship are not, within the meaning of the act, damages done *by the ship*. Such statute does not create a lien which can be en-

forced *in rem* for injuries received by a seaman by the falling of a gangway, resulting as alleged from the master negligently ordering the same to be hoisted while a head wind was blowing.

This was a libel *in rem* filed in the District Court for the Eastern District of Wisconsin, in admiralty, against the propeller Osceola, to recover damages for a personal injury sustained by one Patrick Shea, a seaman on board the vessel, through the negligence of the master.

The case resulted in a decree for the libellant, from which an appeal was taken by the owners to the Circuit Court of Appeals, which certified to this court certain questions arising upon the following statement of facts:

"The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed about 1050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind, and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway

should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in 'requiring and permitting the work of unshipping said gangway to be done while the said vessel was at sea and running against the wind.' The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel."

The questions of law upon which that court desired the advice and instruction of the Supreme Court are—

"First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

"Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

"Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

Mr. C. H. Van Alstine for appellants.

A proceeding *in rem* in the admiralty, is a proceeding to give effect to a maritime lien and such a lien must always exist to form the basis of such a proceeding. *Beane* v. *The Mayurka*, 2 Curt. 72; *The Rock Island Bridge*, 6 Wall. 213; *The Corsair*, 145 U. S. 335, 347; *The Yankee Blade*, 19 How. 82, 89; *The Glide*, 167 U. S. 606, 612.

The maritime lien then is but an incident, a security, and does

not exist in favor of one to whom the owner of the vessel is not liable *in personam* founded upon some maritime contract or tort connected with the vessel.

It necessarily follows that the vessel is not responsible unless appellants are liable *in personam* to appellee under some law, maritime or state, for the damages caused by the negligent order of the master, and such law gave him a lien upon the vessel as security for the payment of his damages.

The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. *The Lottawanna*, 21 Wall. 558. See the Laws of Oleron relating to seamen, Art. 6; Appendix to 30 Fed. Cas. p. 1174; the Laws of Wisbuy, Art. 18; Appendix to 30 Fed. Cas. p. 1191; the Laws of Hanse Towns, Art. 39; Appendix to 30 Fed. Cas. p. 1200; the Marine Ordinances of Louis XIV, sections 11 and 12, title Fourth; Appendix to 30 Fed. Cas. p. 1209.

The substance of these laws, to the effect that if a seaman be wounded in the service of the ship or fall sick during the voyage, he shall be paid his wages and cured at the charge of the ship, has been adopted in this country, *The Alexandria*, 17 Fed. Rep. 390, but these laws are insufficient to give appellee a lien upon the vessel for damages based on mental and physical pain and loss of earning capacity.

The court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. *The Lottawanna*, 21 Wall. 576.

As the maritime law of this country is silent in respect to the claim made in the libel, and as the case must be decided according to law, it is evident that the court must—if it has the right so to do—apply the municipal law, for as we have already seen it cannot extend the maritime law beyond its established limits. As, however, the appellee resorted to a libel *in rem*, the court is bound by the maritime law. *Homer Ramsdell Trans. Co.* v. *La Compagnie Gen. Trans.*, 182 U. S. 406; *The City of Norwalk*, 55 Fed. Rep. 107.

By the maritime law of this country the liability of the ves-

sel owner, in cases like the present, is limited to medical and surgical attendance, and wages to the end of the voyage.

While there are some reported cases in admiralty, holding that a seaman injured in the service of the ship by the negligence of the master, has a cause of action to recover damages from the owner for such personal injury, there is no reported case holding that he has a lien upon the vessel, and the cases holding the owner liable *in personam* are rested on the common law, as that law was understood by the courts deciding them.

Prior to the decision of *Ross* v. *Railway Company*, 112 U. S. 377, decided December 8, 1884, and overruled in *Railway Company* v. *Conroy*, 175 U. S. 323, there is no reported case in the Federal courts of a suit by a seaman against a vessel, or its owners, to recover damages for a personal injury caused by the negligence of the master in the navigation or management of the vessel, excepting *Daub* v. *Railway Company*, 18 Fed. Rep. 625. As to fellow servant relations, see *The Titan & The Hills*, 23 Fed. Rep. 313; *The A. Heaton*, 43 Fed. Rep. 592; *The Sachen*, 42 Fed. Rep. 66; *McCullough's Adm.* v. *N. Y., etc., Steamboat Co.*, 20 U. S. App. 570; *Quin* v. *Lighterage Co.*, 23 Fed. Rep. 363; *Olsen* v. *Navigation Co.*, 44 C. C. A. 51, which were cases decided according to the common law. See also *Quebec Steamship Co.* v. *Merchant*, 133 U. S. 375; *Homer Ramsdell Co.* v. *La Compagnie Gen. Trans.*, *supra*; *Railway Co.* v. *Conroy*, 175 U. S. 323; *Hedley* v. *S. S. Co.*, 1 L. R. Q. B. 58; *Kalleck* v. *Deering*, 161 Massachusetts, 469; *Gabrielson* v. *Waydell*, 135 N. Y. 1.

As the suit at bar is *in rem*, it must be decided under the maritime law and under that law the liability of the owner of a vessel in cases like the present is limited to medical and surgical attendance and wages to the end of the voyage. But if the court has the right to apply to this case any part of the municipal law, sound reason and natural justice requires only that the owner of the vessel shall be bound to use reasonable care to furnish a seaworthy vessel, sufficient and safe appliances, and sufficient and competent seamen and officers, and that the law of assumption of risk should be applied to the seamen.

The master of a vessel, it is true, is vested with considerable

power over the seamen, but he has not the power exercised by masters under ancient maritime law. He has, however, power to compel obedience by the seamen to his orders issued in the navigation and management of the vessel, by forfeiture of wages and imprisonment. Rev. Stat. sec. 4596. But whatever power the master has, he is invested with it *by the maritime law*, not by the owner of the vessel.

The most reasonable and proper construction of the Wisconsin statute makes it apply to cases where the ship itself, and not one of its appliances, directly produces the damage as the last link in the chain of events commencing with negligence or misconduct in the navigation of the vessel as the first or proximate cause, and it is submitted that such is the construction due to this statute.

The Federal courts enforce liens, created by state statutes, upon vessels, when such statutes are not in conflict with the laws and usages of the United States, because, and only because, the lien touches a subject within the constitutional jurisdiction of the Federal courts, and it necessarily follows that they cannot go beyond the state or municipal law creating the cause of action and lien. *Bigelow* v. *Anderson's Adm.*, 34 U. S. App. 261, 273; *The City of Norwalk*, 55 Fed. Rep. 98; *Sherlock* v. *Alling*, 93 U. S. 104; *The Corsair*, 145 U. S. 347. Where a cause of action depends upon general law, the Federal courts are not bound by the state decisions. *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 370.

By the common law of Wisconsin the master is not liable to his servant for a personal injury caused by the negligence of a fellow servant, and whether the relation of fellow servants exists, in a given case, is not to be determined by the rank or grade of the offending servant, but by the nature of the act in the performance of which the injury was inflicted, without regard to the rank of the offending servant. If the negligence of the servant causing the injury was in respect to an act that the law implies a contract duty on the part of the master to perform, and the offending servant has been charged by the master with the performance of that act, then such servant is an agent of the master, but as to all other acts he is a fellow serv-

ant of the servant injured. *Dwyer* v. *Am. Ex. Co.*, 82 Wisconsin, 307; *Stutz* v. *Armour*, 84 Wisconsin, 623; *Cadden* v. *Am. Steel Barge Co.*, 88 Wisconsin, 409; *Hartford* v. *Railway Co.*, 91 Wisconsin, 374; *Klochinski* v. *Shores Lumber Co.*, 93 Wisconsin, 417; *McMahon* v. *Ida Mining Co.*, 95 Wisconsin, 308; *Albrecht* v. *Railway Co.*, 108 Wisconsin, 530, 538; *Wiskie* v. *The Montello Granite Co.*, 111 Wisconsin, 443, and cases cited.

The rule in Wisconsin is that all servants charged by the master with the duty of furnishing another servant with a place to work, or with appliances to work with, or with fellow servants, is an agent of the master for those purposes, but in every other case all servants of a common master, engaged in the same general undertaking, are fellow servants. None of the Wisconsin cases cited involve maritime torts; there are, however, two such cases closely, at least, analogous in their facts, in which different conclusions were reached. See *Matthews* v. *Case*, 61 Wisconsin, 491; *Thompson* v. *Herman*, 47 Wisconsin, 602.

Mr. John H. Roemer for appellee.

As this case is *in rem* unless a lien exists by virtue of the statute of Wisconsin or by the maritime law, or unless appellants have waived the objection by appearing personally, giving an undertaking for the release of the vessel and litigating upon the merits, the action cannot be maintained.

The sovereignty of the State of Wisconsin extends to the center of Lake Michigan, and its laws so far as they do not conflict with the laws of the United States passed in the regulation of commerce and navigation, are operative within the boundaries of that State.

If a state statute gives a right of action touching a subject of maritime nature, the admiralty can administer the law by a proceeding *in rem*, if the statute grants a lien, or *in personam*, no lien being granted. *The Corsair*, 145 U. S. 335; *Bigelow* v. *Nickerson*, 70 Fed. Rep. 113.

Sec. 3348, Wisconsin Statutes of 1898, provides that for all damages arising from injuries done to persons or property by such ship, boat or vessel, a lien is given which may be enforced by proceeding in admiralty, etc.

Whether this statute creates any new cause of action or merely deals with causes already maintainable at common law or in admiralty has never yet been determined by judicial construction.

If the statute merely applies to causes *in personam* already maintainable under the statute, the common, or the maritime law, it is effective to create liens in all cases within its scope, and such liens may be enforced by proceeding *in rem* in admiralty. *Mendell* v. *The Martin White*, Hoff. Op. 450; Case No. 9419 Fed. Cases; *The J. E. Rumbell*, 148 U. S. 1; *The Oregon*, 45 Fed. Rep. 62; *The Oregon*, 158 U. S. 186; *The J. F. Warner*, 22 Fed. Rep. 342.

The subjects of admiralty jurisdiction include "all affairs relating to mariners, whether ship officers or common mariners, their rights and privileges respectively; their office and duty; their wages; their offences, whether by wilfulness, casualty, ignorance, negligence or insufficiency, with their punishments." *Chamberlain* v. *Chandler*, 3 Mason, 242. The rule of the English courts that unless the owner is liable at common law the vessel cannot be held in admiralty, has been rejected in this country. *Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406.

As to jurisdiction in cases of marine torts, see *The Mariana Flora*, 11 Wheat. 54; *The Palmyra*, 12 Wheat. 1; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, 20 Fed. Rep. 140; *The Max Morris*, 24 Fed. Rep. 860; *The Max Morris*, 28 Fed. Rep. 881; *Steamer Max Morris* v. *Curry*, 137 U. S. 1.

If it should be determined that the proceeding should have been commenced *in personam* and not *in rem*, the question cannot be raised at this time. Betts, Adm. Pr. 99; *The Zenobia*, 1 Abb. Adm. 48; *Roberts* v. *Huntsville*, 3 Woods, 386; *The Union*, 4 Blatchf. 90; *The White Squall*, 4 Blatchf. 103; *The Monte A.*, 12 Fed. Rep. 331; *The Williamette*, 70 Fed. Rep. 874; *Leathers* v. *Blessing*, 105 U. S. 626; *Chamberlain* v. *Ward*, 21 How. 554; *The Charles Morgan*, 115 U. S. 69; 2 Brown's Civil & Adm. Law, p. 400; *The Warren*, 2 Ben. 498; *The Bilboa*, Lush. 149.

There is a conflict of opinion as to whether or not the vessel

and its owners are liable in admiralty for the negligence of the master in the management and navigation of the ship, proximately causing injury to an ordinary seaman; that the vessel and its owners are responsible in such cases is supported by the better reasoning. *Peterson* v. *The Chandos*, 4 Fed. Rep. 645; *The Clatsop Chief*, 8 Fed. Rep. 163; *The Titan*, 23 Fed. Rep. 413; *The A. Heaton*, 43 Fed. Rep. 592, and cases cited; *The Julia Fowler*, 49 Fed. Rep. 277; *The Frank and Willie*, 45 Fed. Rep. 494; *McCullough's Admx.* v. *Steamboat Co.*, 20 U. S. App. 570; 61 Fed. Rep. 364; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377; *Leathers* v. *Blessing*, 105 U. S. 626; *The St. Lawrence*, 7 Notes, Cas. Adm. & Ecc. 556, 566; 14 Jur. 534; *Keating* v. *Pac. St. Whaling Co.*, 21 Washington, 415; *The Miami*, 93 Fed. Rep. 218; *Oleson* v. *Oregon, C. & N. Co.*, 104 Fed. Rep. 574.

Passengers have often maintained libels, as well against the ship carrying them as against other ships, for personal injuries caused by negligence for which the owners of the ship libelled were responsible. *The New World*, 16 How. 469; *The Washington*, 9 Wall. 513; *The Juniata*, 93 U. S. 337; *The City of Panama*, 101 U. S. 453, 462. The sixteenth rule in admiralty, which directs that "in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only," does not affect libels for negligence. *Leddy* v. *Gibson*, 11 Ct. Sess. Cas. (3d ser.) 304, distinguished. No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law. Courts of admiralty have always considered seamen as peculiarly entitled to their protection. Seamen may recover their wages by libel *in personam* against either the owners or the master, or by libel *in rem* against the ship. *Sheppard* v. *Taylor*, 5 Pet. 675, 711; *Bronde* v. *Haven*, Gilp. 592; *Temple* v. *Turner*, 123 Massachusetts, 125, 128; Rule 13 in Admiralty. Their lien on the ship or its proceeds takes precedence of all other claims, except, perhaps, claims for salvage, or for damages by collision owing to the fault of their ship. Hen. Adm. sec. 69, and cases cited; *Norwich Co.* v. *Wright*, 13 Wall.

104, 122. A seaman, taken sick or injured or disabled in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. *Harden* v. *Gordon*, 2 Mason, 541; *The George*, 1 Sumner, 151; *Reed* v. *Canfield*, 1 Sumner, 195; *Sherwood* v. *Hall*, 3 Sumner, 127.

The cases relied upon by claimants, that the master of the vessel and the appellee were fellow servants, are common law cases and can be distinguished from this. *Gabrielson* v. *Waydell*, 135 N. W. 1; *Hedley* v. *Pinkney & Sons S. S. Co.*, 1 L. R. Q. B. 58; *Kelleck* v. *Deering*, 161 Massachusetts, 469; *Matthews* v. *Case*, 61 Wisconsin, 491, distinguished and see the only case in which the precise point in question has been squarely raised and decided, *Thompson* v. *Hermann*, 47 Wisconsin, 602, and numerous cases cited. See also *Railway Co.* v. *Conroy*, 175 U. S. 323; *Union Pacific Ry. Co.* v. *Fort*, 17 Wall. 553; *Railway Co.* v. *Ross*, 112 U. S. 377.

But to the general rule there are certain well defined exceptions, recognized by both state and Federal courts, some of which are applicable to the case at bar. Where a master abdicates from control and management of his business, and puts the whole power of superintendence into other hands, he necessarily has one or more vice principals. Any person to whom is committed under such circumstances the entire control of all the servants, including the power to hire and discharge, is a vice principal for whose negligence in the matter of the control of the servants, and the management of the business, the master is liable to the servants. Sherman & Redfield on Negligence (5th ed.), secs. 230, 233, and cases cited; *Railway Co.* v. *Ross*, 112 U. S. 377; *Railway Co.* v. *Baugh*, 149 U. S. 364; *Railway Co.* v. *Peterson*, 162 U. S. 347; *Railway Co.* v. *Keegan*, 160 U. S. 259; *Railway Co* v. *Conroy*, 175 U. S. 323; *Crispin* v. *Babbitt*, 81 N. Y. 516; 20 Am. & Eng. Ency. of Law, 147; *Johnson* v. *First National Bank*, 79 Wisconsin, 414.

See the following cases as to fellow servants or vice principal: *Harrison* v. *Railroad Co.*, 77 Michigan, 409; *Malcolm* v. *Fuller*, 152 Massachusetts, 428; *Carlson* v. *N. W. Telephone Exchange Co.*, 63 Minnesota, 428; *Tailor* v. *Railway Co.*, 121 In-

diana, 124; *Railway Co.* v. *May*, 108 Illinois, 288; *Gormley* v. *Vulcan Iron Works*, 61 Missouri, 492; *Smith* v. *Wabash Railway Co.*, 92 Missouri, 366; *Schroeder* v. *Railway Co.*, 108 Missouri, 322; *Lasky* v. *Railway Co.*, 83 Maine, 461; *Patton* v. *Railway Co.*, 96 North Carolina, 455; *McGovern* v. *Railway Co.*, 123 New York, 281; *Eldredge* v. *Steamship Co.*, 134 New York, 187; *Railroad Co.* v. *Fort*, 17 Wallace, 553; *Borgman* v. *Railway Co.*, 41 Fed. Rep. 667; *Thompson* v. *Railway Co*, 14 Fed. Rep. 564.

The analogies of the general rule of the municipal law exempting the master from liability for injury to a servant caused by the negligence of a fellow servant, do not apply to the master of a vessel and ordinary seamen when the vessel is at sea.

One of the purposes for which the master is employed is to exercise authority and control over the crew in the management and navigation of the ship; in the exercise of that authority and control he is the representative of the owners and not the fellow servant of the crew.

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

In the view we take of this case we find it necessary to express an opinion only upon the first and third questions, which are in substance whether the vessel was liable *in rem* to one of the crew by reason of the improvident and negligent order of the master in directing the hoisting of the gangway for the discharge of cargo, before the arrival of the vessel at her dock, and during a heavy wind. As this is a libel *in rem* it is unnecessary to determine whether the owners would be liable to an action *in personam*, either in admiralty or at common law, although cases upon this subject are not wholly irrelevant.

1. If the rulings of the District Court were correct, that the vessel was liable *in rem* for these injuries, such liability must be founded either upon the general admiralty law or upon a local statute of the State within which the accident occurred. As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty, both at home and abroad, we are bound in answering this question to examine

the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as it is consonant with our own usages and principles, or, as Mr. Justice Bradley observed in *The Lottawanna*, 21 Wall. 558, "having regard to our own legal history, Constitution, legislation, usages, and adjudications."

By Article VI of the Rules of Oleron, sailors injured by their own misconduct could only be cured at their own expense, and might be discharged; "but if, by the master's order and commands, any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the cost and charges of the said ship." By Article 18 of the Laws of Wisbuy, "a mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship," with a further provision that, if he be injured by his own recklessness, he may be discharged and obliged to refund what he has received. Practically the same provision is found in Article 39 of the Laws of the Hanse Towns; in the Marine Ordinances of Louis XIV, Book III, Title 4, Article 11; and in a Treatise upon the Sea Laws, published in 2 Pet. Admiralty Decisions. In neither of these ancient codes does there appear to be any distinction between injuries received accidentally or by negligence, nor does it appear that the seaman is to be indemnified beyond his wages and the expenses of his maintenance and cure. We are also left in the dark as to whether the seaman in such a case has recourse to the ship herself or is remitted to an action against the owners.

By the modern French Commercial Code, Art. 262, "seamen are to be paid their wages, and receive medical treatment at the expense of the ship, if they fall sick during a voyage, or be injured in the service of the vessel." Commenting upon this article, Goirand says in his commentaries upon the French Code, that "when a sailor falls ill before the sailing of the vessel, he has no right to his wages; if he becomes ill during the voyage, and from no fault of his own, he is paid his wages, and tended at the expense of the ship, and if he is left on shore, the ship is also liable for the expense of his return home;" and

under Article 263 "the same treatment is accorded to sailors wounded or injured in the service of the ship. The expenses of treatment and dressing are chargeable to the ship alone, or to the ship and cargo, according to whether the wounds or injuries were received in the service of the ship alone, or that of the ship and cargo."

Similar provisions are found in the Italian Code, Article 363; the Belgian, Article 262; the Dutch, Articles 423 and 424; the Brazilian, Article 560; the Chilian, Article 944; the Argentine, Article 1174; the Portuguese, Article 1469; the Spanish, Articles 718 and 719; the German, Articles 548 and 549. In some of these codes, notably the Portuguese, Argentine and Dutch, these expenses are made a charge upon the ship and her cargo and freight, and considered as a subject of general average. By the Argentine Code, Article 1174, the sailor is also entitled to an indemnity beyond his wages and cure in case of mutilation; and by the German Code he appears to be entitled to an indemnity in all cases for injuries incurred in defence of his ship; and by the Dutch Code, the sailor, if disabled, is entitled to such damages as the judge shall deem equitable. In all of them there is a provision against liability in case of injuries received by the sailor's willful misconduct.

Except as above indicated, in a few countries, the expense of maintenance and cure do not seem to constitute a privilege or lien upon a ship, since by the French Code, Article 191, classifying privileged debts against vessels, no mention is made of a lien for personal injury. The other Continental and South American codes do not differ materially from the French in this particular. Probably, however, the expenses of maintenance and cure would be regarded as a mere incident to the wages, for which there is undoubtedly a privilege.

By the English Merchants' Shipping Act, 17 & 18 Vict. chap. 104, sec. 228, subd. 1, "if the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice, with attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back to some port in the United Kingdom, if shipped in the

United Kingdom, or if shipped in some British possession to some port in such possession, and of his conveyance to such port, and the expense (if any) of his burial, shall be defrayed by the owner of such ship, without any deduction upon that account from the wages of such master, seaman, or apprentice."

These provisions of the British law seem to be practically identical with the Continental codes. In the English courts the owner is now held to be liable for injuries received by the unseaworthiness of the vessel, though not by the negligence of the master, who is treated as a fellow servant of the seamen. Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the Merchants' Shipping Act of 1876, 39 & 40 Vict. chap. 80, section 5, wherein in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. *Hedley* v. *Pinkney &c. Steamship Co.*, 1894, App. Ca. 222, an action at common law. Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master *in personam* for an assault committed upon a passenger or seaman. *The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in general admiralty rule 16, declaring that "in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." In England the master and crew are also treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. *Hedley* v. *Pinkney &c. Steamship Co.*, 1894, App. Ca. 222. It is otherwise, however, in Ireland, *Ramsay* v. *Quinn*, Irish Rep. 8 C. L. 322, and in Scotland, where

the master is regarded as a vice principal. *Leddy* v. *Gibson*, 11 Ct. Sess. Cases, 3d Ser., 304.

The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure. The earliest case upon the subject is that of *Harden* v. *Gordon*, 2 Mason, 541, in which Mr. Justice Story held that a claim for the expenses of cure in case of sickness constituted in contemplation of law a part of the contract for wages, over which the admiralty had a rightful jurisdiction. The action was *in personam* against the master and owner for wages and other expenses occasioned by the sickness of the plaintiff in a foreign port in the course of the voyage, all of which were allowed. The question of indemnity did not arise in this case, but the court held that upon the authority of the Continental codes and by its intrinsic equity there was no doubt of the seaman's right to the expenses of his sickness.

This case was followed in *The Brig George*, 1 Sumner, 151, and in *Reed* v. *Canfield*, 1 Sumner, 195. Though the last case did not involve the question of indemnity, Mr. Justice Story, in delivering the opinion, remarked that "the sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is, what expenses have been virtually incurred for the cure."

The question of indemnity, however, was fully considered by Judge Brown of the Southern District of New York in *The City of Alexandria*, 17 Fed. Rep. 390, which was an action *in rem* for personal injuries received by the cook in falling through the fore hatch into the hold; and it was held that upon common law principles the claim could not be sustained, as the

negligence through which the accident occurred was that of fellow servants engaged in a common employment. The court, however, went on to consider whether the negligence, upon the recognized principles of maritime law, entitled the libellant to compensation from the ship or her owners in cases not arising from unseaworthiness. After going over the Continental codes, the cases above cited and a few others, Judge Brown came to the conclusion that he could find "no authority in the ancient or modern codes, in the recognized text-books, or the decisions on maritime law, for the allowance of consequential damages resulting from wounds or hurts received on board ship, whether arising from ordinary negligence of the seaman himself, or of others of the ship's company. Considering the frequency of such accidents, and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable, beyond what has been stated, is evidence of the strongest character that no further liability under the maritime law exists."

The general rule that a seaman receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship was enforced in *The Atlantic*, Abbott's Adm. 451, though it was said in this case and in *Nevitt* v. *Clarke*, Olcott, 316, that the privilege of being cured continues no longer than the right to wages under the contract in the particular case. In *The Ben Flint*, 1 Abb. U. S. 126; *S. C.*, 1 Biss. 562, the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. See also *Brown* v. *Overton*, 1 Sprague, 462; *Croucher* v. *Oakman*, 3 Allen, 185; *Brown* v. *The Bradish Johnson*, 1 Woods, 301.

In *The Edith Godden*, 23 Fed. Rep. 43, the vessel was held liable *in rem* for personal injuries received from the neglect of the owner to furnish appliances adequate to the place and occasion where used. In other words, for unseaworthiness. This is readily distinguishable from the previous case of *The City of Alexandria*, 17 Fed. Rep. 390, and is in line with English and American authorities holding owners to be responsible to the seamen for the unseaworthiness of the ship and her appliances.

In *The Titan*, 23 Fed. Rep. 413, the ship was held liable to a deck hand, who was injured by a collision occasioned partly by fault of his own vessel. The question of general liability was not discussed but assumed. In the case of *The Noddleburn*, 28 Fed. Rep. 855, the question of jurisdiction was not pressed by counsel, but merely stated and submitted. The case is put upon the ground that, as the accident was occasioned by the master knowingly allowing a rope to remain in an insecure condition, the vessel was consequently unseaworthy. In *Olson* v. *Flavel*, 34 Fed. Rep. 477, libellant was allowed to recover damages for personal injury suffered by him while employed as mate, but if there were any negligence on the part of the respondent, it appears to have been in not providing proper appliances, so that the case was one really of unseaworthiness. In the case of *The A. Heaton*, 43 Fed. Rep. 592, a seaman was allowed to recover consequential damages for negligence of the owners in not providing suitable appliances, although in the opinion, which was delivered by Mr. Justice Gray, he seems to assume the right of the seaman to recover against the masters or owners for injuries caused by their willful or negligent acts. The case however was one of injuries arising from unseaworthiness, although the learned judge in his discussion does not draw a distinction between the cases arising from the unseaworthiness of the ship and the negligent act of the master. It is interesting to note that in *The Julia Fowler*, 49 Fed. Rep. 277, a seaman, employed in scraping the main mast on a triangle surrounding the mast, was allowed to recover for the breaking of the rope which held the triangle, and precipitated libellant to the deck; while in a case almost precisely similar, *Kalleck* v. *Deering*, 161 Massachusetts, 469, the owners were held not to be liable for an injury caused by the negligence of the mate in constructing the triangle and ordering the seaman to use it. In *The Frank and Willie*, 45 Fed. Rep. 494, the ship was held liable to a sailor who was injured by the negligence of the mate in not providing safe means for discharging the cargo. As the opinion was delivered by Judge Brown, who was also the author of the opinion in *The City of Alexandria*, 17 Fed. Rep. 390, the case can be reconciled with that upon the ground that the

question was really one of unseaworthiness and not of negligence.

Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf*, 107 N. Y. 211.

3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

It will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876, above quoted, *Couch* v. *Steel*, 3 El. & Bl. 402; *Hedley* v. *Pinkney &c. Co.*, 7 Asp. M. L. C. 135; 1894, App. Cas. 222, and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.

2. It is insisted, however, that a lien is given upon the vessel by a local statute of Wisconsin, Rev. Stat. of 1898, sec. 3348,

repeating a previous statute upon the same subject, which provides that every ship, boat or vessel used in navigating the waters of that State shall be liable "for all damages arising from injuries done to persons or property by such ship, boat or vessel," and that the claim for such damages shall constitute a lien upon such ship, boat or vessel, which shall take precedence of all other claims or liens thereon. As the accident happened within three miles of the port of Milwaukee, and as the constitution of Wisconsin fixes the center of Lake Michigan as the eastern boundary of the State, there is no doubt that the vessel was navigating the waters of that State at the time of the accident. But the vital question in the case is whether the damages arose from an injury done to persons or property *by such ship*, boat or vessel. The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases where the damage is done by the ship herself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. To hold that it applies to injuries suffered by a member of the crew on board the ship is to give the act an effect beyond the ordinary meaning of the words used. Would it apply, for instance, to injuries received in falling through an open hatchway? Or to a block blown against a seaman by the force of the wind, though the accident in either case might have resulted from the negligence of the master? We think not.

The act in this particular uses the same language as the seventh section of the English Admiralty Court Act of 1861, which declares that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Construing that act, it has been held by the Court of Admiralty that it applies to damages occasioned by a vessel coming in collision with a pier, *The Uhla*, L. R. 2 Ad. & Ec. 29, note, and also to cases of personal injury, *The Sylph*, L. R. 2 Ad. & Ec. 24, where a diver, while engaged in diving in the river Mersey, was caught by the paddle wheel of a steamer and suffered considerable injury; but not to a case where personal injuries were sustained by a seaman falling down into the hold of a vessel,

owing to the hatchway being insufficiently protected, *The Theta*, 1894, P. D. 280, or to loss of life, *The Vera Cruz*, 9 P. D. 96. As we have indicated above the statute was confined to cases of damage done by those in charge of a ship with the ship as the "noxious instrument," and that cases of damages done *on board* the ship were not within the meaning of the act of damages done *by the ship*.

In the case under consideration the damage was not done by the ship in the ordinary sense of the word, but by a gangway, which may be assumed to be an ordinary appliance of the ship, being blown against the libellant by the force of the wind.

It results that the first and third questions must be answered in the negative.

SAN JOSÉ LAND AND WATER COMPANY *v.* SAN JOSÉ RANCH COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 113. Submitted December 2, 1902.—Decided March 2, 1903.

Although no Federal right, title or immunity was specially set up or claimed in the complaint, it is sufficient if it appears in the motion for new trial and in the assignment of error in the state Supreme Court. In this case it also appears from the opinion of the court that the question was whether the plaintiff in error had brought itself within the scope of an act of Congress upon which it relied.

Under the rule of this court requiring opinions to be sent up with the record, it is a sufficient compliance with the words "specially set up and claimed" that the Federal question was fully considered in the opinion of the court, and ruled against the plaintiff in error.

A party who, on complying with the provisions of an act of Congress would have the right to purchase lands, part of the public domain, but who has not complied with the requirements of the act, is not entitled, upon the mere showing of such right to purchase, to demand that its title be adjudged good and valid, and that another party who is in possession be adjudged to have no estate or interest in the land, or that such other person be enjoined from asserting any adverse claim, or that the claimant recover the possession of the land with the right of ousting the defendant from the improvements made thereon by its predecessors.

THIS was an action brought in 1889 by the Land and Water Company, under the Code of Civil Procedure of California, to quiet the title of the plaintiff and determine the nature of the adverse claim of the defendant, to the half of a quarter section of land, which had been sold by the Southern Pacific Railroad Company February 28, 1887, to plaintiff's predecessors in title as part of its land grant of 1871.

The case was tried in 1890, though the decree was not entered until 1897. The facts found by the court were substantially that the Southern Pacific Railroad Company had accepted the benefit of a land grant made March 3, 1871, to the Texas and Pacific Railroad, filed its map of location April 3, 1871, and on August 12, 1873, formed a new corporation, also known as the Southern Pacific Railroad Company; built and constructed a road from Tehachapi Pass by way of Los Angeles to Yuma, and selected the land in question under the act of March 3, 1871; that such land was within the place limits of the Southern Pacific, and also within the indemnity limits of a land grant to the Atlantic and Pacific Railroad by act of July 27, 1866. This latter company never complied with the terms of the grant and never built its road.

That on February 28, 1887, the Southern Pacific agreed with two parties named Nolan and Heckenlively to sell them this land, and after the receipt from the United States of a patent therefor, to deliver them a deed; that by subsequent conveyances, and on August 29, 1888, the right of the grantees became vested in the plaintiff, the San José Land and Water Company; that the land is situated in San Dimas Canyon, through a portion of which the San Dimas Creek flows; that prior to December, 1883, one Stowell claimed to own a water right in the waters flowing down such creek, the character and extent of which the court did not adjudicate, and about that time entered upon the land and constructed across a portion of it a twelve-inch pipe line for the purpose of conducting the water so claimed by him from its point of diversion across said lands to other lands; that prior to July, 1887, the San José Ranch Company, defendant, had, by mesne conveyances, succeeded to the rights of Stowell, and also constructed upon such land, at a point where

the waters of San Dimas Creek flowed, a brick and cement forebay, sand box or dam, and laid therefrom across a portion of said land a fourteen-inch pipe line, both of which pipe lines it claims the right to maintain, but makes no other claim of right to such lands.

Upon this state of facts the Superior Court entered a judgment in favor of the defendant, which was affirmed by the Supreme Court. 129 California, 673. Whereupon the plaintiff sued out this writ of error.

Mr. W. H. Anderson, *Mr. James Anderson* and *Mr. Richard Dunnigan* for plaintiff in error.

Mr. John S. Chapman for defendant in error.

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

Motion is made to dismiss this writ of error upon the ground that no Federal right, title, privilege or immunity was "specially set up or claimed" by the plaintiff in error, as required by the third clause of Rev. Stat., sec. 709. None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial and in the assignments of error in the state Supreme Court. It also appears from the opinion of the court that plaintiff relied upon the act of Congress of March 3, 1887, for the readjustment of land grants, 24 Stat. 556, and the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of that act. This question was fully considered by the court, and it was held that the defendant, having acquired its rights prior to the act of 1887, must prevail against the right claimed by the plaintiff.

While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defence, it is one which appears to have been insisted upon in the argument; and under the rule of this court,

requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed," that it was fully considered in the opinion of the court and ruled against the plaintiff in error. *Murdock* v. *Memphis*, 20 Wall. 590, 633; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 115; *Egan* v. *Hart*, 165 U. S. 188; *Sayward* v. *Denny*, 158 U. S. 180, 184; *Mallett* v. *North Carolina*, 181 U. S. 589. These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases, *Williams* v. *Norris*, 12 Wheat. 117; *Rector* v. *Ashley*, 6 Wall. 142, and *Gibson* v. *Chouteau*, 8 Wall. 314, in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided.

2. The case upon the merits presents but little difficulty. The action is brought under sec. 738 of the Code of Civil Procedure of California, which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The land in question was within the indemnity limits of the land grant of July 26, 1866, 14 Stat. 292, to the Atlantic and Pacific Railroad Company. Plaintiff, however, claims nothing under this grant, as the railroad company never complied with its terms; never built its road, and the grant was forfeited by act of July 6, 1886, 24 Stat. 123, and the land restored to the public domain. The act, however, becomes pertinent in another connection.

The land in question was also within the place limits of the grant to the Texas and Pacific Railroad Company by act of March 3, 1871, 16 Stat. 573, and subsequently became vested in the Southern Pacific, which constructed the road and selected the land in question, claiming it under that act.

It was held by this court, however, in the *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570, that the forfeiture of the Atlantic and Pacific grant of July 6, 1886, did not enure to the benefit of the Southern Pacific, which held the

later grant of the same land, but to the benefit of the United States, and thereby became a part of their public lands. In the next following case, *United States* v. *Colton Marble & Lime Co.*, 146 U. S. 615, this ruling was extended to the indemnity lands of the Atlantic and Pacific, which, upon forfeiture of its land grant, also reverted to the United States.

Hence on February 28, 1887, when the Southern Pacific Company contracted to sell these lands to Nolan and Heckenlively, it had really nothing to sell, and no interest in the land that could pass under that agreement. There was a stipulation in it to make a deed of the premises as soon as the railroad had received a patent therefor from the United States; that it would use ordinary diligence to procure such patent, and that, if in consequence of circumstances beyond its control, it failed to obtain a patent, it guaranteed nothing with regard to the title, but agreed to repay everything which had been paid by the grantees. There was a further agreement that the contract should not be assignable except by endorsement, and with the written consent of the company, and a written promise of the assignee to perform all the undertakings and promises of the grantees.

After making the first payment and paying the annual interest to February 28, 1892, the grantees ceased all further payments. The findings show that at the time of the execution of the contract, "said tract of land was not in the *bona fide* occupation of any adverse claimant under the preëmption or homestead laws of the United States, and the same had not been settled upon at the date of such purchase, or on the 3d day of March, 1887, or subsequent to December 1, 1882, by any person claiming to enter the same under the settlement laws of the United States." That neither the grantees nor their assigns ever settled upon the land, cultivated or fenced it, although Heckenlively did, shortly after the purchase, enter upon the land and begin the construction of a ditch and tunnel thereon. Subsequently the land passed by intermediate conveyances to the plaintiff. Manifestly, however, there was a clear failure of title on the part of the plaintiff to maintain this action. The Southern Pacific had no title to convey, and beyond this there

is no finding that the contract was assigned by endorsement or with the written consent of the railroad company, or that there was any promise on the part of the assignees to perform the undertakings of the original grantees.

Plaintiff's claim to the land must rest, if at all, upon the act of Congress of March 3, 1887, 24 Stat. 556, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes"—the main purpose of which act was to relieve *bona fide* purchasers from railway companies of forfeited lands, by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. By section 5 of this act, "where any said company shall have sold to citizens of the United States, . . . as a part of its grant, lands not conveyed to or for the use of such company, . . . and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patent shall issue therefor to said *bona fide* purchaser, his heirs or assigns." The section, however, contained provisos excepting from its terms all lands which at the date of such sales from the government were in the *bona fide* occupation of adverse claimants under the preëmption or homestead laws, and also of lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States.

There are two difficulties connected with the application of this statute: (1) Assuming that Nolan and Heckenlively were *bona fide* purchasers in good faith from the government, which indeed is a part of the finding, there is nothing to indicate that they had ever made payment to the United States for the lands, or ever applied to do so; nor does a patent ever appear to have been issued to them. In short, the plaintiff relies upon the statute without showing that anything was done under it. (2) The provisions of this section do not apply to lands occupied adversely under the preëmption, homestead or settlement laws

of the United States, and the finding in this connection is that in 1883 one Stowell owned, or claimed to own, a certain water right in the waters of San Dimas Creek, which flowed through a portion of the land, the character and extent of which water right the court did not find, and that in November of that year Stowell entered on the land, laid and constructed across a portion of it a twelve-inch pipe line for the purpose of taking the water across the land to other lands, probably for the purposes of irrigation; and that in July, 1887, the defendant, which had by mesne conveyances succeeded to this water right of Stowell, entered upon the land and built and constructed thereon a stone, brick and cement forebay, sand box or dam, and also a fourteen-inch pipe line across a portion of the lands. It still claims the right to these improvements, but makes no other claim of right, title or interest to the land or any part thereof.

The record does not show exactly how Stowell obtained his rights to the waters of this creek, although the testimony sent up with the record indicates that one Haynes settled upon the land in question in 1869, and obtained a patent either in August or September, 1878; that he used the water from the creek to irrigate the land; made a dam and a ditch and ran it down to the ranch; that he began using the water in March, 1870, and so used it up to the spring of 1878, when he obtained the patent, sold to Stowell, and conveyed the land by deed.

Conceding, however, that, under the findings, we cannot look back of 1883, when Stowell entered the land and laid a twelve-inch pipe line there, under a claim of ownership of the water right, we see no reason why he and his grantees are not protected by section 9 of the act of July 26, 1866, 14 Stat. 251, which declares that, "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

Bearing in mind that these lands were from July 6, 1886, the

date of the forfeiture, public lands, subject to the preëmption, homestead or settlement laws, and that at the time Stowell entered upon the land in question, and constructed a pipe line thereon, (1883,) it seems to have been wholly unoccupied, we think the fact that Heckenlively, under his agreement of purchase of February 28, 1887, and shortly after the same was executed, entered upon the land and began the construction of a ditch and tunnel there, becomes immaterial, since there is a finding that he never settled upon the land, cultivated or fenced it, or took possession of it, and no finding how long he continued the construction of the ditch or tunnel, or the amount of work in connection therewith. For aught that appears he may have abandoned it immediately. There is no evidence that the original grantees from the railroad company, or their successors in interest, ever sought to take advantage of the act of 1887, or ever applied to purchase the lands, or made payment to the United States, or did anything whatever before the beginning of this suit to indicate that they relied upon this statute. We agree with the Supreme Court of California that the plaintiff was not entitled, upon the showing of a mere right to purchase, to demand that its title be adjudged good and valid, and that the defendant had no estate or interest in the land, or that it should be enjoined from asserting any claim adverse to the plaintiff, or that it should recover possession of the land, with the right of ousting the defendant from the improvements which its predecessors had made thereon.

An inceptive right under the statute was an insufficient basis of recovery. A party cannot rest forever on such a right, but is required by the statute, before asserting it against innocent third parties, to take some steps to perfect it. The litigation seems to turn really upon the respective rights of the parties to the waters of San Dimas Creek, and as defendant's predecessors first appropriated them, and the plaintiff shows no superior title, it cannot prevail against the Ranch Company. In view of the uncertain character of the finding that Heckenlively did, shortly after his purchase, enter upon the land and commence the construction of a ditch and tunnel thereon, we are unable to see how the case is affected by the fact that, in

July and August of the same year, the defendant entered upon the land and constructed their forebay or dam, and laid a fourteen-inch pipe in addition to the twelve-inch pipe which Stowell had laid in 1883. We express no opinion as to the possibility of the plaintiff maintaining a second action upon its patent since obtained, or how far this case may, if at all, operate as *res adjudicata* in that.

There was no error in the decree of the Supreme Court, and it is therefore

Affirmed.

MR. JUSTICE MCKENNA took no part in the disposition of this case.

THE ROANOKE.

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

No. 123. Submitted December 17, 1902.—Decided March 2, 1903.

The following propositions in regard to lien for supplies furnished to vessels may be considered as settled:

(1.) That by the maritime law, as administered in England and in this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel; and that in this particular the several States of the Union are treated as foreign to each other.

(2.) That no such lien is given for necessaries furnished in the home port of the vessel, or in the port in which the vessel is owned, registered, enrolled or licensed, and the remedy in such case, though enforceable in the admiralty, is *in personam* only.

(3.) That it is competent for the States to create liens for necessaries furnished to domestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction on the subject of necessaries.

Where, however, Congress has dealt with a subject within its exclusive power, or where such exclusive power is given to the Federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for

the States to invade the domain of such jurisdiction and enact laws which in any way trench upon the power of the Federal courts.

The statutes of the State of Washington, sections 5953, 5954, 2 Ballinger's Code, giving an absolute lien upon foreign vessels for work done or material furnished at the request of a contractor or sub-contractor, and making no provision for the protection of the owner in case the contractor has been paid the full amount of his bill before notice of the claim of the sub-contractor is received, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defences to which they would otherwise have been entitled, is an unlawful interference with the exclusive jurisdiction of all admiralty and maritime cases which is vested by the Constitution in the Federal courts, and to that extent such statute is unconstitutional and void.

THIS was a libel *in rem* for materials, and also for work and labor, alleged to have been furnished by the libellants King and Winge in the repair of the steamship Roanoke, to certain contractors with the owners, who had full charge of the alteration and repair of the steamship. An intervening libel was also filed by one Fraser for labor and material furnished under the same conditions.

The cases resulted in decrees for the libellants, from which the North American Transportation and Trading Company, owner of the steamship, appealed directly to this court, and the following facts were found:

"The North American Transportation and Trading Company appeared as claimant and owner and the vessel was released upon its stipulation.

"It admitted all the allegations of the libel except that the work was done on the credit of the ship, which it denied except that it admitted that libellants had acted under the belief that they had a lien by virtue of law. It then alleged its incorporation and existence under the laws of the State of Illinois, the residence there at all times of its president and general manager, its maintaining only agencies at Seattle and at other places in Alaska and Canada, and its enjoying a high credit. The Roanoke it alleged to be an ocean-going vessel registered at Chicago, Illinois, under the navigation laws of the United States, with the name of Chicago painted on her stern. She was al-

leged to have been purchased by claimant in 1898 on the Atlantic coast, and, upon the Pacific coast since that time, employed between Seattle and the mouth of the Yukon in the summer, and between San Francisco and southern ports in the winter. It was further alleged that the claimant had never given any order for the material and labor described in the libel, and that these were furnished on the order of the contractor, who, before the filing of the libel and without any knowledge by claimant of these unpaid claims, had been paid by this claimant for these materials and labor in full. It was alleged in conclusion that the lien claimed by libellants was claimed under sections 5953 and 5954 of Ballinger's Code and Statutes of Washington, that such a lien was in this instance void, being in violation of the eighth section of the first article of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several States, was an illegal burden upon interstate commerce, and in violation also of the fourteenth article of the Constitution of the United States, as depriving claimant of its property without due process of law and without its equal protection, and was in violation of the second section of the third article of the Constitution conferring on the courts of the United States admiralty and maritime jurisdiction.

"To the intervening libel of Fraser the same answer was made.

"To each of these answers respectively the libellants and intervening libellant excepted as insufficient, and the whole of each, to constitute any answer or defence to the libel.

"The exceptions were sustained, the claimant elected to stand on its answer and a decree was entered against it and its stipulators for the whole sum claimed in the libels."

Mr. Frederick Bausman, with whom *Mr. Daniel Kelleher* was on the brief, for appellant.

The Roanoke was a non-resident ship. Registered in a port, and belonging to a citizen, of Illinois, she was property only of the State of Illinois. *Hays* v. *Pacific M. S. Co.*, 17 How. 596; *Morgan* v. *Parham*, 16 Wall. 471. However much she might

loiter in other waters, she was not liable even to taxation outside of Illinois, for she had no other *situs*. *The Jennie Middleton*, 94 Fed. Rep. 683; *The Havana*, 92 Fed. Rep. 1007; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 32.

This court has jurisdiction. The amount involved is sufficient. *The Paquette Habana*, 175 U. S. 677. That the constitutional question was raised by the defence and not by libellants is no objection. Direct appeal may be taken no matter which party raised such question in the lower court. *Loeb* v. *Trustees*, 179 U. S. 472; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The Washington statute offends the commerce clause of the Constitution. Interstate commerce is one province which, relinquished by the States, has been everywhere explored, occupied and subjected by its new possessor. Nowhere is anything left uncertain. The regulations of government are wrought out in the finest detail. Nothing has been too small. The placing of buoys, the licensing of masters, engineers and pilots, and even the wages of seamen, have become the subject of statutes. *Gibbons* v. *Ogden*, 9 Wheat. 1; *The Genessee Chief*, 12 How. 443. The maritime laws of the national government cannot even be enforced by the States. No more can the uncodified jurisprudence of the seas, for courts of admiralty belong to the Federal government alone.

Railroad Co. v. *Maryland*, 21 Wall. 456, 470, is quoted with approval even by that majority in this court who conceded to the States certain rights as to commerce by land. *Pullman Co.* v. *Pennsylvania*, 141 U. S. 32. Cars that were owned in one State might be taxed if moving in another, but the ships of another State never.

The very sale, hypothecation and transfer of ships is regulated by the navigation laws of the Union, and those laws have their origin in the interstate commerce provisions of the Federal Constitution. Why should one State be allowed, then, to fasten liens upon vessels of other States? Does this not directly invade the interstate commerce right of the general government?

Any other view seems full of danger. State liens might become unreasonable.

Hard as it is to conceive that the Federal government will ever permit the encroachment of state liens where both commerce and admiralty are concerned, it is altogether too hard to imagine that they will permit such liens to be unreasonable in themselves. *The Belfast*, 7 Wall. 624.

This law shows it is one of the most unreasonable ever enacted of its kind.

The Washington statute invades the jurisdiction in admiralty. Although a State may enact lien laws as to ships owned within it has long been settled, but no decision can be construed as authorizing also liens on ships owned without the State. Indeed, it is questionable whether such liens were intended to be supported, even within the State, beyond the home port. *The General Smith*, 4 Wheaton, 438; *Peyroux* v. *Howard*, 7 Peters, 342; *The Belfast*, 7 Wall. 624; *The Lottawanna*, 21 Wall. 558; *The J. E. Rumbell*, 148 U. S. 1; *The Chusan*, 2 Story, 455.

This case was cited with approval twelve years later, in *Steamboat New York* v. *Rae*, 18 How. 223, in which a local rule of navigation of New York was held good as to domestic, and bad as to foreign, ships; in *Hall* v. *De Cuir*, 95 U. S. 485, in 1877; in *The Globe* by Justice Nelson, 2 Blatch. 427; and in *The Selah*, 4 Sawyer, 40; *The Lyndhurst*, 48 Fed. Rep. 839; *The Electron*, 74 Fed. Rep. 689.

In conclusion (1) that as applied to vessels of other States, a local lien invades the interstate commerce powers of the Federal government; (2) that even if any such law can be valid, this one cannot because it is not a reasonable one; (3) that, as regards the admiralty jurisdiction of the Federal government, such laws, whether reasonable in terms or not, are void as to vessels of other States, because wholly unnecessary, and in their nature incompatible with the complete system of admiralty and its policy.

Mr. Harold Preston, with whom *Mr. Benton Embree* and *Mr. Clarence S. Preston* were on the brief, for appellees.

This court does not have jurisdiction. *Baltimore R. Co.* v. *Hopkins*, 130 U. S. 210; *State of Arkansas* v. *Schlierholz*, 179 U. S. 598, 601; *City of Lampasas* v. *Bell*, 180 U. S. 276, 281.

I. The statute of Washington does not violate the commerce clause of the Constitution. It is well settled that the laws of the State in which personal property is situated govern respecting the transfer of title to and liens thereon, even where the owner is a non-resident of the State. *Walworth* v. *Harris*, 129 U. S. 355; *Brown* v. *Smart*, 145 U. S. 454; *Pullman Company* v. *Pennsylvania*, 141 U. S. 32; *The Iris*, 100 Fed. Rep. 104, 106; *Green* v. *Van Buskirk*, 5 Wall. 307; 7 Wall. 139.

In determining the relative power of the States and of Congress concerning foreign and interstate commerce, the place of residence of the owner of the instruments of such commerce is wholly immaterial. A vessel is none the less engaged in interstate commerce because her owner resides in one of the States between which such commerce is carried on. Therefore, in considering whether the statute of the State of Washington conferring liens on vessels violates the commerce clause of the Constitution, the place of residence of the owner may be laid aside.

The uniform current of decisions of this court is to the effect that in those respects in which Congress has not exercised its power to regulate interstate and foreign commerce, state legislation is valid so long as it affects such commerce only indirectly or remotely. *Kidd* v. *Pearson*, 128 U. S. 1, and citations; *Lake Shore R. Co.* v. *Ohio*, 173 U. S. 285, and citations; *Missouri R. Co.* v. *Haber*, 169 U. S. 613; *Louisville R. Co.* v. *Kentucky*, 161 U. S. 677; *Wilkerson* v. *Rohrer*, 140 U. S. 545.

This reserved power in the States is not limited to the right to legislate concerning the public health, morals or safety, but extends also to and includes the power to legislate respecting matters of mere convenience and the prosperity of the people. *Lake Shore R. Co.* v. *Ohio*, 173 U. S. 285.

Counsel for appellant admits this right on the part of the State to legislate as applied to commerce on land, but denies the right respecting commerce by water; there is no ground for such a distinction. *Railroad Company* v. *Maryland*, 21

Wall. 456, cited by appellant, distinguished, and see *Sherlock* v. *Alling*, 93 U. S. 99.

The court draws a distinction between the effect of taxation upon the instruments of interstate commerce, and the regulation of such commerce by other means. *Missouri R. Co.* v. *Haber*, 169 U. S. 613, 632; *Louisville R. Co.* v. *Kentucky*, 161 U. S. 677, 701; *Pittsburgh Coal Co.* v. *Louisiana*, 156 U. S. 590, 598-599.

Compulsory pilotage laws of a State, while admitted to be regulations of commerce, are held valid so long as Congress refrains from legislating on the subject. *Cooley* v. *Board of Wardens*, 12 Howard, 299, 320; *Huus* v. *Steamship Co.*, 182 U. S. 392; *The China*, 7 Wall. 53; *Ex parte McNeil*, 13 Wall. 236; *Pacific Mail S. Co.* v. *Joliffe*, 2 Wallace, 450. See also as to materialmen statutes, *The Lottawanna*, 21 Wall. 558; *McRae* v. *Dredging Co.*, 86 Fed. Rep. 344, 350; *The Robert Dollar*, 115 Fed. Rep. 218.

The statute is not unreasonable, in that by its terms the lien conferred continues for a period of three years. In this instance the liens against the Roanoke were asserted by the commencement of these proceedings within five months after the causes of action accrued. The record fails to show that this lapse of time was unreasonable. No claim of *laches* on the part of the appellees is made. During this period the vessel was in foreign waters, beyond the jurisdiction of the court. No change in the ownership of the vessel took place. No claim is made that the appellant was without knowledge that the appellees furnished the materials and performed the services set forth in the libel. Nor are any facts set forth in the answers to show that the contractors, at whose instance the appellees furnished the materials and rendered the services, were obligated to pay appellees therefor.

II. The statute does not invade the jurisdiction in admiralty.

While a state statute cannot convert a contract non-maritime in character by the general principles of the maritime law, into a maritime one, for that would be to extend the jurisdiction in admiralty, it is now well settled that a lien conferred by a state statute as incident to a maritime contract, is, for all practical

purposes, a maritime lien, and that such a lien is cognizable in the admiralty. *The J. E. Rumbell*, 148 U. S. 1, 20; *The Glide*, 167 U. S. 606; *The Robert Dollar*, 115 Fed. Rep. 218.

The imposition by a local statute of a lien upon foreign vessels, so long as such lien is consistent with the principles of the general maritime law, is no more an invasion of the admiralty jurisdiction than the creation by such statute of a lien upon domestic vessels. *The Chusan*, 2 Story, 455; *The Lyndhurst*, 48 Fed. Rep. 839; *Steamboat New York* v. *Rae*, 18 How. 223; *Hall* v. *De Cuir*, 95 U. S. 585, cited by appellant distinguished; and see *Workman* v. *New York*, 179 U. S. 552, in which it was held that by the maritime law the city was liable, and that the local law, which, as construed by the state court, exempted the city from liability, was not applicable because it deprived parties of rights conferred by the admiralty law. In other words, because it was inconsistent with the principles of the admiralty law.

We contend, therefore, (1) that this court is without jurisdiction to review these proceedings; (2) that the statute of Washington is not a regulation of commerce within the meaning of the Constitution; and (3) that such statute does not invade the jurisdiction in admiralty.

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

This case is appealed directly from the District Court to this court under that clause of section 5 of the Court of Appeals Act, which permits such appeal "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." No additional significance is given to the appeal by certain questions certified by the District Court, as the power to certify is only given in cases appealed upon questions of jurisdiction. But as the case is properly before us upon direct appeal from the District Court, we proceed to dispose of the question of the constitutionality of the law of Washington, under which these proceedings were taken.

By that law, 2 Ballinger's Code, secs. 5953 and 5954—

"5953. All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable,—

* * * * * * * *

"3. For work done or material furnished in this State, for their construction, repair, or equipment, at the request of their respective owners, masters, agents, consignees, contractors, sub-contractors, or other person or persons having charge in whole or in part of their construction, alteration, repair, or equipment; and every contractor, sub-contractor, builder, or person having charge, either in whole or in part, of the construction, alteration, repair, or equipment of any vessel shall be held to be the agent of the owner, for the purposes of this chapter;

* * * * * * * *

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.

"5954. Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any District Court of this Territory."

In this connection the following propositions may be considered as settled:

1. That by the maritime law, as administered in England and in this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel; *The General Smith*, 4 Wheat. 438; *The Grapeshot*, 9 Wall. 129; Gen. Admiralty Rule 12, and that in this particular the several States of this Union are treated as foreign to each other. *The General Smith*, 4 Wheat. 438; *The Kalorama*, 10 Wall. 204, 212.

2. That no such lien is given for necessaries furnished in the home port of the vessel, or in the port in which the vessel is owned, registered, enrolled or licensed, and the remedy in such

case, though enforceable in the admiralty, is *in personam* only. *The Lottawanna*, 21 Wall. 558; *The Edith*, 94 U. S. 518. This is a distinct departure from the Continental system, which makes no account of the domicil of the vessel, and is a relic of the prohibitions of Westminster Hall against the Court of Admiralty, to the principle of which this court has steadily adhered.

3. That it is competent for the States to create liens for necessaries furnished to domestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction over the subject of necessaries. *The General Smith*, 4 Wheat. 438; *The Planter*, (*Peyroux* v. *Howard*,) 7 Pet. 324; *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wall. 558; *The Belfast*, 7 Wall. 624; *The J. E. Rumbell*, 148 U. S. 1, 12. The right to extend these liens to foreign vessels in any case is open to grave doubt. *The Chusan*, 2 Story, 455; *The Lyndhurst*, 48 Fed. Rep. 839.

The question involved in this case, however, is whether the States may create such liens as against foreign vessels, (vessels owned in other States or countries,) and under such circumstances as would not authorize a lien under the general maritime law. The question is one of very considerable importance, as it involves the power of each State, which a vessel may visit in the course of a long voyage, to impose liens under wholly different circumstances and upon wholly different conditions. In the case under consideration the vessel was owned by an Illinois corporation, enjoying a high credit, and maintaining agencies at Seattle and at other places in Alaska and Canada. The Roanoke was an ocean-going vessel, registered at Chicago under the navigation laws of the United States, with the name "Chicago" painted on her stern, although she was engaged in trade upon the Pacific coast between Seattle and the mouth of the Yukon in summer, and between San Francisco and southern ports in winter. Neither the owner nor master nor other officers of the vessel had given an order for the material and labor set forth in the libel, which were furnished upon the order of a contractor, who, before the filing

of the libel and without any knowledge by the owner of these unpaid claims, *had been paid in full for these claims.*

Although this court has never directly decided whether materials and labor furnished by workmen or sub-contractors constitute a lien upon a vessel — in other words, whether the contractor can be regarded as an agent of the vessel in the purchase of such labor and materials—there is a general consensus of opinion in the state courts and in the inferior Federal courts that labor and materials furnished to a contractor do not constitute a lien upon the vessel, unless at least notice be given to the owner of such claim before the contractor has received the sum stipulated by his contract. *Smith* v. *The Steamer Eastern Railroad*, 1 Curtis, 253; *Southwick* v. *The Clyde*, 6 Blackf. 148; *Hubbell* v. *Denison*, 20 Wend. 181; *Burst* v. *Jackson*, 10 Barb. 219; *The Brig Whitaker*, 1 Sprague, 229; *The Whitaker*, 1 Sprague, 282; *Harper* v. *The New Brig*, Gilpin, 536; *Ames* v. *Swett*, 33 Maine, 479; *Squire* v. *One Hundred Tons of Iron*, 2 Ben. 21; *The Marquette*, Brown's Adm. 364.

The injustice of permitting such claims to be set up is plainly apparent. The master is the agent of the vessel and its owner in more than the ordinary sense. During the voyage he is in fact the *alter ego* of his principal. He is entrusted with an uncontrolled authority to provide for the crew, and for the preservation and repair of the ship. He engages the cargoes, receives the freight, hires and pays his crew, and is entrusted perhaps for years with the command and disposition of the vessel. With full authority to bind the vessel, his position is such that it is almost impossible for him to acquaint himself with the laws of each individual State he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go, unhampered by laws which are mainly intended for local application, or for domestic vessels. Local laws, such as the one under consideration, ordinarily protect the ship by requiring notice of the claim to be filed in some public office, limiting the time to a few weeks or months within which the laborer or sub-contractor may proceed against her, requiring notice to be given of the claim, before the contractor himself has been paid, and limiting his recovery

to the amount remaining upaid at the time such notice is received. The statute of Washington, however, provides for an absolute lien upon the ship for work done or material furnished at the request of the contractor or sub-contractor, and makes no provision for the protection of the owner in case the contractor has been paid the full amount of his bill before notice of the claim of the sub-contractor is received. The finding in this case is that the contractor, who had agreed in consonance with the usual course of business, to make the repairs upon this vessel, had been paid in full by the claimant. The injustice of holding the ship under the circumstances is plainly manifest.

Not only is the statute in question obnoxious to the general maritime law in declaring every contractor and sub-contractor an agent of the owner, but it establishes a new order of priority in payment of liens, abolishes the ancient and equitable rule regarding "stale claims," and permits the assertion of a lien at any time within three years, regardless of the fact that the vessel may have been sold to a *bona fide* purchaser, not only without notice of the claim, but without the possibility of informing himself by a resort to the public records. It also gives, or at least creates the presumption of, a lien, though the materials be furnished upon the order of the owner in person.

No opinion upon this subject can afford to ignore the admirable discussion of Mr. Justice Story in the case of *The Chusan*, 2 Story, 455, in which he refused to apply to a Massachusetts vessel a law of the State of New York, requiring a lien for supplies to be enforced before the vessel left the State:

"This statute is, as I conceive, perfectly constitutional, as applied to cases of repairs of domestic ships, that is, of ships belonging to the ports of that State. . . . But in cases of foreign ships, and supplies furnished to them, the jurisdiction of the courts of the United States is governed by the Constitution and laws of the United States, and is, in no sense governed, controlled, or limited by the local legislation. . . . For myself, I can only say, that during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject." To the same effect is *The Lyndhurst*, 48 Fed. Rep. 839; *The Kate*, 56 Fed. Rep. 614.

While no case involving this precise question seems to have arisen in this court, we have several times had occasion to hold that where Congress has dealt with a subject within its exclusive power, or where such exclusive power is given to the Federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for States to invade that domain of legislation, and enact laws which in any way trench upon the power of the Federal government. Cases arising in other branches of the law furnish apt analogies. The principle is stated in a nutshell by Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193. "But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. . . . Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." This was said of a bankrupt law of New York which assumed to discharge the debtor from all liability for debts previously contracted, notwithstanding the Constitution had vested the power in Congress of establishing uniform laws on the subject of bankruptcy. It was held that the States had a right to pass bankrupt laws until the power had been acted upon by Congress, though the law of New York discharging the debtor from liability was held to be void as impairing the obligation of prior contracts within the meaning of the Constitution.

In *Hall* v. *DeCuir*, 95 U. S. 485, 498, it was said that, inasmuch as interstate commerce is regulated very largely by Congressional legislation, it followed that such legislation must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it, except in cases where the legislation of Congress manifests an intention to leave some particular matter to be regulated by the several States, as, for instance, in the case of pilotage. *Cooley* v. *Board of Wardens*, 12 How. 299. Upon this principle it was held that a law of Louisiana excluding colored passengers from the cabin set

apart for the use of whites during the passage of steamboats down the Mississippi, was a regulation of interstate commerce, and therefore unconstitutional. To the same effect is *Sinnot* v. *Davenport*, 22 How. 227. In the subsequent cases of *Louisville &c. Railway* v. *Mississippi*, 133 U. S. 587, and *Plessy* v. *Ferguson*, 163 U. S. 537, state laws requiring separate railway carriages for the white and colored races were sustained upon the ground that they applied only between places in the same State.

In the very recent case of *Easton* v. *Iowa*, 188 U. S. 220, it was held that a state law punishing presidents of banks receiving deposits of money at a time when the bank was insolvent, and when such insolvency was known to them, was unconstitutional as applied to national banks whose operations were governed exclusively by acts of Congress. Said Mr. Justice Shiras (p. 231): "But we are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities." See also *Farmers' &c. Bank* v. *Dearing*, 91 U. S. 29; *McCulloch* v. *Maryland*, 4 Wheat. 316, 425.

The following cases are also to the same general effect: *Degant* v. *Michael*, 2 Indiana, 396; *State* v. *Pike*, 15 N. H. 83; *Lynch* v. *Clarke*, 1 Sand. Ch. 583, 644; *Jack* v. *Martin*, 12 Wend. 311; *Ex parte Hill*, 38 Alabama, 429, 450; *People* v. *Fonda*, 62 Michigan, 401. Although it is equally true that where Congress, having the power, has exercised it but incidentally, and obviously with no intention of covering the subject, the States may supplement its legislation by regulations of their own not inconsistent with it. *Reid* v. *Colorado*, 187 U. S. 137.

Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the Federal courts, which are thereby made judges of the scope of such jurisdiction, subject, of course, to Congressional legislation, the statute of the State of Washington, in so far as it attempts to

control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defences to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void.

The decree of the District Court is therefore reversed, and the case remanded to that court with directions to dismiss the libels.

MR. JUSTICE HARLAN concurred in the result.

UNITED STATES *v.* NIX.

NIX *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 142, 195. Submitted December 18, 1902.—Decided March 2, 1903.

1. Under sec. 829, Rev. Stat., a United States marshal may elect to be reimbursed his actual travelling expenses incurred in serving writs, but there is no authority in law for allowing him mileage in excess of the distance from the place of arrest to the place of receiving the writs, even if the travel is in a new and unsettled Indian country and there are exceptional difficulties to overcome.
2. Where a United States court is opened for business by order of the judge, it is the duty of the marshal to attend and he is entitled to his per diem fee therefor whether the judge be present or not.
3. A general act is not to be construed as applying to cases covered by a prior special act on the same subject. The marshal for the District of Oklahoma is entitled to fees for transportation of prisoners arrested under warrants issued by United States commissioners as fixed by the statute providing a temporary government for the Territory of Oklahoma, notwithstanding the provisions of the act of Congress of August 19, 1894, applicable to marshals generally throughout the country. The fact that a marshal's accounts have been approved by a district judge is sufficient to cast upon the government the burden of showing any error of fact in his account.
4. Where the marshal charged for travel in transporting a prisoner who

escaped from his custody, and there was no finding, either by the district judge in approving his accounts, or by the Court of Claims, of due diligence on the part of the officer to prevent the escape, the item was held to be properly disallowed, the presumption being that the prisoner escaped by negligence.

THIS is a petition for marshal's fees for the District of Oklahoma, upon which the Court of Claims made the findings of fact set forth in the margin.[1] 36 C. Cl. 593; 36 C. Cl. 598.

Mr. Assistant Attorney General Pradt and *Mr. Assistant Attorney Brannigan* for the United States.

Mr. Frank B. Crosthwaite and *Mr. Franklin H. Mackey* for Nix.

MR. JUSTICE BROWN, after making the foregoing statement, delivered the opinion of the court.

Item 2 of the third finding, namely, "travelling 1153 miles

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[1] I. The claimant, Evett D. Nix, was United States marshal for the District of Oklahoma from July 1, 1893, to February 24, 1896, appointed, qualified and acting.

II. During said period the claimant, as such marshal, by his deputies, performed services and travel and incurred expenses in behalf of the United States, and his accounts therefor, verified by his oath and approved by the court in accordance with the law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof was allowed and paid, but a part thereof, as more specifically set forth in Finding III, was disallowed, and no portion thereof has been paid to the claimant.

III. Item 2. To travel, 1153 miles in going to serve warrants of arrest, at six cents per mile, $69.18, being for travel in excess of the distance from the place of arrest to the place of receiving writs. The travel charged for was in a new and unsettled Indian country, without post offices, post routes or section lines. The defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route. The deputies had to find fordable places to cross the river to locate the defendants, there being no bridges. After arrest the defendants were taken by the most direct routes to commissioners for examination.

Item 10. For attendance of the marshal at court, by deputy, for twenty days, at $5 per day, $100.00.

It does not appear whether business was transacted in the court on said days, although the court was opened for business by order of the judge. It does not appear that the judge was present at court on any of these days.

in going to serve warrants of arrest, at six cents per mile, $69.18," involves the question whether travel in excess of the distance from the place of service to the place of receiving the writs can be allowed, in view of the fee bill for marshals. Rev. Stat. sec. 829, provides "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service." This has always been interpreted to mean by the usual travelled route, *Hitch* v. *United States*, 66 Fed. Rep. 937, the length of which is not given in the finding. The excuse for not pursuing the route in this case is that it was a new and unsettled Indian country; that defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route; and that, in the absence of bridges, the deputies had to find fordable places to cross the river to locate the defendants.

Item 12. This item was charged in claimant's accounts as transportation of prisoners, deputies and guards from the several places of arrest, for hearing before the United States commissioners, whose offices were nearest the places where the crimes for which the prisoners were arrested were committed. The number of miles charged in claimant's accounts for this travel was fifty-one thousand three hundred and fifty-five miles, at ten cents a mile, amounting to five thousand one hundred and thirty-five dollars and fifty cents.

Those accounts were submitted to the United States District Court for Oklahoma under the provisions of the act of February 22, 1875, 18 Stat. 333, and the said accounts, including this item, as above charged, were approved by that court. When the accounts so approved were submitted to the accounting officers, all the charges for travel included in that item were disallowed by them under the provisions of the sundry civil appropriation act of August 18, 1894, 28 Stat. 372–416, which made it the duty of the marshal to take the defendants before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial. Subsequently the accounting officers allowed and paid claimant of this item twenty-seven dollars.

After suit was brought in this court, the claimant's deposition was taken in respect to this item, and he proved that, of his own knowledge, eleven thousand four hundred and thirty-three miles were traveled in the transportation of said prisoners, deputies and guards. As to the remainder of the travel he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the

However equitable the charge may have been in this particular case, there is no authority of law for its allowance. There is, however, a special provision in the last clause of sec. 829, by which "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual travelling expenses, to be proved on his oath, to the satisfaction of the court." This seems to contemplate the very contingency which arose in this case, of a number of miles actually and necessarily travelled in excess of the direct route from the place where the process was returned to the place of service. It reimburses the marshal his expenses but denies him a profit upon them. This item must be disallowed.

(2.) Item 10. "For attendance of the marshal at court by deputy, 20 days at $5 per day, $100." The fact that it did not appear whether business was transacted in court on these days, or whether the judge was present in court, was immaterial, in

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Territory, and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. No other evidence was offered by the claimant to establish the number of miles actually traveled than the approval of the District Court for Oklahoma and his own deposition subsequently taken, as above stated. If the approval of his account by said District Court is competent evidence to establish the number of miles actually traveled, this court finds the ultimate fact that he traveled 51,355 miles. If such approval of the District Court is incompetent to establish the number of miles actually traveled, this court finds that the number of miles so traveled was 11,433 in the transportation of prisoners, deputies and guards, as before set forth.

Item 16. For service of a capias and transportation (mileage) of a deputy, prisoner and guard. The capias was issued by the clerk of the United States District Court at Topeka, Kansas, on an indictment found by the grand jury at Topeka. The capias was received by the claimant in Oklahoma City and was executed by arresting the prisoner named in the capias, who was transported to the United States District Court at Wichita, Kansas.

The claimant charged six cents a mile for going sixty-two miles, from Oklahoma City to Perry, to serve the writ, $2 for the service of the writ, and ten cents per mile each for the deputy, prisoner and guard for 111 miles, $33.30, from Perry, Oklahoma, to Wichita, Kansas, and one meal for the prisoner, 75 cents, making a total of $39.77.

Item 24. For actual expenses for transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn, New York, under a warrant of commitment. The warrant of commitment was issued at Oklahoma, and the marshal transported the prisoner on that warrant to Springfield, Ohio,

view of the fact that the court was opened for business by order of the judge. *United States* v. *Finnell*, 185 U. S. 236; *McMullen* v. *United States*, 146 U. S. 360. For aught that appears, the attendance may have been under the circumstances in which a similar charge was allowed in *United States* v. *Pitman*, 147 U. S. 669. Where the court is opened for business by order of the judge, it is the duty of the marshal to attend, and there is no reason why he should not receive his per diem therefor as if the judge were actually present. This claim is not contested by the government, and should be allowed.

(3.) Item 12, for the transportation of prisoners arrested under warrants issued by United States commissioners, involves two questions: first, whether travel should have been charged from the place of arrest to the *nearest* Circuit Court commissioner, or to the office of the commissioner *nearest to the place where the crimes* with which the prisoners were charged *were committed;* second, whether, assuming the position of the claimant in this particular to be correct, as matter of law, there was sufficient evidence of the number of miles travelled to entitle him to the charge of $5135.50.

By "An act to provide a temporary government for the Territory of Oklahoma," 26 Stat. 81, a certain portion of the Indian Territory was set off as a territorial government under the

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where the prisoner was temporarily detained as a witness for the United States in a counterfeiting case. The prisoner having been discharged as a witness in that case at Springfield the marshal continued his transportation from Springfield to New York city on the original warrant of commitment. The prisoner, with a deputy and guard, arrived in New York city too late for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York, and he escaped from the custody of the deputy on the night of the same day while they were going to supper in the hotel where they were stopping. The marshal made every effort to retake the prisoner and failed, $90.50.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States in the sum of one hundred and eight dollars and ninety-five cents ($108.95) on items 2 and 16 of Finding III.

All other items disallowed.

name of Oklahoma. By section 9 the judicial power of the Territory was vested in certain courts, and the usual executive and judicial offices created. By section 10, "persons charged with *any* offence or crime in the Territory of Oklahoma, and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies, wherever found in said Territory, but in *all cases* the accused shall be taken, for preliminary examination, before a United States commissioner, or a justice of the peace of the county, whose office is nearest to the place where the offence or crime is committed. All offences committed in said Territory, if committed within any organized county, shall be prosecuted and tried within said county." By section 28, "the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States."

This is the act upon which the claimant relies for his right to travel, while, upon the other hand, the government contends that this act was repealed by a general act of August 18, 1894, 28 Stat. 372, making appropriations for sundry civil expenses for the year 1895, one of the clauses of which, under the head of "Judicial," provides that "it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offence, to take the defendant before the *nearest* Circuit Court commissioner or the *nearest* judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, . . . and no mileage shall be allowed any officer violating the provisions hereof."

The object of this statute was manifestly to amend Rev. Stat. sec. 829, which provided that the mileage of the marshal for transportation of prisoners should be computed from the place where the process was served to the place where it was returned. This statute provides that he shall be taken to the Circuit Court commissioner nearest the place of arrest, regardless of the fact by whom the warrant was issued. Inasmuch as the later act is a general one, applicable to marshals generally throughout

the country, we do not think it was intended to repeal or interfere with the former act, providing specially for persons charged with *any* offence or crime in the Territory of Oklahoma, and that in *all cases*, whether the crime was committed against the Territory or the general government, the accused shall be taken before a commissioner, whose office is nearest to the place where the offence or crime was committed.

The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townsend* v. *Little*, 109 U. S. 504, that special and general statutory provisions may subsist together, the former qualifying the latter. See also *Churchill* v. *Crease*, 5 Bing. 177; *Magone* v. *King*, 51 Fed. Rep. 525, and cases cited; *State* v. *Clarke*, 25 N. J. Law, 54.

It would seem that this construction works no particular hardship upon the government, since in all cases where the criminal is unable to give bail he is required to be ultimately transported for trial to the county wherein the crime was committed.

The second question connected with this item is whether the marshal produced sufficient evidence of the number of miles travelled. His claim was for 51,350 miles at ten cents per mile. He was unable to prove, of his own knowledge, more than 11,433 miles. As to the remainder he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the Territory, and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. He showed, however, that his accounts had been allowed by the district judge. That was sufficient to cast upon the government the burden of showing any error of fact in his account. *United States* v. *Jones*, 134 U. S. 483. In that case we held that the approval of the commissioner's account by a Circuit Court of the United States, under the act of February 22, 1875, 18 Stat. 333, was *prima facie* evidence of the correctness of the items of that account, and, in the absence of clear and unquestionable proof of mistake on the part of the court, it should be conclusive. We

adhere to that view. It would be an insupportable burden upon the officers of courts if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item. This was evidently not contemplated by the statute. Notwithstanding this, however, there is no doubt that the account may be impeached for error of law. *McMullen* v. *United States*, 146 U. S. 360. This item should have been allowed in full, less the amount paid.

(4.) Item 24, for actual expenses in transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn, New York, under a warrant of commitment, is the only other one contested. The prisoner with a deputy and guard arrived in New York too late for the prisoner to be received at the Brooklyn penitentiary on the same day, and that night he escaped from the custody of the deputy while they were going to supper in the hotel where they were staying.

As there is no finding, either by the district judge in approving his accounts or by the Court of Claims of due diligence on the part of the officer to prevent the escape, the item was properly disallowed. The presumption is that he escaped by negligence. *State* v. *Hunter*, 94 N. C. 829; *State* v. *Lewis*, 113 N. C. 622; *Shattuck* v. *State*, 51 Mississippi, 575.

The judgment of the Court of Claims will therefore be reversed and the case remanded to that court for further proceedings in conformity with this opinion.

DAVIS AND FARNUM MANUFACTURING COMPANY *v.* LOS ANGELES.

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

No. 507. Submitted January 13, 1903.—Decided March 2, 1903.

1. Where a bill is based not only upon diversity of citizenship, but also upon the alleged unconstitutionality of municipal ordinances as impairing the obligation of a contract, an appeal lies to this court and the whole case is opened for consideration.

Where a statute delegates powers to a city, the ordinances of the municipality are the acts of the State, and their unconstitutionality is the unconstitutionality of a state law within the meaning of sec. 5 of the Circuit Court of Appeals act.

2. A court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property or the enforcement of an unconstitutional law. *In re Sawyer*, 124 U. S. 200.

One who has contracted to deliver gas machinery to a gas and fuel company has no standing in a court of equity to restrain a city from enforcing an ordinance prohibiting the erection of gas works within a portion of the city in which the erection of gas works was not prohibited when the contract was made, on the ground that such ordinances are repugnant to the Federal Constitution as impairing the obligation of a contract, it not appearing that the plaintiff has any contract with the city or that the gas and fuel company would not, or could not, by reason of insolvency, respond to its claim under the contract.

THIS was a bill in equity filed in the Circuit Court for the Southern District of California by appellant, a citizen of Massachusetts, to restrain the city of Los Angeles and its officers from enforcing certain municipal ordinances, prohibiting the erection or maintenance of gas tanks or reservoirs within certain portions of the city.

The gravamen of the bill was that on September 1, 1901, Caroline W. Dobbins made a contract with the Valley Gas and Fuel Company, a California corporation, to build certain gas works for her, including all things necessary for the manu-

facture, recovery and storage of gas, on lands thereafter to be designated; that on September 17 the appellant made a contract with the Gas and Fuel Company to erect upon Mrs. Dobbins' premises a water tank and gas holder, having a capacity of 100,000 cubic feet of gas, and that immediately thereafter it constructed and prepared the material and machinery necessary for the erection of the tank and gas holder, and shipped the same to Los Angeles; that on September 28, Mrs. Dobbins purchased certain lands in Los Angeles, which were within the limits wherein it was lawful to erect gas works as described in a municipal ordinance adopted August 26, 1901, and on November 1 applied to the board of fire commissioners for a permit to erect such gas works; that on November 22, her petition came on for hearing before the fire commissioners, and after proof had been made that all provisions of prior ordinances had been complied with, the matter was duly considered, and finally resulted, November 29, in a vote to grant a permit to erect and maintain the gas works.

That upon the 22d day of November, Mrs. Dobbins' contractors began at once to lay the foundation for said works at a cost of upwards of $2500, when on November 25, the city adopted an ordinance, amending that of August 26, 1901, including her property in the prohibited territory for the erection or maintenance of gas works, which ordinance, however, seems to have proved defective, and subsequently in February, 1902, caused certain of the employés of the Gas and Fuel Company to be arrested, charging them with a violation of this ordinance. Subsequently under new proceedings certain employés of the plaintiff were arrested and the work stopped.

Another ordinance was passed on March 3, 1902, also amending that of August 26, 1901, and other arrests were made of the employés for a violation of this ordinance. It was averred that the gas works are in an uncompleted condition, exposed to the elements and in danger of being destroyed, and that all of the aforesaid ordinances were adopted by the common council at the instigation of the Los Angeles Light Company, which has enjoyed a monopoly of the gas business for the last ten years.

A demurrer was filed to this bill by the city for want of equity and of jurisdiction, which was sustained by the court, and the bill dismissed, 115 Fed. Rep. 537, apparently upon the ground that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Whereupon an appeal was taken to this court.

Mr. Henry T. Helm, *Mr. Lynn Helm*, *Mr. Edward C. Bailey*, *Mr. Henry T. Lee* and *Mr. J. R. Scott* for appellant.

I. As the foundation of this action lies in the invalidity of the ordinances of November 25, 1901, and of March 3, 1902, adopted by the city council of the city of Los Angeles, alleged in the bill of complaint to be in contravention of the provisions of the Constitution of the United States, an appeal lies directly from the Circuit Court to this court, and this court having jurisdiction of this case for the purpose of determining whether such ordinances are in contravention of the Constitution of the United States, there exists the power in this court to consider all other questions arising on the record. Act of March 3, 1891, chapter 517, section 5; 26 Statutes at Large, 826; *Horner* v. *United States*, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 478; *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685, 695.

II. The ordinances in question of the city of Los Angeles were but the exercise by the city of the legislative powers delegated to it by the State, and were, therefore, by legal intendment the equivalent of laws enacted by the State itself. *City Railway Company* v. *Citizens' Street Railroad Company*, 166 U. S. 557, 563; *St. Paul Gaslight Company* v. *St. Paul*, 181 U. S. 142, 148.

III. The ordinance of November 25, 1901, was repealed by the ordinance of March 3, 1902. The ordinances are on the same subject matter. The latter ordinance covers the whole subject matter of the earlier and will repeal the former. 23 Am. & Eng. Ency. of Law, 485.

IV. The ordinance of March 3, 1902, is invalid for the rea-

son that it is in violation of the Constitution of the United States in that it impairs the obligation of the contract between appellant and the Valley Gas and Fuel Company to erect and construct the water tank and gas holder upon the premises of Caroline W. Dobbins. *Farrington* v. *Tennessee*, 95 U. S. 679; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Detroit* v. *Detroit Citizens' Street Railroad Co.*, 184 U. S. 368.

V. The ordinance of March 3, 1902, is invalid for the reason that it is in violation of the vested rights acquired by Caroline W. Dobbins, the employer of the appellant, by virtue of the purchase by her of lands within the limits of the district within which it was lawful to erect gas works, by the terms of the ordinance adopted August 26, 1901, and by virtue of the permit granted to her by the board of fire commissioners of the city of Los Angeles on the 22d day of November, 1901, under the existing "building and fire ordinance" of the city of Los Angeles.

(*a*) The rights acquired by Caroline W. Dobbins, the employer of the appellant, were vested rights. *Calder* v. *Bull*, 3 Dall. 394; *Farrington* v. *Tennessee*, 95 U. S. 679; *Steamship Co.* v. *Joliffe*, 2 Wall. 457; *Worth* v. *Cransen*, 7 How. 118; *Classen* v. *Chesapeake Guano Co.*, 31 Atl. Rep. (Maryland) 808; *Roberts* v. *Brooks*, 71 Fed. Rep. 914; *Baltimore Trust Co.* v. *Baltimore*, 64 Fed. Rep. 153; *Levis* v. *City of Newton*, 75 Fed. Rep. 884; *Cleveland City Railroad Co.* v. *City of Cleveland*, 94 Fed. Rep. 385; *City Railway Company* v. *Citizens' Street Railroad Co.*, 166 U. S. 562.

(*b*) The appellant, as the contractor, doing the work for Caroline W. Dobbins under her permit granted to her by the board of fire commissioners, was entitled to the benefit and protection of the vested rights which she had acquired by virtue of legislative authority. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393.

VI. The ordinance of March 3, 1902, adopted by the city council of the city of Los Angeles is invalid and void as depriving the appellant of property without due process of law. *City of Chicago* v. *Netcher*, 183 Illinois, 104; *Frorer* v. *People*, 141

Illinois, 171; *Ramsey* v. *People*, 142 Illinois, 380; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; Cooley, Const. Lim. *393.

VII. The ordinance of March 3, 1902, is not within the police power, nor is it a proper police regulation.

(*a*) The determination by the legislative body of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts. *People* v. *Budd*, 117 N. Y. 1; *Lawton* v. *Steele*, 152 U. S. 133; Brandon on the Fourteenth Amendment, p. 172.

(*b*) The police power has reference to those things which affect the public health, the public safety, the public comfort, or the public morals. *Noel* v. *People*, 187 Illinois, 587; *State* v. *Donaldson*, 41 Minnesota, 74; *City of Indianapolis* v. *Consumers' Gas Trust Company*, 39 N. E. Rep. (Indiana) 433; *Barthet* v. *City of New Orleans*, 24 Fed. Rep. 564; *City of Buffalo* v. *Chadeayne*, 31 N. E. Rep. (N. Y.) 443; *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650; *Walla Walla City* v. *Walla Walla Water Company*, 172 U. S. 115. Also citing and distinguishing *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Stone* v. *Mississippi*, 101 U. S. 814; *Slaughter House Cases*, 16 Wall. 36; *Butchers' Union Co.* v. *Crescent City Live-Stock Landing Co.*, 111 U. S. 746; *Ex parte Lacey*, 108 California, 326; *Barbier* v. *Connolly*, 113 U. S. 27; *Knoxville* v. *Bird*, 12 Lea, 121; *Davenport* v. *City of Richmond*, 81 Virginia, 636.

VIII. This ordinance is invalid because it is an attempt on the part of the city council of the city of Los Angeles to define and make that a nuisance which is not a nuisance *per se*.

(*a*) Gas works are neither in their erection nor maintenance a nuisance *per se*, and it is not within the power of the city council of the city of Los Angeles to pass an ordinance making that a nuisance which is not a nuisance *per se*, nor could such a declaration make it a nuisance unless it in fact had that character. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 560; *Yates* v. *Milwaukee*, 10 Wall. 497; *C., R. I. & P. R. R.* v. *Joliet*, 79 Illinois, 25, 44; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Ex parte Sing Lee*, 96 California, 354; *County of Los Angeles* v. *The Hollywood Cemetery Association*, 124 California, 344;

Grossman v. *Oakland*, 36 L. R. A. (Oregon) 593; *Stockton Laundry Case*, 31 Fed. Rep. 689; *In re Hong Wah*, 82 Fed. Rep. 623; *Ex parte Whitall*, 98 California, 73; Wood on Nuisances, sec. 744.

(*b*) The power granted in the city charter to *abate* nuisances does not give power to *prevent* except in those cases of nuisances *per se*; and those things which only become nuisances because of the method of their operation cannot be prevented and stopped under the power to abate until it has been demonstrated they are nuisances. *Lakeview* v. *Letz*, 44 Illinois, 81, 83.

The charter of the city of Los Angeles is a general law of the State of California. Charter of the City of Los Angeles, Statutes of California, 1889, p. 455.

There is no reservation of power in the charter.

(*c*) The provision of section eleven, Article XI, of the constitution of the State of California, as follows: "That any county, city or township may make and enforce within its jurisdiction all such local police, sanitary and other regulations as are not in conflict with general laws," is not a grant of police power. It is simply an extension to counties, cities and towns of the right to exercise powers that are inherent in the legislature as the representative of the people; but it is in no sense an enlargement of that power. *Ex parte Campbell*, 74 California, 20; *Ex parte Roach*, 104 California, 272.

IX. The ordinance of March 3, 1902, is invalid and is in violation of the provisions of the Constitution of the United States prohibiting any State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

It is invalid as being in violation of the rights of the plaintiff to engage in and conduct a lawful business of erecting gas works in the city of Los Angeles. Brandon on the Fourteenth Amendment, p. 65; *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

(*a*) The business of erecting or maintaining a gas works is a lawful occupation. *New Orleans Gas Company* v. *Louisiana Light Co.*, 115 U. S. 650, 658, 669; Constitution of the State of California, Article XI, sec. 19; *Ex parte Johnston*, 69 Pac. Rep. 973; *People* v. *Stevens*, 62 California, 209.

(*b*) A municipality has not the power or right to impose additional burdens or terms or conditions to the exercise of rights created by the sovereign authority of the State in its constitution. Restrictions in the exercise of these rights are not regulations, and at least impair if they do not deny the exercise of the right. *Township of Summit* v. *N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123; *City of Atlanta* v. *Gate City Gaslight Co.*, 71 Georgia, 106; *Michigan Telephone Company* v. *City of Benton Harbor*, 121 Michigan, 512; *Wisconsin Telephone Company* v. *City of Oshkosh*, 62 Wisconsin, 32; *Appeal of Pittsburg*, 115 Pennsylvania, 4; *Borough of Millvale* v. *Evergreen Railway Co.*, 131 Pennsylvania, 1; *Harrisburg City Pass. R. R. Co.* v. *City of Harrisburg*, 149 Pennsylvania, 465; *State* v. *Flad*, 23 Mo. App. 185; *Hodges* v. *Telegraph Co.*, 72 Mississippi, 910.

The ordinance is also invalid as being unreasonable.

X. A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such criminal prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right. *Central Trust Company* v. *Citizens' St. R. Co.*, 80 Fed. Rep. 225; *S. C.*, 82 Fed. Rep. 1; *Reagan* v. *Trust Co.*, 154 U. S. 362; *Southern Express Co.* v. *Mayor, etc., of Ensley*, 116 Fed. Rep. 756; *Lottery Co.* v. *Fitzpatrick*, 3 Woods, 222; Fed. Cases No. 8541; *Springhead Spinning Company* v. *Riley*, L. R. 6 Eq. 588; *Osborn* v. *United States Bank*, 3 Wheat. 738; *Wood* v. *City of Brooklyn*, 14 Barb. 425; *Manhattan Iron Works* v. *French*, 12 Abbott's N. C. 446; *Rushville* v. *Rushville Natural Gas Co.*, 132 Indiana, 575; *Davis* v. *Fasig*, 128 Indiana, 271; *Platte & D. Canal & Milling Co.* v. *Lee, Mayor*, 29 Pac. Rep. (Colo.) 1036; *Smith* v. *Bangs*, 15 Illinois, 399; *Mayor of Baltimore* v. *Radecke*, 49 Maryland, 218; *Cape May & L. R. Co.* v. *City of Cape May*, 35 N. J. Eq. 409; *Los Angeles City Water Co.* v. *City of Los Angeles*, 103 Fed. Rep. 711; *City of Atlanta* v. *Gate City Gaslight Co.*, 71 Georgia, 196; *City of Austin* v. *Austin City Cemetery Association*, 28 S. W. Rep. (Texas) 528; *Port Mobile* v. *Louisville & N. Railway Co.*, 4 So. Rep. (Alabama) 106; *Smyth* v. *Ames*, 169 U. S. 466,

517; *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 378; *Vicksburg Water Works* v. *Vicksburg*, 185 U. S. 65, 82. Citing also *contra*, opinion of Honorable Olin Wellborn, District Judge, in the case at bar, appearing in the record, reported: *Davis & Farnum Manufacturing Co.* v. *City of Los Angeles*, 115 Fed. Rep. 537. Citing and distinguishing, *Ex parte Sawyer*, 124 U. S. 200; *Suess* v. *Noble*, 31 Fed. Rep. 855; *M. Schandler Bottling Co.* v. *Welch*, 45 Fed. Rep. 283; *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed. Rep. 272.

XI. The plaintiff has no remedy against the defendant for damages for the wrongful arrest of its employés or for the destruction of its business and property rights. *Stedman* v. *San Francisco*, 63 California, 193; *Chope* v. *Eureka*, 78 California, 508; *Doeg* v. *Cook*, 126 California, 213.

XII. It is not enough that the plaintiff has a remedy at law. It must be as efficient and as prompt in its administration as the remedy in equity. *Boyce* v. *Grundy*, 3 Peters, 377; *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, 12; *Insurance Co.* v. *Bailey*, 13 Wall. 616, 621; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Tyler* v. *Savage*, 143 U. S. 79, 95; 2 Story, Eq. sec. 928.

Mr. Albert H. Crutcher, *Mr. W. B. Mathews*, *Mr. Le Compte Davis* and *Mr. J. R. Rush* for appellee.

I. A court of equity has no power to interfere with the enforcement of criminal laws. *Ex parte Sawyer*, 124 U. S. 200, 225; *Suess* v. *Noble*, 31 Fed. Rep. 855; *Hemsley* v. *Myers*, 45 Fed. Rep. 286; *Fitts* v. *McGhee*, 172 U. S. 528; *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed. Rep. 259.

II. A bill in equity will not lie to restrain prosecutions under a municipal ordinance upon the mere ground of its alleged invalidity. *City of Denver* v. *Beede*, 54 Pac. Rep. 624; *Wardens of St. Peter's Episcopal Church* v. *Town of Washington*, 13 S. E. Rep. 700; *State* v. *Wood*, 56 S. W. Rep. 477; *Crighto* v. *Dahmer*, 21 L. R. A. 84; *Wolfe* v. *Burke*, 56 N. Y. 115; *Wallack* v. *Society*, 67 N. Y. 28; *West* v. *Mayor*, 10 Paige, 539; *City of Bainbridge* v. *Reynolds*, 111 Georgia, 758; *Mayor* v. *Patterson*, 34 S. E. Rep. (Georgia, 1900) 600.

III. The cases relied upon by appellant are not in point, or have been overruled. *Stone* v. *Mississippi*, 101 U. S. 814; *Fitts* v. *McGhee*, 172 U. S. 528; *Hemsley* v. *Myers*, 45 Fed. Rep. 283; *Davis & Farnum Mfg. Co.* v. *City of Los Angeles*, 115 Fed. Rep. 537, and cases therein cited.

IV. The enactment of ordinance No. 7029 (New Series) is fully within the police powers delegated to the city of Los Angeles by the State. Constitution of California, Art. XI, sec. 11; Charter of Los Angeles, Art. I, sec. 2; Art. III, secs. 27–40; Stats. 1889, p. 458; Dillon Municipal Corporations, 4th ed. vol. 1, secs. 141, 400; *Butchers' Union, etc.*, v. *Crescent City*, 111 U. S. 746; *Slaughter House Cases*, 16 Wall. 62.

V. The city of Los Angeles, under its police power, was authorized to enact and enforce ordinance No. 7029, irrespective of the question as to whether or not gas works are a nuisance *per se*. *Ex parte Schrader*, 33 California, 283; *Ex parte Lacy*, 108 California, 326; *Ex parte Heilbron*, 65 California, 609; *Canfield* v. *United States*, 167 U. S. 518; *Crowley* v. *Christensen*, 137 U. S. 87; *Barbier* v. *Connolly*, 113 U. S. 27; *Hing* v. *Crowley*, 113 U. S. 703; *Cleveland* v. *Gaslight, etc.*, 20 N. J. Eq. 201; Dillon Mun. Corp. 4th ed. vol. 1, pp. 216, 472; *Ex parte Byrd*, 4 Am. St. Rep. 328; *Welch* v. *Hotchkiss*, 12 Am. Rep. 385; *Cronin* v. *People*, 37 Am. Rep. 564; *Milne* v. *Davidson*, 16 Am. Dec. 189; *Milwaukee* v. *Gross*, 91 Am. Dec. 472; Tiedeman Police Powers, vol. 2, p. 740.

VI. The court in determining the validity of this ordinance can take into consideration only the face of the ordinance and such facts as the court takes judicial cognizance of. *Powell* v. *Commonwealth of Pennsylvania*, 127 U. S. 678, and cases therein cited.

VII. A municipality cannot give, grant, barter away or part with its right to exercise the police power delegated to it by the State. Cooley Cons. Lim. 6th ed. p. 341; Russell Police Powers, p. 88; *Davenport* v. *City of Richmond*, 81 Virginia, 636; *Newton* v. *City of Galveston*, 13 S. W. Rep. 368; *Butchers' Union* v. *Crescent City*, 111 U. S. 746; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659.

VIII. All interests in property and rights in contracts,

whether vested or not, are acquired and held by individuals and corporations subject to the right of the State and municipality to exercise their "police power" for the protection of the lives, health, safety and comfort of their citizens. 2 Story Cons. sec. 1954; Cooley Cons. Lim. 6th ed. 707; *Mugler* v. *Kansas*, 123 U. S. 669; *Com.* v *Alger*, 7 Cush. 96; *Corporation of Knoxville* v. *Bird*, 12 B. J. Lea, 121; *City of Salem* v. *Maynes*, 123 Massachusetts, 372; *City of New Orleans* v. *Stafford*, 21 Am. Rep. 563; *Barbier* v. *Connolly*, 113 U. S. 27; *Cleveland* v. *Citizens' Gas Light Co.*, 20 N. J. Eq. 206.

IX. The allegations in appellant's bill, as to the unreasonableness of this ordinance, are not sufficient to justify this court in declaring the ordinance void on the ground that it is unreasonable. *Barbier* v. *Connolly*, 113 U. S. 27; *Hing* v. *Crowley*, 113 U. S. 703; *Slack* v. *Jacob*, 8 W. Va. 612; *Waltman* v. *Philadelphia*, 33 Pa. St. 212; *Munn* v. *Illinois*, 94 U. S. 113; *Darnelly* v. *Cabanns*, 52 Georgia, 212; *Wells* v. *Mayor*, 43 Georgia, 67; *State* v. *Schlenker*, 51 L. R. A. 351; *People* v. *Cipperly*, 4 N. E. Rep. 108; *In re Wilshire*, 103 Fed. Rep. 620; *City of Newton* v. *Joyce*, 166 Massachusetts, 83; *Harmon* v. *City of Lewiston*, 46 Am. St. Rep. 893; Cooley Cons. Lim. 5th ed. 222.

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

1. As the bill in this case is based not only upon diversity of citizenship, but upon the alleged unconstitutionality of the municipal ordinances of November 25, 1901, and March 3, 1902, as impairing the obligation of Mrs. Dobbins' contract with the city under prior ordinances, an appeal lies directly to this court, and upon such appeal the whole case is opened for consideration. *Horner* v. *United States*, *No. 2*, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499. The State having delegated certain powers to the city, the ordinances of the municipal authorities in this particular are the acts of the State through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a state law within the

meaning of section 5 of the Circuit Court of Appeals act. *City Railway Co.* v. *Citizens' R. R. Co.*, 166 U. S. 557; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 694; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148.

2. The court below did not pass upon the validity of these ordinances, but came to the conclusion that a bill in equity would not lie to restrain their enforcement, and in this aspect we shall discuss the case. As the only method employed for the enforcement of these ordinances was by criminal proceedings, it follows that the prayer of the bill to enjoin the city from enforcing these ordinances, or prevent plaintiff from carrying out its work, must be construed as demanding the discontinuance of such criminal proceedings as were already pending, and inhibiting the institution of others of a similar character.

That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, *In re Sawyer*, 124 U. S. 200, that no further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule. The plaintiff in the case of *Sawyer* sought to restrain the mayor and committee of a city in Nebraska from removing a city officer under charges filed against him for malfeasance in office. This was held to fall within the general rule and not within the exception.

The general rule that a Circuit Court of the United States, sitting as a court of equity, cannot stay by injunction proceedings pending in a state court to enforce the criminal laws of such State, was applied in *Harkrader* v. *Wadley*, 172 U. S. 148, to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in *Fitts* v. *McGhee*, 172 U. S. 516, to a suit brought by the receiver of a railroad against the attorney general of the State to restrain him from instituting or prosecuting criminal proceed-

ings to enforce against the plaintiff the provisions of a state law reducing the tolls, which had been exacted of the public by the railroad, of which the plaintiff was receiver. This was held to be in reality a suit against the State to enjoin the institution of criminal proceedings, and hence within the general rule. See also *Prout* v. *Starr*, 188 U. S. 537.

Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, in which, under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the railroad commissioners of that State, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the State, who, under color of an unconstitutional statute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding. *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551, 558.

In order to determine the exact property rights at stake in the case under consideration it should be borne in mind that this is not a bill by Mrs. Dobbins, the owner of the land and of the proposed gas works, to enjoin the city from interfering with carrying out the permit she had obtained to erect these gas works, nor by the Valley Gas and Fuel Company, with which she had made a contract to erect these works; but by a subcontractor, which had made a contract with the Gas and Fuel Company to erect for *it*, and upon premises to be designated by Mrs. Dobbins, a water tank and gas holder; and, without even

alleging that the Gas and Fuel Company had refused to carry out its contract, or pay to plaintiff damages, or that Mrs. Dobbins had refused to settle any claim the Gas and Fuel Company might have against her, seeks to enjoin the city of Los Angeles in the assumed right of Mrs. Dobbins from interfering with its servants and employés, and from preventing plaintiff from carrying out the work of erecting the water tank and gas holder, and also to desist and refrain from enforcing its ordinances. It sets up no contract of its own with the city which the municipal ordinances have impaired, but a contract of the city with Mrs. Dobbins, to which it was no party, in which it had no direct interest, and that, too, without averring that the Gas and Fuel Company was insolvent, or unable to respond to its claim for damages. It proceeds wholly upon the assumption that the revocation of Mrs. Dobbins' license will operate injuriously to it, and that it cannot obtain a full and adequate remedy at law by an action against the Gas and Fuel Company upon its contract to pay the price agreed upon between them.

It is true the bill is based upon the theory that plaintiff would suffer great and irreparable loss by the interference of the city and by the exposed condition of the works, and that the refusal of an injunction would result in innumerable actions at law and a multiplicity of suits, which would have to be instituted at great expense and without the possibility of recovering indemnity. We are not, however, bound by this allegation, when the facts set forth in the bill show that, if the plaintiff be entitled to a remedy at all, it has an action against the Gas and Fuel Company, which is presumed at least to be able to respond in damages for all such as plaintiff may have suffered by the interruption of the contract. Whether the Gas and Fuel Company in such action could defend upon the ground that the municipality had forbidden the prosecution of the work, might depend somewhat upon the terms of the contract, and upon the right of the Gas and Fuel Company to take advantage of the interference of the city. As to this we express no opinion. It is true the employés of the plaintiff were arrested, but that fact alone wrought no legal injury to the plaintiff, since if it were prevented from any cause for which the Gas and Fuel Com-

pany were chargeable, it might bring an action for damages against that company, with which alone its contract was made, and recover such damages as it could prove to have sustained.

It is true that in a number of cases bills have been sustained by one or more stockholders in a corporation against the corporation and other parties, to restrain the enforcement of an unconstitutional law against the corporation itself, but it has always been held, and general equity rule 94 requires, that such bill must contain an allegation under oath that the suit is not a collusive one to confer on a court of the United States jurisdiction, and must also contain an allegation that the directors of a corporation have refused to institute the proceedings themselves in the name of such corporation, and the efforts of the plaintiff to secure such action on the part of the directors, and the cause of his failure to obtain it. *Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450; *Corbus* v. *Alaska Co.*, 187 U. S. 455. This rule, however, has no application to sub-contractors who stand in no position to enforce the right of their immediate contractors, such as was the Gas and Fuel Company, or of the owner of the property who had agreed with such immediate contractors to do the work. The plaintiff in this case stands practically in the position of one who seeks to take advantage of the unconstitutionality of a law in which it has only an indirect interest, and by the enforcement of which it has suffered no legal injury. In this it stands much in the position of the plaintiff in *Tyler* v. *Court of Registration*, 179 U. S. 405, and in *Turpin* v. *Lemon*, 187 U. S. 51; *In re Wellington*, 16 Pick. 87, 96; *Sinclair* v. *Jackson*, 8 Cow. 543; *Jones* v. *Black*, 48 Alabama, 540; *Shehane* v. *Bailey*, 110 Alabama, 308; *Dejarnett* v. *Haynes*, 23 Mississippi, 600.

In this connection, also, the appellant cites the case of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, in which we held that the trustee of the bondholders of a railway corporation could maintain a suit against the state railway commission to restrain the enforcement of unreasonable and unjust rates. The case, however, was put upon the express ground that the bondholders were the equitable and the beneficial owners of the property of the corporation, and in that capacity

might "invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls." In that case the bondholders were not only the beneficial owners of the property, but a reduction of the tolls might have resulted in the practical destruction of their securities, and unless the bill were maintained they were practically remediless. The case has but a remote analogy to the one under consideration.

As the appellant has shown no legal interest in this litigation, and no lack of a complete and adequate remedy at law, it results that the bill was properly dismissed, and the decree of the court below is therefore

Affirmed.

NASHUA SAVINGS BANK *v.* ANGLO-AMERICAN LAND, MORTGAGE AND AGENCY COMPANY.

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

No. 167. Submitted January 29, 1903.—Decided March 16, 1903.

1. The expression in section, 721 Rev. Stat. (the "laws of the several States") in regard to the authentication of foreign statutes applies not only to statutes of the States but to the decisions of their highest courts.

The Circuit Court of the United States, sitting in New Hampshire, may receive as evidence, when attached to the deposition of the manager of a corporation, who is an attorney and solicitor of the Supreme Court of Judicature in England of thirty years' standing, intimately acquainted with the English Corporation Laws, what purport to be the copies of the laws under which such corporation was organized, and which he testifies were issued by authority, being printed by Her Majesty's printer, and as such are by law receivable in evidence without further proof, in the domestic courts of Great Britain.

2. By subscribing to the stock in a foreign corporation, the subscriber subjects itself to the laws of such foreign country in respect to the powers and obligations of such corporation, and if the statute under which the

corporation is organized and the by-laws of the corporation provide that the directors may from time to time make such calls as they think fit upon members for all moneys unpaid on shares of stock, it is not necessary for the declaration to contain averments either as to the conditions upon which the corporation can make assessments or that the assessments sued for were necessary.

There is a presumption of good faith attaching to foreign as well as to domestic corporations.

Variances between the allegation and proof must be taken when the evidence is offered, and if such evidence be sufficient to support the verdict the defect in the declaration is cured.

Where the bill of exceptions contains nothing to indicate that the call for assessments was not properly made and does not show that it contains *all* the evidence, this court is at liberty, if the circumstances of the case require it, to infer that there was other evidence to support the verdict. The sufficiency of evidence cannot be reviewed on writ of error.

3. Where it appears by the articles of association that the remedy by forfeiture and sale for non-payment of assessments is cumulative, such remedy is not a bar to an action at law for the debt, and such sale or forfeiture is not a condition precedent to the right to recover the assessments.

4. Where the statute under which a corporation is organized provides that moneys payable in pursuance of the articles of the company shall be deemed a debt due by such member, it is not necessary to prove an express promise to pay an assessment.

THIS was an action by the defendant in error, a British corporation, in the Circuit Court for the District of New Hampshire, against the Nashua Savings Bank, a New Hampshire corporation, to recover an assessment made by such corporation in pursuance of its charter and by-laws, upon defendant's subscription to a thousand shares of its stock.

The case was tried before the Circuit Judge and a jury, and resulted in a verdict for the plaintiff by direction of the court, and a judgment against the bank in the sum of $7131.10, which was affirmed on writ of error by the Circuit Court of Appeals. 108 Fed. Rep. 764.

Mr. J. S. H. Frink and *Mr. A. T. Batchelder* for petitioner.

It is elementary law that the statutes of Great Britain are facts, of which this court does not take cognizance without proof. *Liverpool G. W. Steam Co.* v. *Insurance Co.*, 129 U. S. 445.

The ordinary modes of proof are: (1) By exemplification un-

der great seal. (2) By certificate of an officer having authority to make it. (3) By testimony from comparison with original enrollment. *Church* v. *Hubbart*, 2 Cranch, 187, 238; *Emery* v. *Berry*, 28 N. H. 485, in which the distinction between proof of written and unwritten foreign law is recognized. The Circuit Court recognized the modes of proof, as above suggested, as the appropriate ones, but held that the strict rule had been relaxed in New Hampshire in *Hall* v. *Costello*, 48 N. H. 176.

In the *Sussex Peerage Case*, 11 Clark & F. 35, it was held that the witness might refresh his memory by reference to the written law, but the proof of the law is to be from the witness, not the book.

The witness's testimony has not added a word to the copies of the statute. If it is enough to present a portion of the enactment of a foreign country, purporting to be printed by authority, without any verification, then these statutes have been proven, otherwise not. *Beach* v. *Workman*, 20 N. H. 379, 383.

The general rule as to the proof of foreign laws is that the law which is written, that is, statute law, must be proved by a copy properly authenticated, and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law. *Ennis* v. *Smith*, 14 How. 400; *Pierce* v. *Indseth*, 106 U. S. 546, 551.

It would seem, in the case last cited, the state statute permitted proof very similar to that attempted by plaintiff, but it would have been inadmissible but for such statute; we repeat, no law of New Hampshire justifies it.

Courts of one country cannot take cognizance of the laws of another without plea or proof. *Bank of North America* v. *Rindge*, 154 Massachusetts, 203; *Hancock Nat. Bank* v. *Ellis*, 166 Massachusetts, 414.

In the absence of any proof that this call was made for the payment of debts or other obligations of the plaintiff corporation, or that the suit was instituted or carried on for the benefit of creditors, there can be no recovery in the absence of an express promise to pay. *Upton* v. *Tribilcock*, 91 U. S. 45; *Webster* v. *Upton*, 91 U. S. 65; *Chubb* v. *Upton*, 95 U. S. 665, cited and distinguished.

Petitioner's contention is:

(1.) That plaintiff offered no evidence as to what the law of Great Britain is to collect calls or assessments, in the absence of an express promise to pay, and without evidence of the necessity of such calls or assessments to pay debts, when the articles of association provide for a forfeiture of stock. (2.) There being no evidence as to the law of Great Britain, the court must assume that the law of Great Britain in this behalf is the same as that of New Hampshire. (3.) The law of New Hampshire declares that no such action can be maintained. *Kelley* v. *Kelley*, 161 Massachusetts, 111; *Whidden* v. *Seelye*, 4 Maine, 247.

Whether an action of assumpsit or debt would lie in Great Britain to enforce this assessment or call, or whether there must be proof of its necessity, or whether remedy must be had by forfeiture and sale in the first instance, or exclusively, the plaintiff has offered no evidence; Great Britain being an alien country, the burden was on plaintiff to prove its laws. *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 445; *Pierce* v. *Indseth*, 106 U. S. 546, 551.

The law of New Hampshire in this behalf is well settled, that when an act of incorporation gives no express remedy against a member for assessments, he is liable to no action for them by virtue of his membership. *Franklin Glass Co.* v. *Alexander*, 2 N. H. 381; *Anglo Am.* v. *Dyer*, 64 N. E. Rep. 46; *Railroad* v. *Johnson*, 30 N. H. 390; *Company* v. *Burlingame*, 67 N. H. 301; *Shattuck* v. *Robbins*, 68 N. H. 565.

No reason appears why this court should not follow the law as administered in New Hampshire, and there are potent reasons why it should. *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Mandel* v. *Swan Land & Cattle Co.*, 154 Illinois, 177; *R. R. Co.* v. *Bank*, 102 U. S. 14, 58.

Mr. Omar Powell, *Mr. Gilbert A. Davis* and *Mr. Daniel A. Cady* for respondent.

Foreign statutory laws may be proved: (1) by a duly certified copy; (2) by a sworn, compared, written copy; or (3) by a printed copy produced by a licensed practicing attorney of the foreign country authenticated by his oath as having been offi-

cially printed and receivable in evidence in that country without further proof. *McNeil* v. *Holbrook*, 12 Peters, 84–89; *Conn. Mut. Life Ins. Co* v. *Union Trust Co.*, 112 U. S. 250–255. In New Hampshire the rule is still more liberal than that followed in this case. *Hall* v. *Costello*, 48 N. H. 176; *Kennard* v. *Kennard*, 63 N. H. 303; *State* v. *Davis*, 69 N. H. 350; *Barrows* v. *Downs & Co.*, 9 R. I. 446; *The Pawashick*, 2 Lowell, 142; *Jones* v. *Maffet*, 5 S. & R. 523; *Lacon* v. *Higgins*, 3 Stark. 178; *Merrifield* v. *Robbins*, 8 Gray, 150.

There is no reason for a more strict rule. Authentication is a question for the court. *Church* v. *Hubbard*, 2 Cranch, 238; *Ennis* v. *Smith*, 14 How. 426; *Pacific Gas Co.* v. *Wheelock*, 80 N. Y. 278; *Dundee Mortgage, Trust & Investment Co.* v. *Cooper*, 26 Fed. Rep. 665.

Section 140 provides that if a non-resident stockholder shall "neglect to give his address" the office of the company shall be deemed his address. This is a very reasonable requirement. No wrong is done. Even if this paragraph was invalid, the petitioner had due notice and actual knowledge of the call. By becoming a stockholder, the petitioner subjected himself to the laws of England governing the respondent company and all reasonable rules of the company. *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527; *Hudson River Pulp and Paper Co.* v. *H. H. Warner*, 99 Fed. Rep. 187; *Mandel* v. *Swan Land & Cattle Co.*, 154 Illinois, 177.

A sale or forfeiture of the petitioner's shares was not a condition precedent to the respondent's right to recover calls.

In the absence of fraud, a stockholder cannot question the wisdom or necessity of a call. *Oglesby* v. *Attrill*, 105 U. S. 605–610.

A stockholder cannot question the necessity or advisability of a call. Cook on Stockholders, §§ 111, 113. A call made by directors is conclusive evidence of its necessity, and binds the stockholder without notice. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 339; *Bailey* v. *Birkenhead*, 12 Beav. 443; *Anglo American &c. Co.* v. *Dyer*, 64 N. E. Rep. 416; 2 Thomp. Corp. § 1710.

Whether the court erred in directing a verdict requires a

consideration of the evidence as a whole. This question is not before the court as all of the evidence was not included in the bill of exceptions nor does it purport to contain all of the evidence. *Texas & Pacific R. R.* v. *Coxe*, 145 U. S. 593–606; *Hansen* v. *Boyd*, 161 U. S. 397; *City of Providence* v. *Babcock*, 70 U. S. 240–244; *U. S. Mutual Accident Assn.* v. *Robinson*, 74 Fed. Rep. 10.

Every presumption is in favor of the correctness of the decision of the trial court. *United States* v. *Patrick*, 73 Fed. Rep. 800–806.

The accepting and holding of the shares by the petitioner upon these conditions created an implied if not an express promise to pay the balance when called. *Tucker* v. *Haughton*, 63 Massachusetts, 350; *Buffalo &c. Ry. Co.* v. *Dudley*, 14 N. Y. 351; *Howarth* v. *Lombard*, 175 Massachusetts, 574; *Webster* v. *Upton*, 91 U. S. 67; *Upton* v. *Tribilcock*, 91 U. S. 45–48; *Palmer* v. *Lawrence*, 3 Sandf. (N. Y.) 9.

A corporation organized under a foreign government stands in this respect upon the same footing as corporations of other States. *Bank* v. *Earle*, 13 Peters, 589; *The British American Land Co.* v. *Ames*, 6 Met. 391; Story, Conflict of Laws, §§ 5–65; 2 Morawetz Corp. §§ 960–961; 6 Thompson on Corporations, § 7883.

Petitioner's share certificate expressly bound him to an English contract. *Milliken* v. *Pratt*, 125 Massachusetts, 374.

The acts of this company in the management of its internal affairs must have that presumption of validity that will be accorded to the acts of individuals, or to state it more correctly the burden was upon petitioner to show irregularity or invalidity. *Can. So. Ry.* v. *Gebhard*, 109 U. S. 527.

The verdict is the conclusion of the court based upon the *facts* in evidence and as stated in another part of this brief, it can only be reviewed by consideration of *all* the evidence.

If it be claimed that there is a variance between the declaration and the proofs we answer: (1) that can only be decided by an examination of all the evidence which is not before the court;— and (2) that to save the right of objection upon the ground of variance the party must object to the admission of

the evidence when it is offered and if he does not do so it is waived. *Roberts* v. *Graham*, 6 Wall. 578; *Boston & Albany R. R. Co.* v. *O'Reilly*, 158 U. S. 334; *Graves* v. *State*, 121 Indiana, 359; *Dunstan* v. *R. R. Kirkland*, 3 Hughes, 641; *S. C.*, Fed. Cas. 4181.

If the objection be not taken when the evidence is offered, the court may instruct the jury upon the whole field of inquiry covered by the evidence. *Boyce* v. *California Stage Co.*, 25 California, 460; Rev. Stat. § 954.

As the common law rules of pleadings prevail in New Hampshire it is submitted that the *debitatus assumpsit* is the proper form of action. 1 Chitty on Pleadings (13th Amer. ed.), * 340, * 341, * 401, * 106; 2 Chitty Pleadings, * 52; *Davis, Treasurer*, v. *Williams, Administrator*, 3 East, 232; *Pullman* v. *Upton*, 96 U. S. 328; *Mandell* v. *Swan Land Co.*, 154 Illinois, 177; 1 Chitty on Pleadings, 197, * 198; *Dermott* v. *Jones*, 2 Wall. 1–9.

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

The assessment in question had been made by the directors of the company, in pursuance of their amended articles of association, which declared that "the directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on their shares, and each member shall pay the amount of every call so made upon him to the persons, and at the times and places appointed by the directors."

1. In order to prove the incorporation of the plaintiff company, as well as the liability and rights of the stockholders, the deposition of an attorney and solicitor of the Supreme Court of Judicature in England, who was also managing director of the plaintiff company, was read in evidence. His testimony showed that the plaintiff was a corporation organized with limited liability under five different acts of Parliament, from 1862 to 1880, copies of which he produced and delivered to the commissioner, stating that these copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." To the

admission of the statutes the defendant excepted upon the ground that they were not proved according to the established rules of law.

As these statutes were the basis of the plaintiff's corporate existence, and its right to bring this action, they must undoubtedly be proved as facts. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445. While it was stated by this court in the early case of *Church* v. *Hubbart*, 2 Cranch, 187, 238, that foreign judgments are usually and most properly authenticated either by an exemplification under the great seal, by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated, the Circuit Court of the United States sitting in New Hampshire may, under Rev. Stat. sec. 721, declaring that "the laws of the several States," with certain exceptions, "shall be regarded as rules of decision in trials at common law, in the courts of the United States," receive such evidence of the authentication of foreign statutes as the practice of the courts in that State may authorize and justify. *McNiel* v. *Holbrook*, 12 Pet. 84, 89; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 255; *Vance* v. *Campbell*, 1 Black, 427. The "laws of the several States" with respect to evidence within the meaning of this section apply not only to the statutes but to the decisions of their highest courts. *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 582; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan* v. *Bindley*, 1 Wall. 66.

The law of New Hampshire upon this subject appears to have been settled in *Hall* v. *Costello*, 48 N. H. 176, in which an attorney, resident in New Hampshire, who had gone to Canada to investigate Canadian law, was permitted to state orally what he found the law to be, as embodied in the Queen's proclamation of neutrality. To same effect are *Barrows* v. *Downs*, 9 R. I. 446; *Jones* v. *Maffet*, 5 S. & R. 523. There is an even greater reason for permitting a local attorney, of thirty years' experience, who, as he states, was intimately acquainted with the English company or corporation laws, to produce as evidence of such laws copies of the statutes printed by authority

of the English government, and used as proofs of statutes in the English courts.

It would appear that such authentication of foreign laws would be deemed sufficient in the English courts, as in *Lacon* v. *Higgins*, 3 Starkie, 178, it was held that the French code was sufficiently proved by a witness—a French vice consul—who produced a book printed by authority of the French government, which the witness stated contained the French code, upon which he acted in his office as vice consul. In most, if not all, of the States of this Union statutes have been passed permitting laws of sister States to be proved simply by the production of a book containing what purports to be an authorized edition of such laws printed by state authority. *Emery* v. *Berry*, 28 N. H. 473. While the same liberality is not extended to foreign laws required to be proved as facts, it would seem like sticking in the bark to hold that a foreign expert might testify orally as to what such laws were, and not be able to produce what purports to be the official edition of such laws, and to testify as to the authenticity of such edition, and to the fact that it was received as evidence in the domestic courts of that country. To the average mind it would seem as though there was much less liability to mistake in a printed copy of a statute from the official printer, than in a copy written and compared by an ordinary scrivener. The evidence was properly received.

2. Exception was also taken to the declaration, in that it contained no averment or allegation upon what conditions the plaintiff was authorized to make assessments. In this connection it is insisted that the declaration should have averred that such an assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; that it is also defective in that it contains no averment of notice of such assessment to defendant; or that defendant ever made an express promise to pay such assessment; and no direct allegation that defendant was a stockholder at the time the assessment was made. It appears, however, by the act of 25 and 26 Vic. chap. 89, "for the incorporation, regulation, and winding up of trading companies and other associations," that the articles

of association, "when registered, shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, *shall be deemed to be a debt* due from such member to the company, and in England and Ireland to be in the nature of a specialty debt." It also appeared by the articles of association of the plaintiff corporation, No. 3, "that every person who has accepted any share or shares in this company, and whose name is entered in the registry of members, and no other person, shall be deemed to be a member." These regulations also contained the provision heretofore mentioned, that the directors might from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on their shares. The board of directors is thus constituted a tribunal to determine when and to what amount assessments shall be made upon the unpaid shares of stock. By subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation. *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527; *Relfe* v. *Rundle*, 103 U. S. 222.

In the absence of fraud the necessity for an assessment upon the capital stock cannot be made the subject of inquiry by the courts. As was said by Mr. Justice Field in *Oglesby* v. *Attrill*, 105 U. S. 605, 609: "As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful." *Bailey* v. *Birkenhead &c. Railway Co.*, 12 Beav. 433; see also Cook on

Stockholders, sec. 113; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329. Whether such assessment could be impeached by showing that the corporation was not a *bona fide* enterprise, or had never actually engaged in business, or become a going concern, or that the assessment was made unnecessarily and in bad faith, or that a discrimination was made against foreign stockholders, it is unnecessary to determine, since no evidence to that effect was offered on behalf of the defendant. Certainly, under the cases above cited, it would be unnecessary in order to make a *prima facie* case to negative these facts. There is a presumption of good faith attaching as well to foreign as to domestic corporations.

The trial proceeded under the third count of the declaration, which was in *indebitatus assumpsit*, and no objection was made to the evidence offered upon the ground of variance. Under such circumstances, and without expressing an opinion as to the admissibility of the evidence offered, the declaration is good after verdict. In *Roberts* v. *Graham*, 6 Wall. 578, we held that variances between the allegation and proof must be taken when the evidence is offered, and if such evidence be sufficient to support the verdict the defect in the declaration is cured. *Patrick* v. *Graham*, 132 U. S. 627.

The court in charging the jury in this case instructed them that there was no doubt the call for this assessment had been properly proved; that the only possible question which could have arisen was whether or not certain persons were directors of the corporation at the time of the call, and that as the amended articles of the association provided that calls might be made by the directors, there was no doubt that the call in question was properly made.

As the bill of exceptions contains nothing to indicate that the call was not properly made, and does not show that it contained *all* the evidence in the case, we should be at liberty, if the circumstances of the case required it, to infer that there was other evidence to supply any defect in respect to the legality of the call. *Hansen* v. *Boyd*, 161 U. S. 397; *City* v. *Babcock*, 3 Wall. 240; *United States* v. *Patrick*, 73 Fed. Rep. 800. The sufficiency of the evidence cannot be reviewed on writ of

error. *Generes* v. *Campbell*, 11 Wall. 193, 199; *Dower* v. *Richards*, 151 U. S. 658.

It appears from the testimony of the secretary of the company that a notice of the call was posted up in a conspicuous place in the register's office of the company for more than a month before the call was payable, and in addition thereto a printed notice of the call was also forwarded to the defendant bank. This was a sufficient compliance with article 140 of the articles of association, which provides that "if any member resident out of the United Kingdom neglect to give such address as is herebefore required, notice from him may be posted up in a conspicuous place in the register's office of the company, and for all the purposes of these regulations the register's office of the company shall be deemed to be the registered place of abode of such member."

3. A sale or forfeiture of defendant's shares was not a condition precedent to the right to recover this assessment. While a remedy by forfeiture is given by the articles of the association, this remedy is cumulative, and is no bar to an action at law for the debt. This is clearly intended as a concurrent remedy.

4. Nor do we think there was any necessity of proving an express promise to pay this assessment. The English statute above quoted provides that all moneys payable by any member in pursuance of the articles of the company shall be deemed a *debt due by such member* of the company, and as this statute implies a promise to pay from a subscription to the shares, it clearly obviates the necessity of proving an express promise. *Upton* v. *Tribilcock*, 91 U. S. 45; *Webster* v. *Upton*, 91 U. S. 65; *Chubb* v. *Upton*, 95 U. S. 665; *Howarth* v. *Lombard*, 175 Massachusetts, 570, 574. Although the law of New Hampshire seems to be that in the absence of an express promise no personal action will lie, *Shattuck* v. *Robbins*, 68 N. H. 585, yet even there an obligation created by the charter is treated as the equivalent of an express promise. Cook on Stockholders, sec. 71; *Anglo-American Co.* v. *Dyer*, 181 Massachusetts, 593.

There was no error in the action of the court below, and its judgment is therefore

Affirmed.

SENA *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 40. Argued January 16, 1903.—Decided April 6, 1903.

1. Where the boundaries of a Spanish grant made in 1728, are defined with accuracy they will not be controlled by vague and practically unintelligible terms as to quantity.
2. While, owing to the loose manner in which they were made and the boundaries described, this court has been extremely liberal in construing Spanish grants, such grants must still be construed favorably to the government, and the grantee is bound to show not only the grant itself, but that its boundaries were fixed with reasonable certainty; and where the Court of Private Land Claims has held that the evidence of settlement, occupation, continuity of possession, cultivation, etc., is so vague, contradictory and uncertain as to be almost wanting, this court in the absence of clear evidence to the contrary will adopt the opinion of the court below in that particular.
3. Where the last known occupant of a Spanish grant made in 1728 had been killed by the Indians in 1839, and when the land passed to the United States under the treaty of 1848 with Mexico possession had been abandoned by his descendants for at least nine years and no action was taken by any one in regard to the grant until 1899, and meanwhile the public land surveys were extended over the tract in 1861, homestead and other entries were made, improvements established, patents secured and mines opened and developed, the doctrine of laches is peculiarly applicable, and under the provisions of the statute establishing it, the Court of Private Land Claims could not be called upon to confirm such a grant.

THIS was a petition for the confirmation of a tract of land in the county of Santa Fé, New Mexico, known as the José de Leyba grant, which has never been officially surveyed, but is estimated to contain about 18,000 acres.

After filing the petition it was found there were a number of persons holding portions of the tract sued for under a claim of title adverse to the grant; and upon motion of the United States requiring these adverse claimants to be made parties defendants, the original petition was amended, and two of these, the American Turquoise Company and one McNulty, joined with the United States in defending the case.

The court disallowed the claim upon the ground that the evidence did not show a perfect grant, inasmuch as there was no evidence of a compliance with the royal ordinance of 1754, which provided that all grants subsequent to 1700 must be confirmed as a prerequisite to their validity; and that, if it were an imperfect grant, it should, under the act creating the Court of Private Land Claims, have been filed within two years from the taking effect of the act, and was therefore barred.

Since the decree of the Court of Private Land Claims certain additional evidence has been discovered, tending to show possession of the land covered by the grant for a long period subsequent thereto, and which it is now insisted supplies the defects which caused the rejection of the grant.

Mr. Frank W. Clancy for appellant. *Mr. H. S. Clancy* was on the brief.

Mr. Special Assistant Matthew G. Reynolds for the United States. *Mr. Solicitor General Richards*, *Mr. Special Assistant Attorney Pope* and *Mr. Ward L. Bartlett* were on the brief.

Mr. James W. Vroom was on a brief for defendant Prince.

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

The petition of Leyba, upon which the grant was originally made, and which is the material document in this case, and is in the Spanish language, is thus translated in the record:

"City of Santa Fé, May 24, 1728, before the governor and captain general of this kingdom, there was presented this petition with its contents:

"Joseph de Leyba, resident of the city of Santa Fé, appear before your excellency in due legal form, and state that in accordance with the royal ordinance of his Royal Majesty, I enter a piece of land and wood, vacant and unsettled, enough for half a *fanega* of corn-planting land, somewhat more or less, which is bounded on the east by the San Marcos road; on the

south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas.

"Therefore, I ask and pray, your excellency be pleased to make me in the name of His Majesty, a grant for the said piece of land, for myself and my children, heirs and successors, and that the act of royal possession be executed to me whereby I will receive benefit and favor as well as justice which I seek. And I swear in due form that this my petition is not made in malice and as it may be necessary, etc.

"JOSEPH DE LEYBA."

Annexed thereto is the grant of the governor and captain general of the province, with the condition that the grantees settle the land within the term prescribed by the royal ordinances, and a direction to the alcalde to put the party in possession.

Following this is the report of the chief alcalde of the city of Santa Fé, that having taken witnesses and "inspected the lands and woods prayed for by the said petitioner," he put him in royal possession by performing the customary ceremonies of livery of seizin.

There are two disputed propositions connected with this petition of Leyba's: (1) As to the quantity of land granted; (2) as to its boundaries. It is admitted by both parties that the above translation from the record of the quantity of the land granted "as a piece of land and wood, vacant and unsettled, enough for half a *fanega* of corn-planting land, somewhat more or less," is incorrect, the original Spanish being as follows: "*Registro un pedaso de tierras y monte, yermo y despoblado, que cabe media fanega de maiz de sembradura, poco mas ó menos.*"

The argument of the government is that the quantity covered by the grant was only enough land to plant half a *fanega* of corn, a little more or less, and that as a *fanega de maiz* is a measure of corn which will plant 8.82 acres, half of a *fanega* would measure, 4.41 acres; the government translation being "I register a piece of land, and woods, uncultivated and unsettled, that will contain half a *fanega de maiz de sembradura*, a

little more or less." The inference from this is that all that was conveyed was a piece of land that "will contain" enough for half a *fenega of maiz*. Claimant's translation, however, of the words "que cabe" is that it is a tract of land that "contains" within its outer boundaries half a *fanega* of corn, that is, of land capable of cultivation.

The probabilities, aside from the fact that the word "cabe" is a verb of the present tense, favor the construction of the claimant, as the words "lands and woods" would hardly be used as descriptive of a tract of four and one half acres. In addition to that, however, the description of quantity is wholly inconsistent with the boundaries, (hereafter stated,) which evidently contemplated a large tract of land, according to the Spanish and Mexican customs of making grants to settle. Indeed, a grant of four and one half acres of land at a distance from any town, city or settlement is so rare that the presumptions are all against it. If the boundaries were defined with accuracy, we should have very little difficulty in holding that they would not be controlled by the vague description of "a parcel of land and woods, uncultivated and unsettled, which includes half a *fanega* of corn-planting land."

This is the more apparent by an inspection of the subsequent documents, which include a will of Simon de Leyba, son of the grantee, of the year 1783, giving the boundaries of the tract, and a deed of Salvador Antonio de Leyba, grandson of José, to his son in 1834, also describing the lands by similar boundaries. Indeed, none of the subsequent documents make any reference whatever to the half *fanega* of corn-planting land. The will also contains a bequest of live stock and farming tools seemingly appurtenant to the ranch and greatly in excess of what would naturally belong to a tract of four and a half acres.

2. The difficulty, however, is with the description of the boundaries themselves, which is: "On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas." In the will of Simon de Leyba of 1783 the boundaries are the same upon the south and east, and on the north "the road which goes

towards Pecos from the Cerillos, *or* lands of Captain Sebastian de Vargas," and on the west " with the lands of the old Pueblo of the Cienega." The land is described in substantially the same terms in the deed of 1834. The description of the lands on the east side as bounded by the San Marcos road is clearly defined. The description of the north boundary as the road from Pecos to the Cerrillos is also defined with somewhat less certainty, the lands of Sebastian de Vargas having been located, surveyed and confirmed several miles to the east of the Leyba grant; but upon the west and south the boundaries, even as sworn to orally by witnesses, are so uncertain as to afford little guide to a surveyor in attempting to locate the tract.

The west boundary, which is described in the grant as " the lands of Juan Garcia de las Rivas," is described in the will of 1783 as " the lands of the old Pueblo of the Cienega." While there is some evidence from the archives that the father of Garcia de las Rivas, in 1701, owned a piece of land somewhere west of the Leyba tract, known even then as the old Pueblo of la Cienega, there is nothing to show the east boundary of the Pueblo, and consequently the west boundary of the Leyba tract. The south boundary, said to be " an arroyo called Cuesta del Oregano," it seems to be impossible to locate with any degree of certainty, though it was probably near the Coyote Spring, at which the only house built upon this tract appears to have been located. This house long since fell into ruins, and there is no evidence that it has been occupied since the last owner of the grant, Juan Angel de Leyba, was supposed to have been killed by the Indians in 1839.

The evidence of possession subsequent to the grant does not afford much aid in fixing the boundaries, since the land, like most of that in Spanish-American territories, was not of a kind admitting of a well defined, actual and adverse possession, such as that of cultivated land. The most favorable view for petitioner that can be taken of this evidence is that possession of a house or a certain field of arable land may be referable to the entire tract included within the boundaries of the grant; but when the boundaries themselves are indefinite, the possession of a house is of no value in fixing the boundaries. A grant too

indefinite to be located and never fixed by any survey, is void as against the United States. As was observed in *United States* v. *Delespine*, of a Spanish grant in Florida, 15 Pet. 319, 335, "the public domain cannot be granted by the courts." They may locate the boundaries fixed by grant, but the boundaries must be so fixed as to admit of a survey. *United States* v. *Miranda*, 16 Pet. 153, 160; *United States* v. *Ring*, 3 How. 773; *Villalobos* v. *United States*, 10 How. 541; *Arivaca Land and Cattle Co.* v. *United States*, 184 U. S. 649, 652.

The grant was made and possession was given to the grantee in 1728. Nothing being shown to the contrary, we presume that the possession continued until 1783, the date of the will of Simon de Leyba, to his son Salvador Antonio de Leyba, "whom I recognize as my sole heir." The next item of interest tending to show possession is the deed of Salvador Antonio de Leyba in 1834 to his son Juan Angel de Leyba, who are both described as residents of the city of Santa Fé, wherein the same boundaries are also given, although the land is called "the rancho of the Coyote Spring, with its houses and corrals, together with the grant in which the said ranch is situated, which was given to my grandfather by the King of Spain May 25, 1728." Juan Angel appears to have been killed by Indians a few years after this deed was made, but it seems to have been uncertain whether he was in actual possession of the tract.

To rebut the case made by the claimant the government offered in evidence the depositions of several residents of that neighborhood, who swore that they had never heard of the José de Leyba grant, or its boundaries. Objection was made to the reading of these depositions upon the ground that the witnesses named were present in court, and might be sworn orally. It is unnecessary to determine whether the court erred in admitting the depositions under such circumstances, in view of the vague and unsatisfactory evidence on behalf of the claimant of the boundaries and possession of this tract.

Admitting that the documents introduced afforded a sufficient presumption of a continued possession from 1738 to 1834, there was no evidence of the occupation of the land by any member of the Leyba family subsequent to 1839. This fact of

a total absence of any claim to the land made by the last heirs of the occupant, and that the house was allowed to fall into ruins, is strong evidence either that the land was abandoned as not worth cultivating or that a residence there had become too dangerous by reason of the presence of hostile Indians. In this connection the court below found that "the evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant and knowledge of the existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting." In the absence of clear evidence to the contrary we deem it our duty to adopt the opinion of the court below in that particular. *United States* v. *Pendell*, 185 U. S. 189, 197.

While in construing these Spanish grants, owing to the loose manner in which they were made, and the boundaries described, we have been extremely liberal, still we are bound to consider that grants of this description, as of all others, must be construed favorably to the government, and the grantee is bound to show not only the grant itself but that the boundaries were fixed with reasonable certainty. *Slidell* v. *Grandjean*, 111 U. S. 412, 437; *United States* v. *Oregon &c. R. R.*, 164 U. S. 526, 539.

3. But conceding that an experienced surveyor, acquainted with the land in that neighborhood, might locate the boundaries of this tract, there is a still more serious difficulty in the evidence of abandonment and the laches of the claimant, which defences may properly be considered together. Under our Anglo-Saxon system of jurisprudence, questions of the abandonment of land by the owner rarely arise, since they are usually sold to a purchaser or to the State for taxes; but the Spanish law recognizes distinctly the right to abandonment. It is stated in 1 Partidas, Law 50, p. 365, that "if a man be dissatisfied with his immovable estate and abandons it, immediately he departs from it corporally, with an intention that it shall be no longer his, it will become the property of him who first enters thereon." See also Hall's Mexican Law, § 1489. The same principle is stated by Escriche, Title "*Abandono de cosas:*"

"If an owner voluntarily abandons a thing, whether personal or real, with intent no longer to count it in the number of his possessions, because it is useless or burdensome, or for mere caprice, he loses his ownership, and the first who occupies it makes it his." We are also referred by counsel to a law of the Departmental Council of New Mexico enacted in 1837, which declares that "every individual who abandons the land upon which he has settled and which he acquired by grant, with the intention of establishing himself elsewhere to live there, and does not leave some one to take his place in ordinary labor, shall lose the real property he had acquired." See also *Landes* v. *Perkins*, 12 Missouri, 238, 256; *Sideck* v. *Duran*, 67 Texas, 256.

As there is no testimony tending to show that the Leybas ever sought to resume possession of the land after the death of Juan Angel in 1839, there was at least a presumption of abandonment. Not only is there no evidence tending to show possession of the land by representatives of the original grantee since 1839, but for sixty years thereafter there was no attempt made to assert title thereto. By section 7 of the Private Land Claims act, 26 Stat. 854, "all proceedings" therein "shall be conducted as near as may be according to the practice of the courts of equity of the United States," and by section 13 no claim shall be allowed upon an imperfect title unless "the claimant would have had a lawful right to make it perfect had the territory not been acquired by the United States," and it is one "that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect." While it is true that we have held that evidence of possession since the date of the treaty cannot be regarded as an element going to make up a title, *Crespin* v. *United States*, 168 U. S. 208; *Hayes* v. *United States*, 170 U. S. 637, 653; *Hays* v. *United States*, 175 U. S. 248, 259, it does not follow that abandonment of the land and failure to assert a title since the treaty may not operate as a bar. It is clear that, in the establishment of a title as of a certain date, possession subsequent to that date

is of no value ; but considering the title to have been sufficient as of that date, failure to assert such title within a reasonable time thereafter opens the case to the defence of laches.

In *United States* v. *Moore*, 12 How. 209, it was said of a Spanish grant in Louisiana : " We are called on to decide in this case according to the rules governing a court of equity, and are bound to give due weight to lapse of time. The party was under no disability, and slept on his rights, as he now claims them, for nearly fifty years, without taking a single step. He makes no excuse for his long delay, and cannot now get relief by having his title completed. No case has come within our experience, where the obscurity and antiquity of the transaction more forcibly than in the present case, required a court of equity to bar a complainant on legal presumptions founded on lapse of time ; and where the bar should take the place of individual belief." To the same effect are *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, and *United States* v. *Martinez*, 184 U. S. 441.

There are facts connected with this case which render the doctrine of laches peculiarly applicable. This land passed into the possession of the United States under the treaty with Mexico of 1848. Possession of the land had then been abandoned by the descendants of the grantees for at least nine years, and probably longer. In 1854, six years after the treaty, a surveyor general was appointed for New Mexico, 10 Stat. 308, whose duty it was to ascertain the origin, nature, character and existence of all claims to lands under the laws, usages and customs of Spain and Mexico, and report to Congress with a view of confirming *bona fide* grants, and giving full effect to the treaty. No action appears to have been taken before him to ascertain the validity or boundaries of this grant, although the act seems to have remained in force until 1891, when the Court of Private Land Claims was created. The public land surveys were extended over the tract in 1861 ; homestead and other entries were made, improvements established, patents secured, mines opened and developed, but no attempt made to assert the rights of the grantee or his descendants. The Court of Private Land Claims was established in 1891, and all persons having imper-

fect titles were required to present them within two years, and all having perfect titles had the right, but were not bound, to apply to that court for confirmation of such title. It was not until 1899 that the petition in this case was filed by a person who appears, in 1895, to have found lineal descendants of the original grantee, from whom he had secured deeds of this abandoned grant, the very existence of which seems to have been forgotten. If this be considered an imperfect grant, the right to file it expired years ago; if it be a perfect grant, as now claimed, we see no reason why the owner may not prosecute his claim in the territorial courts. Without expressing an opinion as to whether this was a perfect or imperfect grant within the meaning of the law, or whether the boundaries might not still be ascertained by a survey, we are satisfied that it is one which the Court of Private Land Claims could not be called upon to confirm, and that, if for no other reason, the petition should be dismissed upon the ground of laches.

The decree of the court below is therefore

Affirmed.

(See note on page 504.)

RANKIN *v.* FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

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

No. 178. Argued February 26, 27, 1903.—Decided April 6, 1903.

The following propositions may be considered as settled in regard to the liability of shareholders of national banks under section 5151, Rev. Stat.:

1. Liability may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. Nor can the real owner exonerate himself from responsibility by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred.
2. Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock, or held it for others.
3. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in

his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder. But it is otherwise, if he allow his name to appear on the book as owner, or being the owner, makes a colorable transfer of the stock.

Where it was shown that a trust company loaned on shares of a then solvent and dividend paying national bank, and accepted its stock as collateral, and subsequently the pledgor failed, and the trust company caused the stock to be transferred to one of its employés, paid an assessment subsequently levied upon the stock, and charged it to the pledgor, and frequently wrote to ascertain if there was any market for the stock, stating that it was held as collateral, *Held*, that although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character taken in connection with other facts and circumstances, it is one which is properly referred to a jury, and as this case really turned upon the actual ownership of the shares, such question of ownership was properly left to the jury as one of fact.

Held, that the pledgee is not bound by statements made without its knowledge by the assignees of the pledgors upon the schedules of liability to the effect that the pledgee had converted the stock.

This was an action at law by the receiver of the Keystone National Bank of Erie, Pennsylvania, against the defendant company, as the actual owner and holder of 172½ shares of the capital stock of the bank, standing upon its books in the name of one William W. Hand, to recover an assessment upon the shareholders of one hundred per cent made by the Comptroller of the Currency pursuant to Rev. Stat. sec. 5151.

The facts of the case are substantially as follows: On November 15, 1890, Delamater & Co., a banking firm of Meadville, Pa., borrowed $15,000 of defendant company, in renewal of prior loans, giving therefor their note for sixty days, and as collateral security deposited 230 shares of the capital stock of the Keystone National Bank of the par value of $100 per share, standing in the name of the individual members of the firm. The shares were valued at the time at par, $23,000; the bank was in good credit, and for twenty-seven years had regularly paid, and was then paying, semi-annual dividends. With its certificates of stock thus deposited, powers of attorney signed by the individual holders of the stock were also delivered to the defendant. These documents empowered the defendant to

transfer the shares—the name of the transferee and the attorney being blank.

Twenty days thereafter, and on December 5, 1890, Delamater & Co. failed and made a general assignment for the benefit of their creditors, and on December 17, defendant having received notice of the assignment, wrote to the assignees declining to renew the note, but offering to anticipate its payment and return the collaterals. It seems the assets of Delamater & Co. were insufficient for this purpose.

On January 10, 1891, defendant sent to the Keystone National Bank of Erie the original certificates, deposited as collateral, and requested the bank to transfer the shares to William W. Hand, a clerk in the employ of the defendant. Three days later, and on January 13, the bank paid a semi-annual dividend of two per cent, but it does not appear who received this dividend, which proved to be the last one paid by the bank. The transfer was made on the books of the bank, and new certificates issued in the name of Hand, dated January 15, 1891, and were transmitted by the bank to the company, which acknowledged receipt of the stock, and stated that it would like to have a bid for the stock "if you know of a purchaser." Hand signed the transfer in blank on the back of these certificates, and in that form they were retained by the defendant. There was no receipt for the certificates except a memorandum in the handwriting of the clerk on the stub of the stock book: "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia, Penn., 1 /17/ 91."

Fourteen months thereafter, and on March 16, 1892, the Comptroller of the Currency, finding that the capital of the bank was impaired, ordered an assessment of twenty-five per cent on the capital stock to make good the deficiency. The assessment upon these shares amounted to $5750. This amount was paid by the defendant and charged on its books to Delamater & Co. as an additional advance. Its cheque was sent to the bank in a letter signed by Mr. Hand.

On December 22, 1892, pursuant to Rev. Stat. sec. 5143, and with the approval of the Comptroller of the Currency, the capital stock of the bank was reduced from $250,000 to $150,000,

divided into 1500 shares of $100 each. Thereupon, and on January 24, 1893, the defendant sent to the bank the certificates for 230 shares, and on February 7 received the certificates in the name of Hand, for 172½ shares, being the reduced number. Hand signed a transfer in blank on the back of the certificates, and in that form they remained in the possession of the defendant. On March 20, 1894, the vice president of the defendant company addressed a letter to the bank stating that the company held 172½ shares of the stock registered in the name of W. W. Hand, and requesting a copy of their last statement and any other information regarding the business of the bank, and as to whether there were any sales of stock, saying "We would like to sell our holdings if marketable." No reply being received to this letter, the defendant company repeated its substance in another letter of April 4, stating that "as we have a loan of $22,000 depending upon the value of 172½ shares, we desire the above information." Several other letters were written to the same purport.

On June 29, 1897, the Keystone National Bank closed its doors, on July 26 the Comptroller of the Currency appointed a receiver, and on November 3 ordered an assessment of one hundred per cent on the stockholders. Whereupon this action was brought to recover an assessment of $17,250 on the shares registered in the name of Hand.

The case was tried before a jury, and the question submitted to them "whether before this Keystone National Bank failed, the defendant company—the Fidelity Trust Company of this city—was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock; whether the stock had become theirs in the sense in which we use in ordinary speech the word owner, or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

Upon the issue thus submitted the jury returned a verdict for the defendant, upon which judgment was entered, and the case taken to the Circuit Court of Appeals upon writ of error. That court affirmed the judgment. 108 Fed. Rep. 475.

Mr. Asa W. Waters for plaintiff in error.

Mr. Richard C. Dale for defendant in error.

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

There being but little conflict in the testimony as to the actual facts, the question really is whether the court should have submitted the case to the jury, or instructed a verdict for the plaintiff.

By Rev. Stat. sec. 5151, "the *shareholders* of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares;" and by sec. 5234, the receiver may, upon order of the proper court, enforce this individual liability.

Most of the cases arising under this section have turned upon the question whether defendant was in fact the owner of the shares. In this connection the following propositions may be considered as settled:

1. That liability may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. *Pullman* v. *Upton*, 96 U. S. 328. Nor can the real owner exonerate himself from responsibility by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred. *National Bank* v. *Case*, 99 U. S. 628; *Bowden* v. *Johnson*, 107 U. S. 251; *Stuart* v. *Hayden*, 169 U. S. 1.

2. Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock, or held it for others. *Hawkins* v. *Glenn*, 131 U. S. 319.

3. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as

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colorable. There was also the further fact that the Crescent City Bank was in a failing condition when the transfer to Waldo was made, and there was no reasonable doubt that the defendant Germania Bank knew it, and made the transfer to escape responsibility. In the present case the stock was never transferred to the defendant, and the transfer to Hand took place within two months of the time of the original pledge, when the Keystone Bank was supposed to be perfectly solvent, and remained so for more than a year thereafter when the assessment of twenty-five per cent was made, the bank continuing in business until June 29, 1897, more than six years after the transfer to Hand.

In *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479, the law as laid down in the prior case was somewhat relaxed, and a tendency manifested to look more closely at the equities. In that case Blumer & Co. borrowed a sum of money from the defendant, and as security for the loan transferred 450 shares of stock of the First National Bank of Allentown standing in the name of one Kern, a partner in the firm of Blumer & Co., on the books of the bank, and had a new certificate issued in the name of one Henry, president of the defendant warehouse company. The fact of the transfer of this stock to its president was brought to the attention of the directors of the warehouse company, who deemed it inadvisable to have the stock stand in the name of the president, and it was therefore transferred to one McCloskey, a porter in the employ of the company, and irresponsible. McCloskey never had possession of the certificate, and at the request of the warehouse company, gave a power of attorney for the sale and transfer of the stock, and shortly thereafter died. The stock was subsequently transferred to one Ferris, another employé, also irresponsible. Dividends were regularly paid on this stock to Kern, and the warehouse company never acted as a shareholder. It was held that, as there was no evidence of fraud or bad faith; as the warehouse company was never the owner of the stock, and never held itself out as such; never consented to a transfer of stock on the books; never claimed dividends, or acted as a shareholder, or ever pretended to be anything but a mere pledgee, it was not liable.

Said the court: "The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co. who were always the real owners." It was held that, as the defendant promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose, and asked that the transfer be made to McCloskey, from that time the case stood precisely as it would, if the transfer had been originally made to him instead of to Henry, the president of the company. "All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment." The case differs from this only in the fact that here there was *some* evidence (enough to go to the jury) that defendant had held itself out as the owner of the shares.

In *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606, the stock which was delivered to the defendant as collateral security was reissued, and new certificates issued to the defendant as "pledgee." It was held that, as the stock book gave information that the defendant held the stock as pledgee only, it was not liable to an assessment. See also *Robinson* v. *South. Nat. Bank*, 180 U. S. 295; *Nat. Park Bank* v. *Harmon*, 79 Fed. Rep. 891; *S. C.*, 172 U. S. 644.

There is no doubt whatever that the defendant originally took blank transfers of the certificates of stock in question as security for its loan to the Delamaters; that at that time the stock was worth its face value, $23,000; had paid dividends for twenty-seven years prior thereto, and was in good credit. To charge the defendant with liability as a shareholder it must be made to appear that it had either become the owner of the shares in fact, or had held itself out to be the owner, and thereby estopped itself to deny its liability as such.

The first change in its attitude toward the stock took place within two months after the original pledge, and was caused by the failure of the Delamaters, which occurred within twenty days after the loan was made. The change consisted in sending back, January 10, 1891, the original certificates, and requesting the bank to transfer the shares to Hand, which was

done. Defendant evidently did not then intend to become the owner of the stock, as immediately after receiving notice of the failure of the Delamaters the vice president of the company addressed a note to them, or their assignees, calling attention to the note and the pledge of the stock, and saying that if they were prepared to anticipate the payment of the note and have the collateral returned, they would be glad to so arrange it; and in a further letter of May 5, 1891, to the Delamaters, he notified them that the note was secured by the Keystone Bank stock, and "if we cannot secure payment for the note and interest, I have to notify you that we shall proceed to sell the collateral at auction." It also appears that on July 7, 1892, the vice president of the company addressed a letter to the auditor of the Delamater estate, notifying him of their claim against that estate upon the note for $15,000, and stating that the company held the shares of the Keystone Bank as collateral for the loan. Thereafter, and on March 30, 1893, the company received a dividend of $795.60, to which it was undoubtedly entitled as pledgee.

Even so late as 1894 the vice president of the defendant company addressed a note to the Keystone Bank, requesting information regarding their business; whether there had been any sales of the stock and at what price, and saying that "as we have a loan of $22,000 depending upon the value of 172½ shares, we desire the above information." It is true that the defendant in 1892 paid an assessment of $5750 upon this stock, but the amount was charged to the Delamaters as an additional advance, and was evidently paid to save its interest in the stock from forfeiture. Rev. Stat. sec. 5205 as amended in 1876, 19 Stat. 64. It is not easy to see how the defendant could have done otherwise than it did without prejudice to its own rights, as well as to the rights of the assignees of the pledgors.

It is also evident that the assignees of the Delamaters treated the interest of the defendant in the stock as a mere pledge, since in their account filed in the Court of Common Pleas of Crawford County, July 13, 1896, they charge themselves in the account as follows: "Equities in stocks and bonds, pledged as collateral on loan unadjusted, as follows: (*a*) $23,000, stock of

the Keystone National Bank of Erie, pledged for a loan of $15,000, appraised at $8000." Proof was offered that in this account the assignees had made another entry, "said stock having been converted by the holder of the note, and said stock having been assessed to the amount of 25 per cent of its face value, did not sell for enough to pay the debt for which it was pledged." This memorandum was excluded, and properly so, by the court below, inasmuch as it was a mere assertion of fact made by these assignees without the knowledge of the defendant. The company could not be bound by a statement thus made by these assignees without its knowledge or acquiescence. Again, it was obviously untrue, as the stock had never been sold. Evidently all that was intended by the word "converted" was that the stock was not worth enough "to pay the debt for which it was pledged." There can be no doubt that defendant would have been willing at any time to surrender the stock upon payment of the debt, and that it retained it simply because it was forced to do so.

It is also true that a number of letters were written during the time the defendant held possession of its certificates, in which it made inquiries as to the value of the stock, the number of sales made, and spoke of itself as holding or owning the stock which it desired to sell, and that Hand once or twice voted the shares by proxy; but the bank clearly could not have been misled, as the nature of such ownership was shown in the letter of April 4, 1894, in which they spoke of a loan of $22,000 depending upon the value of 172½ shares, and repeatedly thereafter, and as late as April, 1897, said they were anxious to sell this stock "to close an account" for which it was collateral.

If such representations had been made either by a formal entry upon the books of the bank or to the public, or to any one who could have been prejudiced by them, defendant might be held to be estopped, but as they were made to officers of the bank, who understood perfectly the capacity in which the defendant retained the stock, it was properly held to be a question for the jury.

Plaintiff also offered to show in the stock ledger of the

bank over the name of W. W. Hand, in an account opened with him at the request of the defendant, a pencil memorandum at the top of the page in these words: "Fidelity Trust and Safe Deposit Company, Philadelphia." As it does not appear who made this memorandum, when or for what purpose it was made, or what it was intended to indicate, it was properly excluded from the consideration of the jury. It was probably explanatory of the fact that correspondence with regard to Hand's account was kept up with the defendant company. It had no tendency, however, to show anything inconsistent with defendant's position as pledgee of the stock. As the stock stood in Hand's name, the entry had no tendency to prove ownership in another. *Carey* v. *Williams*, 79 Fed. Rep. 906; *Sigua Iron Co.* v. *Greene*, 104 Fed. Rep. 854.

The fact that the certificates were put in the name of Hand, though calculated upon its face to awaken suspicion, wrought no material change in the situation. If defendant were in fact the owner of the shares, it could not avoid liability by listing them in the name of another. *National Bank* v. *Case*, 99 U. S. 628. If it were the pledgee, it had the option of listing these shares in its own name as pledgee, *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; or in the name of another and irresponsible party, even though this were done for the purpose of avoiding liability, *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479. The creditors were not injured, since if the exact truth had appeared upon the face of the certificates, by registering the shares as pledgee, they would have had no recourse against the defendant. Upon the other hand, if defendant had really owned the shares, it would have been a fraud to list them in the name of Hand. Perhaps it would have been less open to criticism to have listed them in its own name as pledgee, but as its failure to do so under the theory of the defendant that it was in fact the pledgee, misled no one, it should not be held liable for what was done in good faith and with no intent to defraud.

The case then really turned upon the actual ownership of the shares, and this question was properly left to the jury as one of fact. Although the construction of written instruments is one

for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury. *Brown* v. *McGran*, 14 Pet. 479. In that case it was said by Mr. Justice Story that "there certainly are cases, in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury, for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions, and agreements of the parties, are often to be arrived at only by allusions to circumstances which are but imperfectly developed." This case is specially applicable to the one under consideration, inasmuch as plaintiff relies chiefly upon the fact that defendant, in its correspondence with the bank, spoke of itself as owning or holding the shares standing in the name of Hand. Under the circumstances, it is entirely possible that the word "owner" may have been used in its ordinary sense, or as representing a pledgee upon whom the ownership of the shares had been cast by the failure of the pledgor, and the depreciation of the value of the shares to an amount insufficient to pay the note. It can hardly be possible that the statute was intended to impose a liability upon a pledgee, who had taken the shares as collateral security and, through the failure of the pledgors, had been forced against its will into the position of ownership. Such a result might operate to destroy altogether the possibility of raising money upon the deposit of national bank shares as collateral. See also *Fagin* v. *Connoly*, 25 Missouri, 94; *Prather* v. *Ross*, 17 Indiana, 495; *Roberts* v. *Bonaparte*, 73 Maryland, 191; *Macdonald* v. *Morrill*, 154 Massachusetts, 270.

This case could only have been withdrawn from the jury upon the theory that, taking all the testimony together, there could be but one reasonable interpretation put upon the conduct of the defendant with respect to these certificates. Such, in our opinion, is not the case. The fact undoubtedly was that the

defendant did not intend to impose upon itself the statutory liability of a shareholder, and considering that it had not only lost its original debt of $15,000 (less a small dividend) by the failure of the Delamaters, as well as the additional assessment of $5750 paid to save the shares from forfeiture, that there was no evidence of fraud or double dealing in its conduct, and that its liability was purely a technical one, it was not unnatural for the jury to require that such liability should be clearly established, before imposing upon it an additional burden of $17,250, for which it had received no possible consideration.

Some stress is laid by the plaintiff upon the fact that neither the Delamaters nor their assignees ever gave their consent to the transfer of the stock to Hand, but as the power of attorney originally given upon the deposit of the stock expressly authorized such transfer, and the rights of the defendant could only be protected in that way, there is no force in the objection, particularly in view of the fact that neither the Delamaters nor their assignees complained of such transfer. Being an act which it was authorized to take as pledgee, it cannot be made reponsible as owner therefor.

There was no error in the action of the Court of Appeals, and its judgment is therefore

Affirmed.

Mr. Justice Harlan dissented.

GLIDDEN v. HARRINGTON.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 199. Argued March 12, 1903.—Decided April 6, 1903.

Although this court has never had occasion to determine exactly what the Fourteenth Amendment required in the assessment of ordinary annual taxes upon personal property, such proceedings should be construed with the utmost liberality and while notice may be required at some stage of the proceedings such notice need not be personal, but may be given by publication or by posting notices in public places. Such notices must be suitable and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law.

The statute of Massachusetts which requires that all personal estate within or without the Commonwealth shall be assessed to the owner; that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth, shall be assessed in the place where the trustee resides; that the assessors before making the assessment shall give notice by posting in some public place or places; that in case the taxpayer shall fail to make returns they shall ascertain as nearly as possible the particulars of the estate and estimated value, which shall be conclusive upon the owner unless he can show a reasonable excuse for omitting to make the return; also making provision for an application to the assessors for an abatement of taxes and for an appeal to the county commissioners, does not deprive taxpayers of their property without due process of law.

A person residing in Massachusetts and holding property in trust has the same opportunity to show that he held no property in trust as he has in regard to his individual property, and it is as much his duty to disclose it as though it were individual property.

THIS was an action brought in the Superior Court of Middlesex County by Harrington, collector of taxes for the city of Lowell, to recover a tax upon personal property, assessed upon the defendant as trustee, for the year 1889.

The case resulted in a verdict for the plaintiff, which was carried by exceptions to the Supreme Judicial Court, where the exceptions were ordered overruled, 179 Massachusetts, 486, and the case remanded to the Superior Court, in which judgment was entered.

Mr. Harvey N. Shepard for plaintiff in error.

Mr. George F. Richardson for defendant in error. *Mr. Francis W. Qua* and *Mr. William A. Hogan* were with him on the brief.

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

This case involves the question whether the proceedings taken to enforce this tax deprived the defendant Glidden of his property without due process of law, within the meaning of the Fourteenth Amendment.

The facts of the case are substantially that a resolution for the assessment of taxes for the year 1889 was passed by the municipal council of Lowell, and approved by the mayor on March 22 of that year; and it was ordered that a copy of the resolution be furnished to the assessors on or before April 1. Before proceeding to make the assessment, the assessors, in the latter part of April, gave proper notice to the inhabitants of the city, by posting in public places in the several wards of said city, notifications that they were about to assess taxes, and requiring the inhabitants to bring into the assessor's office on or before June 15 of that year true lists of their polls and personal estates not exempt from taxation.

Two members of the board of assessors were appointed a committee "to inquire into telephone matters for taxation." The committee "advised that a suitable person be sent to Albany to look up matters in that direction," which committee was authorized by the board to use its discretion in the matter. The expert employed by the committee to look up foreign corporations reported stock of the Erie Telegraph and Telephone Company held by individuals in Lowell, and mentioned seven trustees, one of whom was the defendant. On July 25, 1889, the board "voted to tax (assess) the directors of the Erie Telegraph and Telephone Company as trustees $160,000 each." There were $1,600,000 held by ten trustees, of which the defendant was one. No list of personal estate held in trust had

been or was submitted by defendant. The tax bill, as trustee, was delivered personally to the defendant about September first. About two months after such assessment, September 10, the warrant for the collection of the taxes was put in the hands of the collector.

On February 24, 1890, defendant filed a statement to the effect that, although he was informed that certain shares of stock stood in his name as trustee, he was not the owner of the shares and not taxable therefor, and thereupon made application as trustee for an abatement, upon which application a number of hearings were had. But before the proceedings were determined this action was brought by a succeeding collector.

Upon the trial in the Superior Court it appeared that the defendant was assessed as trustee upon certain shares of three telephone companies, which the assessors understood were held by him in trust for the Erie Telegraph and Telephone Company. The basis of valuation adopted by the assessors was the market price of the shares of this latter company. Defendant offered evidence tending to show that at the time of the assessment he owned no personal property whatever as trustee; that said shares were owned by the Erie Telegraph and Telephone Company and were in its possession and control, although they stood in his name; and further evidence tending to show that said property was not taxable to him, and was not within the jurisdiction of the assessors or of the State. This evidence was excluded by the court, which ruled that the only questions for the jury were "whether the assessors ascertained as nearly as possible the particulars of the estate held by the defendant as trustee, for the purpose of making this assessment, and whether, having obtained those particulars, they estimated such property at its just value according to their best judgment, information and belief."

The court held the validity of the tax to depend upon the question whether the assessors had jurisdiction to make the assessment. Having found that the defendant was an inhabitant of Lowell and had taxable personal property there, it was thought that he was within the jurisdiction of the as-

sessors, and that it made no difference whether such property was all held by him individually, or partly as individual and partly as trustee, inasmuch as it was all a personal tax. The court, having held that the proceedings conformed to the state statute, and that defendant's only remedy was the statutory proceeding for abatement, it only remains for us to consider whether these proceedings constitute due process of law within the Fourteenth Amendment.

This was not a special assessment, but the ordinary annual tax upon personal property. The act requires that all personal estate, within or without the Commonwealth, shall be assessed to the owner; that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth shall be assessed in the place where the trustee resides. Before making the assessment the assessors shall give notice by posting in some public place or places; that in case the taxpayer shall fail to make return, they shall ascertain, as nearly as possible, the particulars of the estate and estimate its just value, which shall be conclusive upon the owner, unless he can show a reasonable excuse for omitting to make his return. Provision is also made for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax.

These proceedings are amply sufficient to constitute due process of law. Although, with respect to this class of taxes, we have never had occasion to determine exactly what the Fourteenth Amendment required, we have held that the proceedings should be construed with the utmost liberality, and while a notice may be required at some stage of the proceedings such notice need not be personal, but may be given by publication or by posting notices in public places. It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111

U. S. 701; *Paulsen* v. *Portland*, 149 U. S. 30; *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421; *Allen* v. *Georgia*, 166 U. S. 138; *King* v. *Portland*, 184 U. S. 61; *Simon* v. *Craft*, 182 U. S. 427; *Turpin* v. *Lemon*, 187 U. S. 51.

In the *Kentucky Railroad Tax cases*, 115 U. S. 321, it was held that a state statute for the assessment of taxes, which gave notice of the proposed assessment to the owner by requiring him at a time named to present a statement of his property, with an estimate of its value, which fixed time and place for public sessions of other officers, at which this statement and estimate were to be considered, where the party interested had a right to be present and to be heard, and which gave him opportunity to judicially contest the validity of the proceedings, was due process of law within the Fourteenth Amendment. In *Lent* v. *Tillson*, 140 U. S. 316, it was held that in a case of a special assessment for widening streets, publication in a newspaper was sufficient notice to property owners interested.

The complaint in this case is based upon the proposition thus stated by plaintiff: That it is not due process of law for a State "to compel a man, who holds no property in trust and makes no return to the assessors, to pay a tax assessed against him as such trustee, without opportunity to show that he held no property in trust." This proposition, however, assumes that no opportunity was given the defendant to show that he held no property in trust, when the fact was that public notice was given the inhabitants to produce before the assessors a list of their personal estates, among which there was specified by the statute personal property held in trust. Defendant did not choose to comply with that notice by submitting a list of the property held by him in trust, although he subsequently made application for abatement, upon which application a number of hearings were had. Upon his failure to make his returns the assessors did the only thing they could do: ascertain as nearly as possible the particulars of the personal estate and estimate it at what they believed its just value. If defendant held personal property as trustee it was as much his duty to disclose it as if it had been individual property, and his contention now, that he had no reason to anticipate that he would be taxed for

property held in trust, because he held none, is met by the fact that he applied for an abatement of this tax, and that, after several hearings upon the case, it was refused him. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335.

There was nothing in the proceedings of which the plaintiff had any right to complain as a violation of the Fourteenth Amendment, and the judgment of the Superior Court is therefore

Affirmed.

MR. JUSTICE WHITE, not having heard the argument, took no part in the decision of this case.

WISER *v.* LAWLER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 174. Argued February 25, 26, 1903.—Decided April 27, 1903.

Promoters of mining enterprises, in the preparation of prospectuses, are bound to consider the effect that would be produced upon an ordinary mind by the statements contained in them, and in estimating the probability of persons being misled by them, the court may take into consideration not only the facts stated, but the facts suppressed.

Vendors of mining properties are not responsible for false statements made in prospectuses issued by a mining company to whom the properties had been sold, unless they knew or connived in such statements, or were active in putting them in circulation. While they may have known that prospectuses were being issued, they were under no obligation to read them, or contradict their statements or promises, or interfere with their circulation or distribution.

If their title be of record, they are not bound to give notice of their rights in the property to the purchasers of stock, or to refuse the money due upon their contract of sale when it is tendered them.

To constitute an estoppel by silence there must not only be an opportunity but an obligation to speak, and the purchase must have been in reliance upon the conduct of the party sought to be estopped.

A person holding a deed of property which he has placed upon record, is not ordinarily bound to disclose his title to persons contemplating purchasing, or making improvements upon the land, unless his silence be deceptive, or accompanied by an intention to defraud.

THIS was a complaint in the nature of a bill in equity filed in the District Court of Yavapai County, Arizona, by appellants,

for themselves and all others interested, against John Lawler and Edward W. Wells, principal defendants, and the Seven Stars Gold Mining Company, The Industrial Mining and Guaranty Company and John Griffin, receiver of such companies, to adjudge Lawler and Wells to be estopped from disputing the title of the Seven Stars Company to certain mining properties, and to decree such properties to belong to that company, and for an account of the proceeds of all ore taken from the mines and received by defendants Lawler and Wells, or, in the alternative, for a money decree against them for the aggregate amount paid by plaintiffs and others for stock in the company, upon the representations contained in certain prospectuses and maps, by which the plaintiffs were induced to purchase stock in such company, and for a confirmation of the title to the property in such defendants.

The cause came on for hearing upon the pleadings, and at first resulted in an interlocutory decree in favor of the plaintiffs, with an order for an accounting by defendants. The case was then referred to a master to report the number of shares in the Seven Stars Company subscribed and paid for, and to ascertain the amount paid to defendants Lawler and Wells on account of the purchase price of the property. This was finally fixed at the sum of $180,139.82, which was held to be a lien, and the property was ordered sold in satisfaction thereof. A new trial was subsequently granted, upon the hearing of which, upon pleadings and evidence, it was held that plaintiffs were entitled to no relief, and the complaint was dismissed, and an appeal taken to the Supreme Court of Arizona, which affirmed the decree of dismissal. 62 Pac. Rep. 695.

The Supreme Court made a finding of facts in sixty-four paragraphs, which is quite too long to be reproduced here, but which may be summarized as follows:

In May, 1892, the defendants Lawler and Wells were the owners of the legal title to a collection of mines known as the "Hillside Group," the muniments of such title being of record in the county recorder's office of Yavapai County.

Lawler and Wells offered these mines for sale at $450,000 cash, and on May 12 one Warner visited the mines and con-

tracted for their purchase for $450,000, paying $20,000 in cash, the remainder to be paid in installments in accordance with the terms of an escrow agreement entered into between Lawler and Wells and one Cowland. This agreement provided, among other things, that a deed conveying the mines to Cowland be held in escrow by the Bank of Arizona and be delivered upon paying the full sum of $450,000; and that upon the failure of the payments the deed should be redelivered to Lawler and Wells and all payments be forfeited. Cowland agreed that all moneys paid by him should belong to Lawler and Wells and should be retained by them as liquidated damages accruing from the failure to pay for the property, and Lawler and Wells be released from any obligation to convey the property. It was further agreed that Cowland might take possession of the property, develop and operate it, the proceeds to be paid to the vendors and credited upon the purchase price; that Lawler and Wells should, nevertheless, remain in legal possession of the property until full payment, but should not work it or interfere with its operation by Cowland. It was further agreed that, should Cowland fail to make any payments, all improvements on the property and ore taken therefrom should be the property of Lawler and Wells. A deed of the property was executed to Cowland and placed in escrow as above stated. Warner was the real party in interest and Cowland only his agent.

On June 14, Warner and Cowland, with some others, incorporated the Industrial Mining and Guaranty Company for the purpose of handling mines and buying and selling stock, to which company Cowland delivered a written assignment of all his interest in the escrow agreement, as well as a deed of the mining properties with a covenant of warranty against incumbrances. The new company assumed all the covenants of Cowland in the escrow agreement, to make the payments therein stipulated, and to procure the escrow deed then in the hands of the Bank of Arizona. Possession of the properties was delivered to the new company with full knowledge on its part of the terms of the escrow agreement. The company remained in possession until October 1, 1892.

On August 15, 1892, Warner and several others incorporated

the Seven Stars Gold Mining Company under the laws of New Jersey, of which certain persons, including one of the plaintiffs, were elected directors. About the same time the Guaranty Company offered to sell and convey all its interests in certain mining properties, including a part of those described in the escrow agreement, to the Seven Stars Company, upon receiving $2,800,000 in cash of stock of such company. On October 1 the Guaranty Company placed the Seven Stars Company in possession of the Hillside Group, with full knowledge on the part of the latter of the terms of the escrow agreement.

The Guaranty Company, as the agent of the Seven Stars Company, issued in September, 1892, a prospectus, known as the American prospectus, to promote the sale of the stock of the Seven Stars Company, 300,000 of which prospectuses, accompanied by a map and an application for subscription to stock, were circulated throughout the United States. In October, 1892, the Guaranty Company directed the issuing of an English prospectus, which was never circulated, but another, issued without the authority of the Guaranty Company or the Seven Stars Company, was prepared, supervised and circulated by Cowland. The descriptive matter in this prospectus was obtained from data furnished by the officers of the Guaranty Company. The circulation of this prospectus amounted to 80,000 copies, and accompanying each copy was a map and application for subscription to stock; but neither Lawler nor Wells had any knowledge or information that this prospectus had been or was being circulated in England, or had any knowledge of its contents until some time in October, 1893. The further material facts are set forth in the opinion.

Mr. M. F. Gallagher and *Mr. G. W. Kretzinger* for appellants.

Mr. William C. Scarritt and *Mr. H. C. McDougal* for appellees. *Mr. E. L. Scarritt* was on the brief.

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

The principal defendants to this suit are Lawler and Wells,

(hereinafter termed "the defendants") and the case turns upon their complicity in and responsibility for the contents of the prospectuses, which are full of exaggerated and delusive statements, and were undoubtedly a gross fraud upon persons who took stock upon the faith of their exuberant promises. Indeed, they were of such a character as to create surprise that intelligent investors should have believed their statements to be true. The representation upon which the greatest reliance is placed is that contained in the American prospectus; that "the titles are unquestionable, to the Seven Stars, Hillside, Happy Jack and other mines, being held under United States patents;" and in the English prospectus, that "the mines *owned by the company* are situated in the Eureka mining district, Yavapai County, Arizona," and that "the title is indefeasible, being United States patents to five claims, together with several locations as easements."

Attached to these prospectuses was a map entitled "Map of the group of mines belonging to the Seven Stars Gold Mining Company." It is true that there is neither in the prospectuses nor in the map a distinct assertion that the legal title to the properties mentioned was vested in the Seven Stars Company; but we think that no one can read them without inferring and believing that the Seven Stars was the owner of these properties, and that the net proceeds of their operation would be distributed in dividends to stockholders. As they were circulated as an inducement to take stock in the enterprises, we are bound to interpret them by the effect they would produce upon an ordinary mind. *Andrews* v. *Mockford*, (1896) 1 Q. B. D. 372. They were, however, even more damaging in their omissions than in their statements. No mention was made of the fact that the title to these properties stood in the names of Lawler and Wells; no allusion to the Cowland agreement, with its provisions for forfeiture, nor to the fact that the only interest of the company was an equitable right to the properties after the sum of $450,000 had been realized from the profits and paid to defendants. In estimating the probability of subscribers being misled by these prospectuses we may take into consideration not only the facts stated, but the facts suppressed. *New Bruns-*

wick &c. Co. v. *Muggeridge*, 1 Drewry & Smale, 363. They are entitled to know the *cons* as well as the *pros*. *Gluckstein* v. *Barnes*, (1900) App. Cas. 240; *Hubbard* v. *Weare*, 79 Iowa, 678; *Hayward* v. *Leeson*, 176 Massachusetts, 310; *In re Leeds and Hanley Theatres*, (1902) 2 Ch. Div. 809.

It does not appear, however, that these defendants were promoters or interested in the organization of the Guaranty Company, or the Seven Stars Company, or in the sale of the capital stock of such companies, although they knew that Warner's intention was to incorporate a company, and, to use the language of one of the defendants, "work it for all there was in it." As they were not concerned in the methods used to procure subscriptions to stock, or in the statements made in the prospectuses, it is difficult to see how they can be held responsible, unless they are made so by the fact that they knew and connived in the misstatements as to the title of the company. But while they might have known that the prospectuses were being issued, they were under no obligation to read them or contradict their exaggerated statements and promises. In their agreement with Cowland they had stipulated that he, or his assignee, should explore, work and operate the property, and they could not have failed to know that this would be done through a company organized for that purpose. Such company would be anthorized to issue prospectuses and obtain subscriptions to stock as best it could, and clearly defendants were not bound to supervise its methods in doing so, or render themselves responsible for statements made by the company, provided they did not indorse them. There were no relations between them and the purchasers of the capital stock, and no duty on their part to interfere with the circulation and distribution of the prospectuses and maps, or to inform the subscribers personally that they were the owners of the legal title to the property. They had the right to rely, so far as respected these companies and their stockholders, upon the fact that their title was of record, and was notice of their rights to every one who contemplated taking stock in the company.

The testimony bearing upon the complicity of Lawler and Wells with the preparation of these prospectuses and maps is

such as amounts rather to a suspicion that they may have known and approved of their contents, than to positive proof that they received their indorsement. Of course, if it were shown that they were put forth by them personally with knowledge upon their part of their contents, and of the falsity of their statements, and that they were issued as a basis of obtaining subscriptions to stock, they would be justly held liable as participants in the fraud; but the mere fact that they turned over the organization of the company to other parties who would pursue the usual course of issuing prospectuses for the purpose of raising subscriptions, would not, of itself, charge them with the duty of examining and verifying their statements.

The facts principally relied upon are that the defendants caused to be delivered to Mr. Rickard, an agent of Cowland, a report previously made upon the mines, known as the Blauvelt report, together with a map of the underground workings of the mines, known as the Blauvelt map, as well as copies of the smelter and milling returns of ores shipped from the mines, known as the "smelters' returns." It is not found, however, that these documents were false in any particular, except the map, which was prepared by one Brodie, without the knowledge of the defendants, but was seen by defendant Lawler hanging in the office of the companies in New York, and was entitled "Plat of the Hillside and adjoining claims," although it appears that afterwards, without the knowledge of Lawler, these entitling words were changed, before the maps were distributed, to the words "Map of group of mines belonging to the Seven Stars Gold Mining Company." It thus appears that when Lawler saw this map it contained no words indicative of ownership in the Seven Stars Company. It also appeared that in August of the same year defendant Wells visited the office of the Guaranty Company in New York, and while there had an interview with Warner, president of both companies; but the evidence does not show that anything was said to Wells about the plans of the companies, or the issue and circulation of a prospectus; although Lawler became aware of the fact that the prospectus was being prepared for circulation, and for the

purpose of promoting the sale of the stock of the company, and that the Blauvelt report and map were being used in connection with it.

In October, 1892, Warner represented to the defendants that he was unable to place the securities he held, in time to meet the payment of that portion of the price falling due November 12, and relying upon his representations and requests defendants agreed to an extension of the time; but on May 8, 1893, the whole scheme so far as Warner was connected with it, collapsed, by his executing a general assignment of his property for the benefit of his creditors. Defendants, learning of this, made a further agreement with Cowland, extending the time for payment under his agreement, receiving as part of the consideration $50,000 par value of the guaranteed capital stock of the Seven Stars Company, and the appointment of Lawler as manager of the mines. In May, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of stock of the Seven Stars Company, and in August, 1893, the Chancery Court of New Jersey, in which State the company was incorporated, appointed defendant Griffin receiver of both companies. In September, defendants, as owners of the legal title, and exercising their rights under the original escrow agreement, entered into possession of the group of mines and remained in exclusive possession until September, 1897, when a receiver was appointed by an Arizona court.

The most important item of testimony, and one which lies at the basis of this suit, is the fact that the defendants received from the proceeds of the mines, during their operation by the Seven Stars Company, sums aggregating $47,812.25, and also received from Warner and others, on account of the purchase price of the property, $112,339.96. This, however, they had a perfect right to do under their contract, unless they were distinctly apprised of the fact that it was fraudulently procured. But the prospectus, map and application were prepared under the supervision of Warner, and the documents framed in accordance with his views. The evidence tends to show that while defendants had knowledge of the preparation and circulation of the prospectus

and maps, knowledge of the statements and representations contained in them is not brought home to them, nor were they bound to inform themselves as to their contents.

There are further findings that defendants, in October, 1892, became aware that the American prospectus was being distributed by the Guaranty Company, and that they did not at any time protest against its preparation or circulation, or in any way give notice of their rights in the mines to any of the purchasers of the stock of the Seven Stars Company, except as such notice might be imputed to them through the record title in defendants. But it is further found that they did not at the time the subscriptions to the stock were being made, make any representations or communications to any subscriber to said stock; nor did they have any notice or knowledge that any moneys received by them on account of the purchase price formed a part of the money raised from subscriptions to stock and paid to the Guaranty Company on account of the purchase price—at least not until May 20, 1893, when nearly all the payments had been made. Neither were they interested as promoters or otherwise in the organization of either of the corporations, or in the issue or circulation of the prospectuses, or the sale of the capital stock.

Were they bound to refuse the money when it was tendered them? Even if defendants had knowledge or notice that payments received by them on account of the purchase price were made from moneys raised from subscriptions to stock, there was no impropriety in receiving their money from the proceeds of the sales of the stock, although the contract specified only that they should be entitled to the proceeds of the ore mined. As they had agreed to sell their interests at $450,000, and Cowland had agreed to pay that amount, it may be assumed that this was the real value of the properties at that time. This amount defendants had a right to receive before they surrendered the deed of the properties, but how it was to be raised was no concern of theirs. Granting the provision in the contract for the forfeiture of all moneys paid, in case the sale finally fell through, to have been a harsh one, (and in fact it was much less harsh than it appeared to be,) it was fully un-

derstood and agreed upon by both parties; and while a bill in equity might not have lain to enforce it, it does not follow that defendants will be compelled to return the money unless they actively participated in the representations under which it was raised. The case would have been stronger if the Cowland agreement had provided distinctly that a mining company should be formed and defendants paid from the proceeds of sales of its stock, but the agreement made no provision how the money should be raised or from what fund it should be paid, except that the proceeds of the operation of the mines and the ores should be at once paid to the defendants and be credited on the agreement. It was not provided, however, that this should be the only source from which the money should be raised.

As matter of fact, the Guaranty Company was engaged in promoting sundry mining and industrial enterprises, including the business of the Seven Stars Company; and during the time the payments were being made, it received and disbursed the sum of $824,142.13, which was deposited in its own name in a common fund in the Continental National Bank, and chequed out by the Guaranty Company in its various business enterprises as required, and, amongst others, to the defendants on account of the Cowland agreement. These cheques, which were generally payable to Cowland, were collected by the payee, the money transmitted to the Bank of Arizona, and placed to the credit of defendants on account of the purchase price of the property. Between June 15, 1892, and September 18, 1893, the Guaranty Company paid out for operating expenses, purchase of machinery, purchase price of the Hillside group of mines, dividends and all other expenses, an aggregate sum of $380,295.81—over $100,000 more than the amount of money received from the sale of the Seven Stars guaranteed stock.

The case, then, comes to this: Whether the mere fact that defendants knew that a prospectus was to be issued; that they furnished the Blauvelt report, (not shown to be false,) to which was appended a map indicating (though not to their knowledge) that the mines belonged to the Seven Stars Company, and that

they might have informed themselves, if they had chosen to do so, of the contents of the prospectus, and did actually receive a large amount of money without knowing the source from which it came, render them liable as participants in the fraud perpetrated by the circulation of the prospectus?

Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped; and the express finding of the court in this case is "that the subscribers to the capital stock of the Seven Stars Company, in making their several subscriptions therefor and payments thereon, did so without any knowledge of, and without relying on, anything said or done, or omitted to be said or done, in the premises by the said Lawler and Wells, or either of them." Granting that if these subscribers had known all the defendants knew regarding the title to this property, they would not have subscribed to the stock of the company, it does not follow that defendants were bound to take active steps to inform the public of that which already appeared upon the record.

This case does not belong to that class of which *Gregg* v. *Von Phul*, 1 Wall. 274, is an example, wherein it was said that "if one has a claim against an estate and does not disclose it, but stands by and suffers the estate to be sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser." Such cases are believed to be confined to those where the party's silence is inconsistent with the position subsequently assumed by him, as where he suffers land to be improved while holding an unrecorded deed of it. In this case, however, defendants' posi-

tion was perfectly consistent with their title of record and with the Cowland agreement, which distinctly provided that Cowland or his assignees should enter into possession, develop and work the mines upon their own account, though paying the proceeds to them.

But, conceding defendants to have been apprised of the contents of the prospectus, it would certainly be an exceptional case if a person holding a deed of property which he has placed upon record would be bound to disclose his title to a person contemplating purchasing or making improvements upon the land, or would be estopped from making his claim thereto by mere silence, since he has a right to rely upon the constructive notice given by the record; although the rule would be otherwise in case of positive misrepresentations upon his part. *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 337; *Knouff* v. *Thompson*, 16 Pa. St. 357; *Brinckerhoff* v. *Lansing*, 4 Johns. Ch. 65; *Rice* v. *Dewey*, 54 Barb. 455; *Kingman* v. *Graham*, 51 Wisconsin, 232; *Sulphine* v. *Dunbar*, 55 Mississippi, 255; *Porter* v. *Wheeler*, 105 Alabama, 451. The authorities also recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement. *Sumner* v. *Seaton*, 47 N. J. Eq. 103; *Hill* v. *Epley*, 31 Pa. St. 331; *Markham* v. *O'Connor*, 52 Georgia, 183.

For instance, if a mortgagee stood by while a mortgagor was selling a piece of property to a person whom the mortgagee knew was purchasing the property upon the supposition that it was unencumbered, he might be estopped by his silence, even though his mortgage were of record. But upon the other hand, if he were merely informed that the mortgagor was endeavoring to sell the property as unencumbered, he would clearly be under no obligation to look up the purchaser, or to inform the public generally of the existence of the mortgage. In such case he might safely rely upon the record. No duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed. *Sullivan* v. *Davis*, 29 Kansas, 28. As stated by Bigelow on Estoppel, 5th ed., page 596: "So long as he is not brought in contact with the person about to act, and does

not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct, as the natural and obvious result of it." It cannot be that A would be estopped by silence with respect to his title to property which B is about to purchase, when he has no knowledge that B contemplates buying and B has no knowledge that A is connected with the property. We know of no case holding that a man is estopped by silence as against the public, or any particular person with whom he has no fiduciary relation. It was said by the Court of Appeals of New York in *Viele* v. *Judson*, 82 N. Y. 32, 40, of the cases holding a party to be estopped by his silence: "In all of them the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And, in all, the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done had the truth been told. These elements are essential to create a duty to speak."

Before holding that defendants are liable by reason of their silence it ought to be made to appear what action they could have taken to prevent the perpetration of the fraud embodied in the prospectus and maps. If they had actually participated in it by circulating these documents, or representing them to be true, the case would have been different; but if they be held at all it must be by reason of their silence and inaction, when it is not even shown that they were cognizant of the statements contained in them. They may have seen them, but they were not bound to read them, or inform themselves of the truth of their statements, since they were no party to them in any way whatever, and were interested only in obtaining payment for their property. But conceding that they were fully apprised of their contents, what action were they bound to have taken? They could not give notice to the hundreds of thousands to whom the prospectuses were sent, since they were not even apprised of their names or addresses. A notice to the company not to send out these prospectuses would have been equally futile, in case the directors chose to disre-

gard it, since they could not control their action, nor could they have sustained a bill for injunction, since they could have shown no personal injury to themselves by reason of the action of the promoters.

The difficulty of doing exact justice to the plaintiffs in this case, without also doing an injustice to the defendants, suggests another reason why they should not be charged with liability for the circulation of this prospectus and map without clear proof of their complicity. At the time of the sale of these mining properties their real value must have been unknown. If the mines proved successful they may have been worth millions; if unsuccessful, they would be of little value—perhaps worthless. The amount agreed upon, $450,000, was one which the defendants were willing to take as a compromise, and one which the plaintiffs were willing to pay as a speculation. Each party to the sale took his own chances, and no complaint is made of unfair dealing on either side. In their cross complaint defendants tendered to the court and offered to deliver the deed and possession of the mines upon the payment of the residue due them under the escrow agreement. If the property be now more valuable than the amount agreed to be paid, no reason is apparent why the tender should not have been accepted. If, as appears to be more probable, it is of less value, or wholly valueless, the defendants in refunding the amount paid would not only lose that amount, but all possibility of reselling the mines to other parties, and would thereby assume the risk of an unfortunate speculation, which the whole design of the sale was to impose upon the purchasers under the Cowland agreement, namely, the plaintiffs. In making the purchase the vendees were willing to assume the risk of the mines proving unsuccessful. The vendors were evidently unwilling to take this risk, and preferred to take a sum certain for their speculative chances. Assuming that in equity the defendants could be called upon to refund the money paid, it seems unjust that they should also be saddled with the burden of an unfortunate speculation. In short, the circumstances have so changed that justice cannot be done without imposing damages upon the defendants which were not within the contemplation of the parties.

If the first alternative prayer of the bill were granted, and it were adjudged that the defendants were estopped from asserting that the Seven Stars Company was not the owner of the mining properties, and adjudging such company to have full title thereto, and that defendants should also repay all the proceeds of ore taken therefrom and received by them, amounting to $47,812.25, it will result that of the $450,000, agreed upon as the price of the property, they would have received but $112,339.96, and would lose $337,660.04, of the amount agreed to be paid. Upon the other hand, if the second alternative prayer were granted, and defendants were adjudged to return the money found due in the first decree of the District Court, namely, $180,139.82, and retake the property, which now appears to be of little value, they would be practically, in either case charged with the entire burden of the venture which it was the express object of the Cowland agreement to avoid. A decree that would bring about this result would savor of punishment to defendants rather than of compensation to plaintiff.

We think the plaintiffs have wholly failed to make out such a complicity on the part of the defendants, with the preparation and circulation of these prospectuses, as would make them liable for the losses which the plaintiffs have doubtless sustained.

The decree of the court below is, therefore,

Affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

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

No. 108. Argued January 23, 26, 1903.—Decided March 9, 1903.

Prior to the passage of the act of Congress "to further regulate commerce with foreign nations and among the States" approved February 19, 1903, a District Attorney of the United States under the direction of the Attorney General of the United States given in pursuance of a request made by the Interstate Commerce Commission was without power to commence a proceeding in equity against a railroad corporation to restrain it from

discriminating in its rates between different localities. *Held*, therefore, that there was error committed below in refusing to sustain a demurrer of a defendant railroad company to a bill filed by a District Attorney of the United States under the circumstances stated.

As, however, the act of February 19, 1903, expressly conferred the power which did not theretofore exist and as that act specifically provided that the new remedies which it created should be applicable to all causes then pending, *Held*, that although the action of the lower court in refusing to sustain the demurrer would be overruled, the case would not be finally disposed of but would be remanded for further proceedings in consonance with the provisions of the act of February 19, 1903.

The original bill of complaint in this cause was filed on behalf of the United States against the present appellant in the Circuit Court of the United States for the second division of the District of Kansas on July 26, 1893. To the bill a demurrer was filed and overruled. 65 Fed. Rep. 903. Subsequently exceptions were sustained to an answer, and thereafter an amended answer and a replication were filed. The questions now presented for decision, however, were raised by an amended bill filed on July 19, 1897. In such amended bill it was alleged that the suit was brought on behalf of the United States by the United States attorney for the District of Kansas, by the authority of and under the direction of the Attorney General of the United States, and that such authority and direction had been given in pursuance of a request of the Interstate Commerce Commission of the United States "that the United States attorney for the District of Kansas be authorized and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters herein complained of." It was further averred in substance that the respondent was subject to the terms and provisions of the act to regulate commerce, 24 Stat. 379, and operated lines of railway between the city of St. Louis in the State of Missouri, and the city of Omaha, in the State of Nebraska, a distance of 501 miles, and between the city of St. Louis and the city of Wichita, in the State of Kansas, a distance of 458 miles. It was charged that in the transportation of freight between St. Louis and said cities of Omaha and Wichita the service was

substantially of a like, contemporaneous character, and was made under substantially similar circumstances and conditions but that, notwithstanding such fact, the rates exacted upon shipments of freight between St. Louis and Wichita very much exceeded the rates charged on freight shipped between St. Louis and Omaha. It was averred that the collection of such alleged excessive freight rates or any rate of freight on shipments between St. Louis and Wichita in excess of the rate charged for shipments of freight of a similar character and classification between St. Louis and Omaha, operated an unjust and unreasonable prejudice and disadvantage against the city of Wichita and the localities tributary thereto, and against the shippers of freight between St. Louis and the city of Wichita. Averring that the wrongs complained of "are remediless in the premises under the ordinary forms and proceedings at law, and are relievable only in a court of equity and in this form of procedure," the ultimate relief asked was the grant of a perpetual injunction restraining the respondent from continuing to exact a greater rate for transportation of freight of like classification between the city of Wichita and the city of St. Louis than was asked between the city of St. Louis and the city of Omaha. A demurrer was filed to the amended bill upon various grounds, one of which denied the right of the United States to institute the suit.

On hearing, the demurrer was overruled, exception was reserved, and, the defendant electing to stand on its demurrer, a final decree was entered granting a perpetual injunction as prayed, and, on appeal, the Circuit Court of Appeals affirmed the decree, but filed no opinion. An appeal was thereupon allowed.

Mr. John F. Dillon, with whom *Mr. J. H. Richards*, *Mr. C. E. Benton*, *Mr. B. P. Waggener* and *Mr. Alexander G. Cochran* were on the brief, for appellant.

I. The Interstate Commerce Act is a complete code of laws and rules of procedure, both civil and criminal, governing interstate commerce and radically revolutionizes all prior procedure. Aside from private actions at law for damages by persons injured (secs. 8, 9), the said act creates new rights and

remedies to which all right of redress is limited, and which the general, or common law, so called, did not give. *I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263, 275; *Express Cases*, 117 U. S. 1; *United States ex rel. Morris* v. *R. R. Co.*, 40 Fed. Rep. 101; *Menacho* v. *Ward*, 27 Fed. Rep. 530; *I. C. C.* v. *C. N. O. & T. P. R. Co.*, 167 U. S. 505.

The Interstate Commerce Act is necessarily exclusive as a rule or system of procedure for primary examination into the facts, and in the language of the act for "the execution and enforcement of its provisions." *Fourth National Bank* v. *Francklyn*, 120 U. S. 747. *United States* v. *Hudson*, 7 Cranch, 32; *West. Un. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92, distinguished.

II. The Interstate Commerce Act makes special provisions for the remedy by injunction, and such remedy in cases like the present can only be obtained through a previous investigation by the Interstate Commerce Commission.

Sections 13 to 16, inclusive, provide a complete plan of procedure, in cases like the present, and in terms and purpose are utterly inconsistent with the right of the United States to bring or maintain the present bill.

Before the amendment to § 16 giving the right of recovery at law there existed only the right of equitable relief. *Malcoon* v. *C. & N. W. R. Co.*, 3 I. C. R. 715.

Hitherto uniform course of procedure in cases of this character is against the right to maintain the present suit.

An examination of the whole course of the Interstate Commerce Commission will disclose that they have in every single instance, excepting in the case at bar, pursued the course so clearly defined by the act, and it is manifest that the commission itself recognizes the procedure we insist upon here. *I. C. C.* v. *N. E. R. Co.*, 74 Fed. Rep. 70; 5 I. C. R. 650; *I. C. C.* v. *L. & N. R. Co.*, 73 Fed. Rep. 409; 5 I. C. R. 657. The procedure contended for here is recognized as a condition precedent to equitable relief. *Swift & Co.* v. *P. & R. R. Co.*, 58 Fed. Rep. 858; 4 I. C. R. 633, and *Swift & Co.* v. *P. & R. R. Co.*, 64 Fed. Rep. 59.

These decisions are fatal to the present suit. Also see *State* v. *R. R. Co.*, 17 Neb. 647; *I. C. C.* v. *Ala. M. R. Co.*, 168

U. S. 174; *I. C. C.* v. *C. N. O. & T. P. R. Co.*, 167 U. S. 495–506, and cases cited; *Texas Pacific R. Co.* v. *I. C. C.*, 162 U. S. 204.

By reason of its inequality and injustice, the present procedure, if sustained, would deprive the carrier of the right expressly given to "desist" or make "reparation," etc. See Judge Hook's decision not yet reported in *Vanderslice-Lynde Co.* v. *Mo. P. R. Co.*, January 7, 1902, United States Circuit Court, Kansas.

III. Section 12, upon which the suit here is alleged in the bill to be grounded, does not authorize complainants to bring or the courts to hear the same.

The controversy set forth in the bill—namely, whether the rates complained of are discriminatory, as alleged in the bill—is legal and not equitable in its nature, and entitles the defendant, under the Seventh Amendment to the Constitution, to a trial by jury. Said section 12 does not attempt to change or enlarge the jurisdiction of the Circuit Courts in equity, or to authorize a bill in equity, such as the present bill, to determine the reasonableness of rates or discrimination in rates, either in the name of the United States or in that of the commission, and the Circuit Court in equity has no jurisdiction, either generally or under the Interstate Commerce Act, over the particular controversy presented by the bill. The remedy at law by action or by mandamus is adequate.

IV. There is no remedy in equity for the case stated in the bill: The Interstate Commerce Act confers no general equity jurisdiction; on the contrary a resort to an original bill in equity is excluded by the special provisions of the act as to remedies; the remedy by mandamus is adequate.

It is an indisputable proposition, in the absence of an express statute, that remedy by bill in equity is not the proper remedy to enforce the performance by a corporation of public duties prescribed by law, and especially to enforce by injunction penal statutes. *Attorney General* v. *Utica Insurance Company*, 2 Johnson's Chancery Rep. 371, decided by Chancellor Kent. See, also, case of *People* v. *Same* (*quo warranto*), 15 Johns. 358; *Commonwealth* v. *Bank*, 28 Pennsylvania, 389 (*quo warranto*);

p. 379 (same matter in equity). Citing and distinguishing, *Attorney General* v. *Railroad Companies*, 35 Wisconsin, 425, 1874.

The Supreme Court of the United States has always maintained the distinction between mandamus and relief in equity. Their respective functions are distinct. Thus, mandamus and not a bill in equity lies to compel municipalities to levy taxes according to their contract duty. *Walkley* v. *Muscatine*, 19 Wall. 167; *Heine* v. *Levee Commissioners*, 19 Wall. 655; *Barkley* v. *Levee Commissioners*, 93 U. S. 258; *Thompson* v. *Allen County*, 115 U. S. 550; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Smith* v. *Bourbon County*, 127 U. S. 105; *Butterworth* v. *United States*, 112 U. S. 50.

The remedy to compel performance of public duty by corporations is by mandamus and not in equity. The principle is elementary. It is indeed fundamental. To those who recall the nature and extent of the superintending jurisdiction of the Queen's Bench over all public bodies and corporations, exercised largely by mandamus, and in connection with this the historical development of equity as a supplement and aid to law where the legal remedies were inadequate, the principle is extremely clear. *Re Sawyer*, 124 U. S. 200, where the general subject is fully considered; *Hannewinkle* v. *Georgetown*, 15 Wall. 475; *Dows* v. *Chicago*, 11 Wall. 108; many cases, Federal and state, are cited in Dillon, Munic. Corp. (4th ed.) secs. 826, 906–908. That the remedy in this case by mandamus is adequate is demonstrable. *In re Debs*, 158 U. S. 564, distinguished.

V. The Interstate Commerce Act as construed by the courts, having conferred upon carriers the sole power of making rates, in the absence of any provisions by Congress fixing interstate rates, and it having made the duty of the carriers in making such rates to take into consideration all of the circumstances and conditions, similar and dissimilar, the schedule or schedules so made are presumptively lawful, and the naked allegation and charge in the bill that such rates are unreasonable and discriminative, or that there is an undue prejudice under similar circumstances and conditions, is not sufficient either to constitute a cause of action or to give the Circuit Court jurisdiction in equity to originally hear and determine the validity

of the rates thus fixed. *Texas & Pacific Ry. Co.* v. *I. C. C.*, 162 U. S. 197; *I. C. C.* v. *Ala. M. R. Co.*, 168 U. S. 144; *C. N. O. & T. P. R. Co.* v. *I. C. C.*, 162 U. S. 184–197; *T. & P. R.* v. *I. C. C.*, 162 U. S. 197–255; *I. C. C.* v. *Ala. C. M. R. Co.*, 74 Fed. Rep. 715; *I. C. C.* v. *C. N. O. & C. Co.* 167, U. S. 480; *Parsons* v. *C. & N. W. R. Co.*, 167 U. 447; High on Injunctions, old ed. § 526.

Mr. W. C. Perry, with whom *Mr. Assistant Attorney General Beck* was on the brief, for appellee.

I. The demurrer admits a violation of the law.

II. The purpose of the act was to compel equality of treatment, to provide a new remedy and preserve all existing remedies. *Interstate Commerce Commission* v. *Railway*, 167 U. S. 479.

III. Proceedings before the commission are not exclusive of other remedies. *State ex rel. Matoon* v. *Railroad*, 17 Nebraska, 648; *State ex rel.* v. *Telephone Co.*, 17 Nebraska, 126; *Lowry* v. *Railroad*, 46 Fed. Rep. 86; *Railroad* v. *Railroad*, 47 Fed. Rep. 771; *Vincent* v. *Railroad*, 49 Illinois, 33; Sutherland Stat. Const. sec. 202; *Smith* v. *Stevens*, 10 Wall. 321; *United States* v. *County of Macon*, 99 U. S. 590; *Mayor of Nashville* v. *Railway*, 19 Wall. 475; *Thomas* v. *West Jersey R. Co.*, 101 U. S. 52; *South* v. *Maryland*, 18 Hun, 402; *Hearne* v. *Insurance Co.*, 20 Wall. 493; *Amy* v. *City of Salina*, 12 Fed. Rep. 414; *Oregon Short Line* v. *R. R. Co.*, 51 Fed. Rep. 465; *Osborne* v. *Railroad*, 48 Fed. Rep. 49; *S. C.*, 52 Fed. Rep. 912; *Railway* v. *Goodrich*, 149 U. S. 680; *Kentucky Bridge Co.* v. *R. R. Co.*, 37 Fed. Rep. 565; *Wright* v. *United States*, 167 U. S. 512; *Attorney General* v. *Railroad Companies*, 35 Wisconsin, 425; *Coal Company* v. *Coal Company*, 88 Am. Dec. 537 (note); 2 Morawetz on Corporations, sec. 1132; *Cumberland Valley R. R.'s App.*, 62 Penn. St. 227; *Sparhawk* v. *Railroad*, 54 Penn. St. 421; *State ex rel.* v. *Saline County Court*, 51 Missouri, 350; *State ex rel.* v. *Calloway County*, 51 Missouri, 395; High on Injunctions, secs. 1303, 1304, 1554; *Interstate Commerce Commission* v. *Railway*, 167 U. S. 479.

IV. Even if the commission has exclusive original jurisdiction of complaints made by individuals, the rule does not ap-

ply to the government. *Savings Bank* v. *United States*, 19 Wall. 239; *Swearingen* v. *United States*, 11 Gill & J. 373; *Commonwealth* v. *Baldwin*, 1 Watts, 54; *United States* v. *Hoar*, 2 Mason, 314; *People* v. *St. Louis*, 5 Gilman, 351; *In re Debs*, 158 U. S. 564.

V. Section 12 specially authorizes this suit. Sutherland Stat. Const. sec. 240; *Wilkinson* v. *Leland*, 2 Pet. 627, 632.

VI. Remedies summarized.

VII. Cases in which mandatory injunctions have been granted. *Great North. R. R. Co.* v. *R. R. Co.*, 1 Coll. 507; *Earl* v. *G. N. R. R. Co.*, 10 Hare, 664; *Corning* v. *Troy Rail. Co.*, 40 N. Y. 391; *Storer* v. *Great W. R. R. Co.*, 2 Y. & C. 48; *Wilson* v. *Furnace Co.*, L. R. 9 Eq. 28; *Sanderson* v. *Cockermouth Co.*, 11 Beav. 497; *Great Nor. Co.* v. *Manchester Co.*, 5 De G. & S. 138; *Green* v. *West C. Co.*, L. R. 13 Eq. 44; *Hood* v. *N. E. Co.*, L. R. 8 Eq. 666, on appeal; *Commonwealth* v. *Eastern*, 103 Massachusetts, 259; *Harris* v. *Cockermouth Co.*, 3 C. B. N. S. 693; *Mariot* v. *London Co.*, 1 C. B. N. S. 489; *Vincent* v. *C. & A. R. R. Co.*, 49 Illinois, 37; *District Attorney* v. *Ry. Co.*, 16 Gray, 442; *Atty. Gen.* v. *Boston Wharf Co.*, 12 Gray, 553; *Atty. Gen.* v. *Lee Co.*, 104 Massachusetts, 244; *Atty. Gen.* v. *Cohoes Co.*, 6 Paige, 133; *Atty. Gen.* v. *R. R. Co.*, 1 Stock. 526; *Commonwealth* v. *R. R.*, 24 Penn. St. 159; *Georgetown* v. *Canal Co.*, 12 Pet. 98; *Atty. Gen.* v. *Street Ry. Co.*, 14 Grant (V. C.) Ch. 673; *Commonwealth* v. *Ry. Co.*, 24 Penn. St. 159; *Atty. Gen.* v. *Ry. Co.*, 1 D. R. & S. M. 154, 161, 162; *Atty. Gen.* v. *Leicester*, 7 Beav. 176.

VIII. Equity is equal to every emergency. 2 Red. on Rail. sec. 205; *Taylor* v. *Simon*, 4 Myl. & C. 14; *More* v. *Malachy*, 1 Myl. & C. 559; *Wolworth* v. *Holt*, 4 Myl. & C. 619–635; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago &c. Ry. Co.* v. *Ry. Co.*, 47 Fed. Rep. 24; *Gay* v. *United States*, 138 U. S. 1; *Atty. Gen.* v. *R. R. Companies*, 35 Wisconsin, 425.

IX. That there may be a remedy at law to persons for damages is no defence to this suit. *Atty. Gen.* v. *R. R. Cos.*, *supra*; *United States* v. *Baker*, 1 Paine, 156; 12 United States Digest (first series), p. 745.

X. The bill does not plead conclusions of law. The argu-

ment that the traffic between St. Louis and Omaha, and between St. Louis and Wichita was conducted under similar circumstances and conditions is one of fact, and not of law. *Commission* v. *Railway*, 168 U. S. 144; Daniell's Chan. Pl. & Pr. vol. 1, 6th Am. ed., p. 369; Story Equity Pl. sec. 253; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 194; *Interstate Commerce Commission* v. *Alabama Mid. R. Co.*, 168 U. S. 144; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648.

XI. Although strictly speaking, there is no national common law, and even if carriers have the right at their own risk to make rates which are presumptively lawful, yet these facts do not affect this case. *Interstate Commerce Commission* v. *Ry.*, 168 U. S. 144.

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

The violation of the act to regulate commerce, complained of in the amended bill, was an asserted discrimination between localities by a common carrier subject to the act, averred to operate an unjust preference or advantage to one locality over another. The right to bring the suit was expressly rested upon a request made by the Interstate Commerce Commission to do so, in order to compel compliance with the provisions of the act to regulate commerce relating to the matters complained of in the bill.

Bearing in mind that, prior to the request of the commission upon which the suit was brought, no hearing was had before the commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, the question for decision is whether, under such circumstances, the law officers of the United States at the request of the commission were authorized to institute this suit?

Testing this question by the law which was in force at the time when the suit was begun and when it was decided below,

we are of the opinion that the authority to bring the suit did not exist.

But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, that is, the act "To further regulate commerce with foreign nations and among the States," approved February 19, 1903. By section third of that act it is provided:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or is being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity. . . ."

And the same section moreover provides as follows:

"It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled An act to regulate commerce and the acts amendatory thereof."

Although by the fourth section of the act conflicting laws are repealed, it is provided "but such repeal shall not affect causes now pending nor rights which have already accrued, but

such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law [italics ours] *and as modified by the provisions of this act.*" We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the act to regulate commerce. In the nature of things it cannot be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these conditions we think the ends of justice will best be served by reversing the decrees below and remanding the cause to the Circuit Court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as subsequently amended, especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

MR. JUSTICE BROWN concurs in the result.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE HARLAN, dissenting.

I am unable to concur in either the opinion or the judgment in this case.

I think there was no final decree in the Circuit Court, and that, therefore, the Court of Appeals should have dismissed the appeal. After the cause had been once put in issue by bill, answer and replication, a stipulation was filed as follows:

"Whereas, after joining issue upon the pleadings heretofore filed in the above-entitled suit, to wit, the original bill of complaint, the demurrer thereto, the original answer, the amended

answer and the replication thereto, it has been determined by all of the parties to, and all of the parties interested in said suit that it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the Circuit Court of Appeals of the United States and the Supreme Court of the United States;

"Now, therefore, it is hereby agreed and stipulated by and between the above-named complainants, by their solicitors, W. C. Perry and M. Cliggitt, and the above-named defendant, by its solicitors, J. H. Richards and C. E. Benton, that said complainants shall file an amended bill of complaint in said suit, to which said defendant shall file a demurrer, and that, if the court before which said cause is now pending shall overrule said demurrer and allow the relief prayed for in said amended bill of complaint, then said defendant shall proceed to appeal said cause in due course, and that the party, complainants or defendant, against which said Circuit Court of Appeals shall decide adversely, shall, if said party so desires, in due course appeal said cause for final determination to the Supreme Court of the United States.

"And it is further hereby agreed and stipulated that pending said appeal and all the procedure incident thereto the decree and order of said courts, whether it be said Circuit Court of the United States for the District of Kansas, or said Circuit Court of Appeals, or said Supreme Court of the United States, if adverse to said defendant, allowing and decreeing the reliefs and remedies prayed for in said amended bill of complaint, shall be suspended and not enforced against said defendant The Missouri Pacific Railway Company, and when a decision has been rendered in said suit by said Circuit Court of Appeals, or by the Supreme Court of the United States, if the cause is taken to that court, then it is further hereby agreed and stipulated that the decision and judgment of either or both of said courts, if adverse to said defendant The Missouri Pacific Railway Company, shall be vacated, set aside and annulled and shall not be regarded as of any force or effect against said defendant The Missouri Pacific Railway Company except so far

as holding the amended bill to be sufficient, but that said The Missouri Pacific Railway Company shall have the right and shall be permitted to file an answer in said suit, to which said complainants The United States of America shall in due course file a replication thereto, and the issues shall be duly joined and the cause proceed to hearing and determination upon its merits in due course, the intention of this agreement being that the proceedings had upon the demurrer to said amended bill of complaint and the proposed appeal of said suit to a higher court shall in no manner prejudice the right of said defendant to a trial of said suit upon its merits.

"Dated this 16th day of July, 1897.

"W. C. PERRY,
"MORRIS C. CLIGGITT,
"*Solicitors for Complainant.*"

On an application made by the complainant, supported by the affidavit of its solicitor, stating that the defendant consented thereto, an order was entered giving the complainant leave to file an amended bill, and also to the defendant, with consent of the complainant, like leave to file a demurrer. An amended bill of complaint and a demurrer thereto were filed, the demurrer was sustained and, the defendant electing to stand on its demurrer, a decree was entered in behalf of the complainant. A transcript before us shows that all this, from the filing of the stipulation to the entering of the decree, took place on the same day, to wit, July 19. Obviously all subsequently thereto was done in pursuance of the stipulation. That the stipulation was not signed by the solicitors for the defendant is immaterial, as it was for its benefit alone. In the brief for the government in this court, after a statement of preliminary proceedings, it is said:

"It being manifest that the great volume of testimony would have to be taken, and as the defendant had raised the serious question whether the United States could maintain the suit, or had the right, in its own name, and without a preliminary hearing before the Interstate Commerce Commission, to enforce, by injunction, the provisions of the Interstate Commerce

Act which forbid discrimination, it was thought best to finally settle that question. Therefore the stipulation on pages 53–54 was entered into. That stipulation provides for the filing of an amended bill, the levelling of a demurrer thereat, and an appeal or appeals to the United States Circuit Court of Appeals and to this court. The amended bill was filed (pp. 55–60); the defendant demurred (p. 61); the court overruled the demurrer, and the defendant, electing to stand on its demurrer, final decree was entered in favor of the complainant. (pp. 62–73.)"

And in the brief for the defendant and appellant it is in like manner said:

"After all this, the parties made the stipulation found on page 53, to the effect that 'it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the Circuit Court of Appeals of the United States and the Supreme Court of the United States,' which it was stipulated might be done without prejudice to the right of the defendant if it were held that the bill was maintainable to a trial of the suit upon its merits.

"The amended bill was accordingly filed (Record, pp. 55–60); demurrer thereto was filed (p. 61), and a decree rendered in favor of the complainant."

Now although it may be that the stipulation was not brought into the record by means of a bill of exceptions, and although it does not affirmatively appear that the trial court was made aware of this stipulation, or acted in pursuance thereof, yet as the railway company brings here a record containing the stipulation, and as it is admitted by counsel for both parties that it was entered into, and that subsequent proceedings were had in pursuance of its agreements, I think notice should be taken of it by this court. Indeed, if nothing appeared of record, and counsel should admit before us that a stipulation had been entered into between the parties in respect to the finality of the decree, ought we not to act on such admission? Can parties stipulate that questions of law shall alone be presented to this court, and that if our decision be one way the case shall there-

after proceed in the trial court for an inquiry and decree upon the facts? I know that the statutes of some States permit the taking of a case to the appellate court upon a ruling made on a demurrer, but we have always held that the decree or judgment must be final before we are called upon to review it. When a case has once been decided by this court no further proceedings can be had in the trial court except upon our direction, whereas here the parties have stipulated that without such direction a new trial may be had. In other words, our decision is not to be final although we affirm the decree. It seems to me that the decree of the Court of Appeals should be reversed and the case remanded to that court with directions to dismiss the appeal.

Upon the merits, also, I dissent. The bill is an original bill in behalf of the United States, filed under the direction of the Attorney General, and the fact that the Interstate Commerce Commission requested him to cause this suit to be instituted in no manner adds to or affects the question of the government's right to maintain it. The commission was not asking the Department of Justice to enforce any of its orders, in which case, as we held in *East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Commerce Commission*, 181 U. S. 1, it would become our duty to examine the proceedings had before the commission. This is an independent suit instituted by the government, not to carry into effect any orders of the commission, but to enforce a duty cast upon carriers of interstate commerce, and the right of the government to maintain such a suit does not depend upon the request of any individual or board. The twenty-second section of the act to regulate commerce provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Every remedy, therefore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by that act.

We held in *In re Debs*, 158 U. S. 564, that the United States had a right, even in the absence of a statute specially authoriz-

ing such action, to come into the Federal courts by an original bill to restrain parties from obstructing and interfering with interstate commerce. It seems to me singular that the government can maintain a bill to prevent others from obstructing and interfering with interstate commerce and yet cannot maintain a bill to compel carriers to fully discharge their duties in respect to such commerce. Can it be that the government has power to protect the carriers of interstate commerce and not power to compel them to discharge their duties?

It is said that this is a suit to compel the carrier to refrain from discriminating between places; that there was no common law duty to abstain from such discrimination; that it is forbidden only by statute. But confessedly it was a common law duty of a carrier to make no unreasonable charges. It is distinctly averred in the amended bill (Rec. 57, 59):

"And your orators further aver and show unto your honors that said defendant has established and for a long time has maintained and still maintains in force on the line of its railroad between the city of St. Louis and the city of Wichita rates, rules and regulations governing all freight traffic between said cities over the said railroad which are unjust and unreasonable, in this, that said charges for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive, exorbitant, unreasonable and unjust to the extent and amount that such rates and charges exceed the rates and charges on the line of said defendant's railroad between the cities of St. Louis and Omaha, all of which is to the great detriment and hindrance of commerce and trade between the said cities of St. Louis and Wichita, and between the localities to which said cities contribute as a supply point, and to the irreparable injury of the public and to the people of the United States.

* * * * * * * *

"And your orators further aver and show unto your honors that any schedule rates and freight charges for the various shipments and classifications hereinbefore set forth between the said cities of St. Louis and Wichita that are in excess of the

tariff schedules and freight charges for shipments of the like kind and class of property between the cities of St. Louis and Omaha are unreasonable, excessive, exorbitant and unjust in and of themselves, and constitute an unreasonable discrimination against Wichita and the localities tributary thereto and the people living therein and against persons shipping freight between the cities of Wichita and St. Louis, and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage."

The truth of these allegations is admitted by the demurrer. The charges for shipments for freight between St. Louis and Wichita are "unreasonable, excessive, exorbitant and unjust in and of themselves." Surely here is a disregard of what was at common law a plain and recognized duty of the carrier.

Further, while at common law a mere difference in the prices charged by the carrier to two shippers respectively might not have been forbidden, yet it may well be doubted whether, if the difference was so great as to amount to an unreasonable discrimination, the rule would not have been otherwise. In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S. 263, 275, we said:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service, *Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 393; *Baxendale* v. *Eastern Counties Railway Co.*, 4 C. B. (N. S.) 63; *Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 S. C. 38; *Johnson* v. *Pensacola Ry. Co.*, 16 Florida, 623, though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

But beyond this the interstate commerce act itself forbids

unjust discrimination, and such discrimination is also clearly and fully set forth in the bill. Can it be that the government is powerless to compel the carriers to discharge their statutory duties? It is nowhere said in the interstate commerce act that this duty or any other duty prescribed by statute is to be enforced only through the action of the commission. On the contrary, as we have seen, it expressly provides that all other remedies are left unaffected by the act, and a duty cast by statute equally with a common law duty may by the very language of the act be enforced in any manner known to the law.

Further, the act to regulate commerce, as originally passed, in section 16, required the district attorneys of the United States, under the direction of the Attorney General, to prosecute suits to compel carriers to obey the orders of the commission. If all remedies were to be secured only through action in the first instance by the commission that provision was all that was necessary, but in the amendatory act of 1889, 25 Stat. 855, there was added in section 12 this clause: "The commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof." Clearly that contemplates just such a case as the present, and when, in the judgment of the commission, it is better that the proceedings should be had primarily in the courts, it may call upon the legal officers of the United States to bring the proper actions.

For these reasons I am compelled to dissent, and I am authorized to say that MR. JUSTICE HARLAN concurs in this opinion.

POTTER *v.* HALL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 168. Submitted February 24, 1903.—Decided April 6, 1903.

Smith v. *Townsend*, 148 U. S. 490; *Payne* v. *Robinson*, 169 U. S. 323, and *Calhoun* v. *Violet*, 173 U. S. 60, decided only that one who, in violation of law, was within the territory in Oklahoma opened for settlement under the act of March 2, 1889, and the President's proclamation executing the same at the moment of time when the race for land began, was disqualified from entering land. In those cases the question was reserved whether one was disqualified because he had been in the territory prior to the time fixed for its opening, but had retired from the territory and on the day of the opening had made the race for land on an equality with others. *Held*, therefore, that the court below erred in treating the cases in question as decisive of the question which they reserved.

The Land Department charged with the execution of the statute having in many rulings held that prior entry did not disqualify provided the one who had so entered had returned and taken part in the race with the others, unless the prior entry conferred some manifest advantage, which would not otherwise have been possessed, *Held*, that as this construction of the statute was in accord with the spirit and intent of the act it should not be disregarded by the courts upon the ground that it was in conflict with the mere letter of the statute.

The ruling of the Land Department in this particular case that the prior going into the prohibited territory by an entryman who had retired and taken part in the race on an equality with others did not disqualify the entryman, because the prior entry had given him no particular advantage which he would not otherwise have possessed, *Held*, to be a finding of fact not reviewable by the courts.

THIS case involves conflicting claims to a tract of land in Oklahoma. Potter, the appellant, who was plaintiff below, claiming to be the owner by title derived under the homestead laws of the United States, sued to recover the property. Mrs. Hall, the appellee, the defendant below, by answer and cross petition averred that herself and husband, being duly qualified to enter the land under the homestead laws, were the first to enter upon and occupy it in the year 1889, when it was opened for settlement, and that they had resided on it as their homestead up to the time of the death of the husband, and she thereafter had

continued to reside on it as a homestead up to the bringing of the suit. It was alleged that Potter, claiming that he had duly entered upon the land, contested the right of Hall to make entry thereof, on the ground that Hall did not possess the requisite qualifications and had abandoned the land, and that Hall, on the other hand, had contested the right of Potter on the ground that he had unlawfully entered upon the land prior to the time when it was open for settlement in violation of the act of 1889 and the proclamation of the President carrying out the provisions of that act. It was, moreover, alleged that the result of these contests was a recommendation by the local land officers that Hall's application be approved and that Potter's be rejected. A copy of the report of the register and receiver was made a part of the cross petition. It was then averred that the Secretary of the Interior, in reviewing the action of the Commissioner of the General Land Office, passing on the recommendation of the register and receiver, had approved the finding of the local officers, but that subsequently the Acting Secretary had reviewed the previous decision of the Secretary, had rejected the claim of Hall and sustained the right of Potter, and that the patent of the United States had issued to Potter in consequence of such decision. The opinion of the Secretary on the first hearing and that on the second were also made part of the cross petition. Charging that the decision of the Secretary in favor of Potter involved error of law reviewable by the court, the prayer of the cross petitioner was that, as the widow of Hall, she be recognized as entitled to make entry of the land; that Potter be adjudged to hold the land under the patent of the United States for her benefit, and that a decree be awarded directing a conveyance. To the cross petition Potter demurred on the ground of no cause of action. The demurrer having been overruled, and Potter declining to plead further, a decree was entered in favor of the defendant Hall, adjudging the land to her and decreeing a conveyance. The Supreme Court of the Territory affirmed the decree. 11 Oklahoma, 173.

The material facts found by the Land Department are these: Potter entered on the land the 22d of April, 1889, the day upon which it was open for settlement, and continuously maintained

his residence thereon. Hall first entered upon a part of the land about six months after, that is, in October, 1889. The facts concerning Potter's entry were stated by the Secretary in his opinion on the first hearing as follows:

"The history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22, 1889; shortly before this date Potter had been appointed by the Indian agent of the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid, and is within possibly a quarter of a mile from the tract in question. On this morning of April 22, 1889, some three or four hours before the hour of noon, Potter, who it seems was at said line, seeing some freighters camped on the land involved, went thereon to order them off; he then returned to the line, and (at) the hour of noon started in the race for a claim; he reached the land before any of his competitors, and, as he states, commenced his settlement at one half or one minute after twelve o'clock."

The deduction which the Secretary drew from these facts was thus stated by him:

"In my opinion the facts just stated sustain the conclusion reached by the local officers to the effect that Potter was not qualified to enter the tract in question by going into the territory on the morning of April 22, 1889, before the hour when the lands therein were opened to settlement; he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an advantage over rival claim seekers. It follows under the prevailing rulings, *Dean* v. *Simmons*, 17 L. D. 526, and cases cited, that

Potter is not qualified to make entry of land in Oklahoma, and that his application to enter the tract in question must be rejected."

The Acting Secretary, when he came to consider the case on a rehearing or review, whilst accepting the facts concerning Potter's entry as stated in the previous opinion, drew from them a different conclusion from that which had previously been deduced. He said:

"Accepting this statement as correct, and a reëxamination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged, and which it cannot be denied, was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point, he neither gained nor sought advantage, and it was error to hold that under the circumstances of entry into the territory he was disqualified thereby."

Mr. J. W. Shartel and *Mr. J. H. Everest* for appellant.

Mr. Charles P. Lincoln and *Mr. Mark D. Libby* for appellee.

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

The Supreme Court of the Territory disregarded the final action of the Land Department as expressed in the opinion of the Acting Secretary on the rehearing, and decreed that Potter held the land in trust for the defendant and appellee on two

grounds: First, because the final action of the department was held to be a violation of the provisions of the law opening the land in question to settlement; and, second, because, as stated by the court, "We feel less hesitation in reversing the conclusion of the last tribunal of the Land Department 'on review,' not only because the conclusion we now arrive at is that *which must necessarily be arrived at upon the facts*, (italics ours,) but also because it was the one accepted by the Secretary of the Interior, as well as the Commissioner of the General Land Office." The conclusion of the court, that the final action of the Land Department was contrary to law, was rested upon what was deemed to be the controlling effect of the rulings in *Smith* v. *Townsend*, 148 U. S. 490; *Payne* v. *Robertson*, 169 U. S. 323, and *Calhoun* v. *Violet*, 173 U. S. 60. But the decisions relied upon do not sustain the conclusion which the court deduced from them. In all three of the cases the only question decided was the validity of an entry made by one who was within the inhibited territory at the time when the land was opened by law for settlement. The cases therefore did not involve whether one who was outside of the territory at the moment of time when the land was opened, lost his right to take part in the race into the territory because at a time previous to that moment, he had been within the territory in question. Indeed, not only was the question which this case presents not embraced within the decisions upon which the court below based its conclusion, but it was expressly excluded from the rulings made in the cases in question. Thus, in *Smith* v. *Townsend*, in referring to the statute and the President's proclamation opening the land for settlement, it was said in the concluding passage of the opinion (p. 501):

"It may be said that if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2 and before April 22, should chance to step within the limits of the territory would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory, it may perhaps be

said that if within the letter he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead. Be that as it may—and it will be time enough to consider that question when it is presented—it is enough now to hold that one who was within the territorial limits at the hour of noon, April 22, was, within both the letter and the spirit of the statute, disqualified to take a homestead therein."

The court below having then erroneously held that the case was controlled by the previous adjudications of this court, we are called upon to determine the question which was expressly reserved in *Smith* v. *Townsend*, that is, whether one who was outside of the legal barrier at twelve o'clock M. on April 22, the day and time when that barrier was removed by operation of law and the terms of the proclamation of the President, was disqualified from participating in the race for the land because prior to that date and within the prohibited period he had been within the territory which was thereafter to be opened for settlement. The statutes and proclamation of the President by which this question is controlled were fully set out in *Smith* v. *Townsend*, *supra*, and need not be at length restated. Suffice it to say, that the provisions opening the land for settlement, regulating the mode of settlement and the President's proclamation executing these statutes, are found in the act of March 1, 1889, 25 Stat. 757, the act of March 2, 1889, 25 Stat. 980 and 1005, and the proclamation of the President of March 22, 1889, 26 Stat. 1546. The first of these acts contained the provision that "any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." The act of the subsequent day (March 2, 1889) contained the following provision:

"But until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

The proclamation of the President contained these words:

"Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto."

Doubtless, as observed in *Smith* v. *Townsend*, a rigorous adherence to the mere letter of these statutes and the terms of the proclamation would exclude every person from the right to enter and occupy land within the prohibited territory, even although such person was outside of the territory, and therefore on an equality with all others if perchance such persons had accidentally or otherwise gone into the prohibited territory between the second day of March and the twenty-second day of April. But it is also true that if the provisions of the statute and proclamation be enforced, not according to their mere letter, but in harmony with the intention which may be fairly deduced from them, a contrary rule would result. Whilst, as held in *Smith* v. *Townsend* and the cases referred to which have followed it, obviously the purpose of the statute was to exclude any one from entering land who was within the territory at the period fixed for the opening, it may well be doubted whether the words "enter upon and occupy," as used in the act of 1889 and in the President's proclamation, embrace the mere accidental or casual presence in the prohibited territory subsequent to the 2d of March and prior to the 22d of April of one who was outside on the 22d of April, and therefore in a position of substantial equality with others seeking to make the race for the land.

The Land Department, charged with the execution of the act, was early called upon to determine whether one who was outside of the territory at the time of the opening, and took part in the race for land was disqualified because, subsequent to the second of March, and before the opening, he had been within the limits. In the case referred to the entryman had, on the 20th of April, crossed the line accidentally and gone two miles into the territory, but on being informed of the fact, had retired and waited with others on the line until the 22d, the day

of opening. After considering the terms of the statute the conclusion was reached that an entry of this kind was not within the spirit of the prohibition of the statute, and the entry was confirmed. *Donnell* v. *Kittrell*, (1892) 15 L. D. 580. This ruling was followed in *Higgins* v. *Adams*, 18 L. D. 598, where it was held that one who had gone into the disputed territory on the morning of the day of the opening for the purpose of watering his team, and who, on completing this object, had returned to the boundary and made a start with the others, did not come within the spirit of the statute. In *Curnutt* v. *Jones*, 21 L. D. 40, (1895) the whole subject was elaborately reviewed and many prior cases referred to. Briefly the facts in the case were these: The entryman had resided for several years in the vicinage of the prohibited territory, and had habitually entered therein for the purpose of getting his mail. On the day, however, of the opening he was at the line with others and took part in the race for land. It was held that the prior entry did not deprive him of the right to enter land; that whether entry prior to the day of the opening affected the right to make entry would depend upon the facts of each particular case, and upon whether, in considering them, it was concluded that the prior entry placed the one who had made it in such a position of advantage over others as to render it unjust and inequitable to allow him to make an entry of land. In summing up the case Mr. Secretary Smith, in his opinion, said:

"Jones, the defendant in this case, had lived for some time on the border of the territory, within less than a mile from the line, and almost from the necessity of his situation was familiar with the lands in the immediate vicinity. His information respecting them, and particularly respecting the tract subsequently entered by him, is shown to have been acquired long prior to March 2, 1889, and as was well said in the case of *Golden* v. *Cole's Heirs*, *supra*, 'it was impossible to deprive people who had been over the territory of the knowledge they had thus acquired.' His periodical visits to Oklahoma City, which was at once his post office, his most convenient and accessible railway station, and his market town, do not appear to have brought him any advantage over other persons seeking lands in the territory."

In *Tipton* v. *Maloney*, 23 L. D. 186, (1896) it was held that one who within the prohibited period had passed along the highways in the territory was not disqualified for making an entry, provided he was outside of the line on the day of the opening and took part on an equality with others in the effort to secure land. And rulings to the like effect were made in *Hensley* v. *Waner*, 24 L. D. 92, and *Henderson* v. *Smith*, 28 L. D. 303. The settled rule then applied by the Land Department in the execution of the statute is that one who took part in the race for land on the day of the opening was not prohibited from taking land because of a prior entry into the territory unless it be shown that manifest advantage resulted to the entryman from his previous going into the territory. The rule thus for a long period and consistently enforced must obviously have become the foundation of many rights of property. And as we consider that the rule thus applied in the practical administration of the statute by the officials by law charged with its execution conforms to its intention, we are unwilling to overthrow it by a resort to a narrow and technical construction. It remains only to consider whether error was committed by the department in finally ruling that the entry made by Potter on the morning of the 22d, before he returned to the line to take part in the race, involved error of law reviewable by the courts. But as such entry did not, as a matter of law, preclude Potter's right to go outside of the territory and take part in the race for land, but depended upon whether, as a matter of fact, he obtained by his previous going into the territory a substantial advantage over others, which he would not have otherwise possessed, it follows that the final conclusion of the department that no such advantage resulted, involved but the finding of an ultimate fact and not a conclusion of law, and it is, therefore, not reviewable. If the facts found by the Secretary had no tendency to sustain the conclusion reached by him it might be that a question of law would arise, but such is not the case. Indeed, in view of the finding that Potter had been for a long period of time living across the line in close proximity to the land which he entered, and which was only a quarter of a mile distant from the place where the

race began, and that he reached the land in two minutes from the time when the start was made, it might well be argued that his going into the territory, as stated, had no tendency to establish that he obtained an advantage by reason of acquiring information which he had not previously possessed. But so to say would lead only to the conclusion that as a matter of law the department rightly held that Potter was a qualified entryman. The fact that the final conclusion as to the ultimate facts reached by the department differed from the conception of such ultimate facts entertained by the department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties.

The judgment of the Supreme Court of the Territory must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

FARMERS' AND MERCHANTS' INSURANCE COMPANY *v.* DOBNEY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 189. Submitted March 9, 1903.—Decided April 6, 1903.

Where the allowance of an attorney's fee under the provisions of a state statute is the basis of the Federal right asserted, and it appears that one of the assignments of error relied upon before, and considered and expressly decided by, the highest court of the State was that the statute was unconstitutional and void and in conflict with the Fourteenth Amendment for the want of mutuality and deprived the plaintiff in error of the equal protection of the law, the motion to dismiss will be denied.

Sections 43, 44, 45 of chapter 48 of the laws of Nebraska of 1899, by which the court upon rendering judgment for a total loss sued for against an insurance company upon any policy of insurance against loss on real property by fire, tornado or lightning shall allow the plaintiff a reasonable attorney's fee to be taxed as costs is not repugnant to the equality clause of the Fourteenth Amendment either because it arbitrarily subjects insurance companies to a liability for such fees when other defendants in other cases are not subjected to such burden, or because the fee is to be

imposed on the insurance companies but not on the insured when the suit is successfully defended, or because the statute arbitrarily distinguishes between different classes of policies allowing the fee in certain cases and not in others.

THE case is stated in the opinion of the court.

Mr. Halleck F. Rose for plaintiff in error.

Mr. M. P. Kinkaid and *Mr. M. F. Harrington* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

Having been adjudged to pay the amount of a fire policy written on the dwelling house of the defendant in error, which was totally destroyed by fire, the plaintiff in error prosecutes this writ. The judgment was for $861.40 with interest, costs, and $150 as a reasonable attorney's fee. This latter amount was fixed under authority conferred on the court by sections 43, 44 and 45 of chapter 43 of the Compiled Statutes of Nebraska, which are a reproduction of chapter 48 of the laws of Nebraska for 1899. The sections in question are reproduced in the margin.[1] The allowance of the attorney's fee is the basis of the Federal right asserted. It is moved to dismiss the writ on the ground that the Federal right was not specially set up

[1] Compiled Statutes of Nebraska, chapter 43.

SEC. 43. Whenever any policy of insurance shall be written to insure any real property in this State against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages.

SEC. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this State, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this State, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this State.

SEC. 45. The court, upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs.

below as required by Rev. Stat. 709, or was in any event alleged too late to enable the Supreme Court of Nebraska to consider it. Among the assignments of error contained in the petition in error filed before the hearing in the Supreme Court of Nebraska was the following:

"Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney fee to be taxed, is unconstitutional and void for want of mutuality of the provisions and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States, and in conflict with section 3 of article 1 and section 15 of article 3 of the constitution of Nebraska."

The case was considered by commissioners appointed pursuant to the Nebraska law to aid the Supreme Court of the State in the discharge of its duties. The commission in an elaborate opinion recommended the affirmance of the judgment. In such opinion the assignment of error concerning the attorney's fee, above quoted, was considered and numerous cases decided by the Supreme Court of Nebraska sustaining its allowance under the statute in question were referred to. It was said in the opinion that the legality of the attorney's fee "was not an open question in this State" because the right to allow the fee had been previously sustained by the Supreme Court of the State in many cases. A passage from the case of *Lancashire Insurance Company* v. *Bush*, 60 Nebraska, 116, expressly declaring that the statute concerning the allowance of the attorney's fee was consistent both with the Constitution of the United States and of the State of Nebraska, was approvingly cited, the passage in question being as follows:

"These decisions are vigorously attacked, but we are convinced, as the result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the Constitution of the United States, or of this State, which forbids classification of subjects for the purpose of legislation."

The Supreme Court of Nebraska, for the reasons stated in

the report of the commission, affirmed the judgment. 62 Nebraska, 213. It results that not only was the Federal question relied upon specially called to the attention of the Supreme Court of the State of Nebraska, but it was by that court expressly decided. The grounds upon which the motion to dismiss is predicated are, therefore, without merit, and it is overruled.

All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defence of a suit to enforce certain insurance policies is repugnant to the equality clause of the Fourteenth Amendment, are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorney's fees when other defendants in other classes of cases are not subjected to such burden; second, because whilst the obligation to pay attorney's fee is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generically considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance as between themselves may not be classified separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Insurance Company* v. *Warren*, 181 U. S. 73; *Insurance Company* v. *Mettler*, 185 U. S. 308. In the *Orient* case, a statute of the State of Missouri, which subjected fire insurance contracts to an exceptional rule, was up-

held, not only on the ground of the right of the State to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the *Warren* case a like principle was applied to a statute of the State of Ohio establishing a particular regulation as to life insurance companies. In the *Mettler* case a statute of the State of Texas was sustained, applicable alone to life insurance policies, which authorized the enforcement, not only of a reasonable attorney's fee, but also of twelve per cent damages after demand in case of the unsuccessful defence of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts or to authorize a classification of insurance contracts so as to subject one character of such contracts when put in one class to one rule and other varieties of such contracts when placed in another class to a different rule. The only claimed distinction between the cases previously decided and the present one is that in this case the classification is made to depend, not alone upon the general character of the contract, but upon the kind of property insured and the extent of the loss. This it is elaborately argued takes this case out of the rule established by the previous cases and causes the statute to be repugnant to the Fourteenth Amendment. But as the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for subclassification.

It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney's fee in case of a total loss of real estate insured and not permit recovery of such fee when the property insured has been only partially destroyed?

The distinction between real and personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case, the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value fixed by both parties in the policy, the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the State. If in regulating and classifying insurance contracts the legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason.

Affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE BROWN dissented.

ONONDAGA NATION *v.* THACHER.

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

No. 234. Argued April 8, 9, 1903.—Decided April 27, 1903.

Writ of error dismissed for want of jurisdiction, because no claim of Federal right was specially set up or called to the attention of the state court in any way, and that court did not pass upon or necessarily determine any Federal question.

THIS action was originally brought by the Onondaga Nation and Te-has-ha, an Onondaga Indian. Subsequently several other Onondaga Indians, one Seneca Indian, a Cayuga Indian

and the University of the State of New York were made additional plaintiffs. The ultimate object of the action was to recover from the defendant four wampum belts, to which defendant asserted ownership by purchase, but which were averred by the plaintiffs to be the property of a league or confederacy of Indian tribes, known as the "Ho-de-no-sau-nee." The Onondaga Nation, through an officer selected by it, was averred to be the lawful keeper or custodian of said belts. The league or confederacy referred to was also at one time known as the Iroquois Confederacy, as the Five Nations (consisting of the Mohawk, Onondaga, Seneca, Oneida and Cayuga tribes) and, after the Tuscarora Nation of Indians came into the league, as the Six Nations. By an amendment to the complaint it was alleged that on February 26, 1898, "the Onondaga Nation elected the University of the State of New York to the office of wampum keeper, and by bill of sale sold and transferred to the University of the State of New York all its interest in the said wampums;" and the right to the custody of the belts was alleged to be in said University. These wampum belts were thus described:

"One belt of dark wampum beads representing the confederation organization of the Five Nations under Hiawatha; one belt representing the first treaty stipulation between the Six Nations and General George Washington, picturing in wampum beadwork the council house, General Washington, the O-do-ta-ho, or president of the tribes, and thirteen representatives of the colonies; also two fragments of other belts, one representing the first approach to the Indians of the 'people with white faces,' and the other a narrow belt representing the unity of the Five Nations."

The complaint contained no allusion to the Constitution, treaties or statutes of the United States.

In substance the answer contained a recital of the facts connected with the purchase of the belts, and it was asserted that absolute ownership thereof existed in the defendant.

The action was tried at a special term of the Supreme Court of Onondaga County, New York. After the introduction of oral and documentary evidence, the court filed findings of fact

and conclusions of law. The defendant was found to be the absolute owner of the property in question; the Onondaga Nation was held not to have legal capacity to sue; the University of the State of New York was decided not to have such interest in the subject matter of the action as entitled it to bring an action for the recovery of any or either of the wampum belts; and the individual Indians made parties plaintiff were adjudged not to possess such a community of interest with the members of the various tribes constituting the league or confederacy which it was alleged originally owned the belts, as to permit the maintenance by them of the action. Beyond statements made in testimony or in recitals of historical facts showing that the general government had made treaties with the confederacy of the Six Nations and with certain of the tribes which had composed the confederacy, and that said treaties had been evidenced by the exchange of belts of wampum, there was not contained in the evidence or in the findings referred to, or in the judgment rendered or in the exceptions thereafter filed by the plaintiffs to the findings of the court, any allusion to the Constitution, treaties or statutes of the United States.

On appeal the appellate division of the Supreme Court of New York for the fourth judicial department affirmed the judgment of the trial court. An appeal was then taken to the Court of Appeals of the State of New York, and that court affirmed the judgment, 169 N. Y. 584, upon the following *per curiam* opinion:

"We think the judgment appealed from should be affirmed, upon the ground that neither the Onondaga Nation nor the individual Indians named as plaintiffs, had legal capacity to bring and maintain the action. *Strong* v. *Waterman*, 11 Paige, 607; *Seneca Nation* v. *Christie*, 126 N. Y. 122; *Johnson* v. *Long Island R. R. Co.*, 162 N. Y. 462.

"As to the University of the State of New York, one of the plaintiffs, the finding of fact by the trial judge, 'that the University of the State of New York never purchased any or either of the wampum belts mentioned and described in the complaint, and that said University of the State of New York never was selected or "raised up" to the position or office of "wampum

keeper," and no official proceedings were ever begun on the part of any of the tribes of Indians which formerly composed said Iroquois Confederacy for the purpose of conferring any such position or office upon said University of the State of New York, assuming that there is or was, at the time of said alleged proceedings, any such official position,' is supported by evidence, and the judgment having been affirmed at the appellate division, it is, therefore, conclusive upon us."

The record and the proceedings in the cause having been remitted to the Supreme Court of Onondaga County, and the judgment of the Court of Appeals having been made the judgment of the lower court, a writ of error was allowed to review this latter judgment.

As-que-sent-wah (*Edward Winslow Paige*) for plaintiffs in error.

Mr. John A. Delehanty for defendant in error.

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

The jurisdiction of this court to review the judgment complained of is controlled by section 709 of the Revised Statutes. Now, so far as we have been able to ascertain from a careful examination of the record there was not drawn in question in the courts of the State of New York in the case at bar, in any manner, the validity of a treaty or statute of, or an authority exercised under, the United States, and the courts of the State of New York rendered no decision against the validity of any such treaty, statute or authority. Nor is there anything contained in the record to indicate that there was drawn in question in the state courts the validity of any statute of, or the validity of an authority exercised under, a State, and necessarily there was no decision sustaining the validity of any state statute or authority exercised under a State, alleged to be repugnant to the Constitution, treaties or laws of the United States. Neither can we find anything in the record to warrant the contention that the plaintiffs in error ever, specially or otherwise,

set up or claimed in the course of the litigation in the courts of New York, which is under review, any title, right, privilege or immunity under the Constitution, or a treaty or statute of, or commission held or authority exercised under, the United States.

There are no formal assignments of error in the record or in the brief of counsel for plaintiffs in error. It is, however, asserted in such brief that a Federal question arises upon the record because of the ruling by the Court of Appeals of the State of New York, that "there was evidence supporting the finding of fact by the trial judge that the University of the State of New York never purchased any or either of the wampum belts mentioned and described in the complaint, and that said University of the State of New York never was selected or 'raised up' to the position or office of 'wampum keeper,' and no official proceedings were ever begun on the part of any of the tribes of Indians which formerly composed said Iroquois Confederacy for the purpose of conferring any such position or office upon said University of the State of New York, assuming that there is or was, at the time of said alleged proceedings, any such official position."

Referring to this ruling of the Court of Appeals of New York, counsel for plaintiffs in error say:

"It is plain that this is a holding that the Council of the Onondagas *had no power* to select a depositary for the wampums. It is not that the University could not take, could not act and could not sue, but '*that it never was selected*' for the position of wampum keeper. As the action of the Council *selecting* it, or *voting its selection*, is admitted on the record, this can only mean that the action of the Council of the Onondagas *was void as beyond its power*, and thus the Federal question is right up, because the case was decided by the Court of Appeals upon that question *solely*."

But, even if the quoted matter is susceptible of the construction that it adjudged that the Council of the Onondaga Nation of Indians did not possess the power which it is claimed they attempted to exercise in 1898, to select the University of the State of New York as the depositary for the wampums, it is not apparent, and no reason has been advanced which enables

us to discover how a Federal question can be evolved from the holding referred to which would entitle us to review the judgment below. Certainly, the Court of Appeals of New York did not suppose that a Federal question was lurking in the record presented for its consideration.

In any event, as we find that no claim of Federal right was specially set up, or called to the attention of the state court in any way, we are without jurisdiction to review the judgment of the state court. *Telluride Power Transmission Co.* v. *Rio Grande Western Railway Co.*, 187 U. S. 569, 580.

Writ of error dismissed for want of jurisdiction.

SHURTLEFF *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 76. Argued January 20, 1903.—Decided April 6, 1903.

Where Congress creates an office and provides for the removal of the incumbent at any time for inefficiency, neglect of duty, or malfeasance in office, if the removal of the officer is sought to be made for any of those causes he is entitled to notice and a hearing; but if the President removes him without giving him notice and an opportunity to defend himself, it must be presumed that the removal was not made for any of the causes assigned in the statute.

In the absence of constitutional or statutory provision the President can, by virtue of his general power of appointment, remove an officer, even though he were appointed by and with the advice and consent of the Senate. This power (assuming, but not deciding, that Congress could deprive the President of the right to exercise it in such a case as this) cannot be taken away by mere inference or implication, and in the absence of plain language in the statute Congress will not be presumed to have taken it away.

Under section 12 of the Customs Administrative Act of June 10, 1890, providing for the appointment of general appraisers and their removal by the President for inefficiency, neglect or malfeasance in office, the President may also remove such officers without any of the causes specified, under his general power of removal.

THE appellant seeks to review a judgment of the Court of Claims denying his right to be paid the salary pertaining to

the office of a general appraiser of merchandise and accruing between May 15 and November 1, 1899. The court refused to decree payment of the claim on the ground that he was not one of the appraisers during the time for which he demanded such salary.

The facts, as they appear in the findings of the Court of Claims, are that the appellant was nominated on July 17, 1890, to be one of the general appraisers of merchandise under the act of June 10, 1890, chapter 407, 26 Stat. 131, and that nomination was consented to on the following day by the Senate, and the appellant was thereupon commissioned to be such general appraiser of merchandise. He accepted that office and took the oath required on July 24, 1890, and remained in such office and was paid the salary attached thereto up to May 15, 1899. On May 3 of that year he received the following communication from the President:

"EXECUTIVE MANSION,
"WASHINGTON, D. C., *May* 3, 1899.

"SIR: You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor.

"WILLIAM MCKINLEY."

The appellant never resigned his office nor acquiesced in any attempted removal therefrom, and he was never notified or informed of any charges made against him, either of inefficiency, neglect of duty or malfeasance in office, and he knows of no cause for his removal from the office having been ascertained or assigned by the President.

Since May 15, 1899, he has been ready and willing and offered to discharge the duties of the office, and has not been paid any salary since that date. He has made monthly demand upon the Treasury Department for the salary attaching to the office from May 15 to November 1, and such demand has been refused.

On May 12, 1899, an appointment was made during the recess of the Senate to fill the vacancy caused by the removal of the petitioner from his office, and such appointment was to be

in effect not longer than to the end of the next session of the Senate of the United States. The appointee under that commission took the oath of office and entered upon the duties thereof on May 12, 1899, and has received pay as such officer beginning on May 19, 1899, up to the present time. On December 15, 1899, he was nominated to the Senate and the nomination to that office was confirmed on January 17, 1900, and he was commissioned by the President under the above confirmation on January 22, 1900, and took the oath of office under that appointment on January 26, 1900, and since that time has remained in the office to which he was so appointed.

Upon these findings the Court of Claims decided as a conclusion of law that the appellant was not entitled to recover, and his petition was therefore dismissed. 36 C. Cl. 34.

Mr. Edwin B. Smith for appellant.

Mr. Assistant Attorney General Pradt for appellee.

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

The office of general appraiser of merchandise was created by the twelfth section of the act of Congress approved June 10, 1890, commonly called the Customs Administrative Act. 26 Stat. 131, 136. The material portion of that section reads as follows:

"Sec. 12. That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of seven thousand dollars a year. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

There is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section. Under

the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing. *Reagan* v. *United States*, 182 U. S. 419, 425. In speaking of causes of removal, Mr. Chief Justice Fuller said in that case:

"The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient."

Various state courts have also held that where an officer may be removed for certain causes, he is entitled to notice and a hearing. See *Dullam* v. *Willson*, 53 Michigan, 392, 401; *Page* v. *Hardin*, 8 B. Mon. 648, 672; *Willard's App.*, 4 R. I. 597; *Commonwealth* v. *Slifer*, 25 Pa. St. 23, 28; *State* v. *Hawkins*, 44 Ohio St. 98, 114; *Biggs* v. *McBride*, 17 Oregon, 640, 650; *Ham* v. *Boston*, 142 Massachusetts, 90.

It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend. The question then arises, can the President exercise the power of removal for any other causes than those mentioned in the statute; in other words, is he restricted to a removal for those causes alone or can he exercise his general power of removal without such restriction?

We assume, for the purposes of this case only, that Congress could attach such conditions to the removal of an officer appointed under this statute as to it might seem proper, and, therefore, that it could provide that the officer should only be removed for the causes stated and for no other, and after notice and an opportunity for a hearing. Has Congress by the twelfth section of the above act so provided?

It cannot now be doubted that in the absence of constitu-

tional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate. *Ex parte Hennen*, 13 Pet. 230; *Parsons* v. *United States*, 167 U. S. 324, and cases cited. To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. Congress has regarded the office as of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President and to be administered by officers appointed by him, (and confirmed by the Senate,) with reference to his constitutional responsibility to see that the laws are faithfully executed. Article II, sec. 3.

In *Blake* v. *United States*, 103 U. S. 227, there were two constructions that might have been placed upon the act there under consideration, determining the tenure by which army and naval officers held their commissions in time of peace, and that construction was placed upon the fifth section of the act of July 13, 1866, chapter 176, 14 Stat. 92, which left with the President his power to remove an officer of the Army or Navy, by the appointment of his successor, by and with the advice and consent of the Senate. Although the question was regarded as not free from difficulty, it was held that there was no intention on the part of Congress to deny or restrict the power of the President with the consent of the Senate to displace army and naval officers in time of peace by the appointment of others in their places. This indicates the tendency of the court to require explicit language to that effect, before holding the power of the President to have been taken away by an act of Congress.

The appellant contends that because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any

other cause, and that the President was therefore by the statute prohibited from any removal excepting for the causes, or some of them therein defined. The maxim, *expressio unius est exclusio alterius*, is used as an illustration of the principle upon which the contention is founded. We are of opinion that as thus used the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away. Did Congress by the use of language providing for removal for certain causes thereby provide that the right could only be exercised in the specified causes? If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution, but with that exception no civil officer has ever held office by a life tenure since the foundation of the government. Even judges of the territorial courts may be removed by the President. *McAllister* v. *United States*, 141 U. S. 174. To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. The rule which is expressed in the maxim is a very proper one and founded upon justifiable reasoning in many instances, but should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner.

We can see no reason for such action by Congress with reference to this office or the duties connected with it.

The appellant has cited some cases in the state courts, where, under the peculiar circumstances therein set forth, and with regard to the particular provisions of the statutes, it has been held that the power to remove is restricted to the causes stated in such statutes. We do not regard them as applicable to a case like this.

In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.

By the fourth section of article II of the Constitution it is provided that all civil officers shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. No one has ever supposed that the effect of this section was to prevent their removal for other causes deemed sufficient by the President. No such inference could be reasonably drawn from such language.

We are not unmindful of the force of the contention that, if the power of removal is not limited to the causes specified in the statute, that then those words providing for a removal for inefficiency, neglect of duty or malfeasance in office, fulfill no function, because without them the President has unlimited power of removal, and with them he still has the same power.

It may be said, however, that there is some use for the provision for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend, and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal cannot be regarded as the least imputation on his character for integrity or capacity. Other causes for removal may, however, exist, and be demanded by the interests of the

service, in order that the office may be better conducted, although the officer may not be proved guilty of conduct coming within the statute as a cause for removal. It is true that, under this construction, it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the government. The only restraint in cases such as this must consist in the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare.

It may be, perhaps, that the suggestion above indicated, of the purpose of the statute as evidenced by this language is not entirely satisfactory as a reason for its employment. We by no means overlook the objections to it. But we are called upon to place a meaning upon language which, as used in this section of the statute, gives rise to doubts as to what its true meaning is. We are asked not alone to interpret the language actually used, but to infer or imply therefrom a further meaning as to its effect, which does not necessarily flow from the language itself, and, if adopted, results in the creation of a tenure of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt. But we are not shut up to the necessity of finding some other and more plausible reason for the use of this language or else to adopt the meaning contended for by the appellant. The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language. This has not been done, and although language has been used from which we might speculate or guess that possibly Congress did intend the meaning contended for by appellant, yet it has not in fact expressed that meaning in words plain enough to call upon the courts to determine that such intention existed.

The claim made by the appellant, it will be seen, is for salary accruing prior to the appointment and confirmation of his successor by the President and Senate, but holding, as we do, that

the President had the power to remove on other grounds than those mentioned in the act, he exercised that power by appointing the appellant's successor for the time which elapsed between such appointment and his reappointment after the meeting of the Senate and his confirmation by that body.

We are of opinion that the judgment of the Court of Claims should be

Affirmed.

SEXTON *v.* CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 155. Argued and submitted January 28, 1903.—Decided April 6, 1903.

Under sec. 5328, Rev. Stat., and the provisions of the Criminal Code of California, the state courts of that State have concurrent jurisdiction with the courts of the United States to try a person for extortion where the basis of the extortion was a threat to accuse a person of having committed an act which is a crime exclusively against the United States and made so by a Federal statute.

PLAINTIFF in error was convicted in the Superior Court of the county of El Dorado, California, of the crime of extortion. Judgment was entered, and, upon appeal to the Supreme Court of California, it was there affirmed, 132 California, 37, and the plaintiff in error brings the case here for review.

The indictment upon which the conviction was had alleged that on June 20, 1898, at the county of El Dorado, State of California, one S. H. Briggs and the plaintiff in error—

" . . . did wilfully, unlawfully and feloniously obtain from one C. Greenwald certain personal property consisting of money, the property of the said C. Greenwald, to the amount and value of thirty dollars, with the consent of said Greenwald, induced by the wrongful use and exercise upon him of fear by means of a threat then and there made by the said John E. Sexton and S. H. Briggs to accuse him, the said Greenwald, of

the crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein, contrary to the form, force and effect of the statute in such case made and provided."

After the finding of this indictment the defendant Sexton moved the court to set it aside on various grounds, the ninth being that the court had no jurisdiction of the offence charged in the indictment, nor of the person of the defendant, and it was contended that the Federal court alone had jurisdiction over the act for which he was indicted in the state court. The motion was denied and the defendant then pleaded not guilty. Upon the trial the jury found the defendant guilty, as charged in the indictment, and he was sentenced to be imprisoned in the State's prison for the term of two years.

Argued by *Mr. James Parker* for plaintiff in error. *Mr. John E. Sexton* was on the brief.

Submitted by *Mr. U. S. Webb*, attorney general of the State of California, *Mr. Henry H. Glassie*, *Mr. R. Woodland Diggs* and *Mr. George A. Sturtevant* for defendant in error.

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

The record now before us raises but a single question for our determination, and that is whether the state court upon the facts alleged in the indictment had any jurisdiction over the subject matter.

The plaintiff in error contends that the right of the general government to exercise jurisdiction over the crime of which he was convicted is exclusive, and therefore the state court had no right to try him upon the indictment found in that court.

The act of which the plaintiff in error is alleged to have threatened to accuse Greenwald of committing is mentioned in section 3392 of the Revised Statutes of the United States, which makes it an offence to sell cigars unless in new boxes, with the

exception therein detailed. Having created the offence above described, Congress also provided for the punishment of the offence of extortion by threats to accuse an individual of a violation of the provisions of that, among other sections of the internal revenue law.

Section 5484, Revised Statutes, provides that—

"Every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing against any violation of any internal revenue law, shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The provision prohibiting the sale of cigars in any but new boxes is part of the internal revenue law.

By the twentieth subdivision of section 629, Revised Statutes, there is given to the United States Circuit Courts—

"Exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offences cognizable therein."

The Revised Statutes also provide:

"Sec. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

"First. Of all crimes and offences cognizable under the authority of the United States."

Upon these various statutes the plaintiff in error founds his contention that, as the offence which it is alleged in the indictment he threatened to accuse Greenwald of having committed is one which exists solely under section 3392 of the Revised Statutes, which creates it, and as section 5484 provides the penalty for extorting money by threatening to inform or as a consideration for not informing against any violation of that law, the authority to punish for extorting upon such grounds is exclusively in the Federal courts.

On the other hand, it is claimed upon the part of the State

that the offence of which the plaintiff in error has been convicted was one against the State, under sections 518 and 519 of the Penal Code of the State of California.

Those sections provide that—

"SEC. 518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

"SEC. 519. Fear such as will constitute extortion may be induced by a threat, either:

* * * * * * * *

"2. To accuse him, or any relative of his or member of his family, of any crime."

Upon this subject the Supreme Court of California said:

"In substance, it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws, and under fear induced by such threat secured from Greenwald the aforesaid sum of thirty dollars. It is insisted that the facts alleged do not constitute an offence against the laws of the State of California, but, upon the contrary, constitute a crime exclusively within the jurisdiction of the Federal courts. We find nothing in this contention. The defendant is charged with the crime of extortion, an offence directly within the jurisdiction of the state courts. He is not charged with a violation of a Federal statute, but with a violation of a state statute. He threatened to accuse a man with the commission of a crime. It makes no difference if that crime be one solely triable in the Federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offence would be one against the laws of this State. It would be extortion, as defined by the Penal Code of this State, and this court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws. The court finds no substantial defect in the indictment, and the demurrer thereto is not well taken."

The case of counterfeiting the money of the United States is excepted by statute from the law giving exclusive jurisdic-

tion to the United States courts of offences against the laws of the United States. *Fox* v. *State of Ohio*, 5 How. 410; *Houston* v. *Moore*, 5 Wheat. 1, 26. It has also been held that the United States could punish the crime of counterfeiting coin under the Federal statute. The same act may be an offence both against the State and the United States, punishable in each jurisdiction under its laws.

The foundation of the claim of counsel for the State is the statement that the defendant was not tried for or convicted of an offence under the Federal statute, but the indictment simply alleged that he extorted money by threatening to accuse Greenwald of an offence under the Federal statute. It was the extorting of the money by reason of fear induced by the threat that constituted the crime, and that was a crime provided for by the state statute, and it is insisted that the State is not prevented from trying the individual under that statute because he might have been proceeded against in the Federal court under a Federal statute (section 5484) of a somewhat similar nature; that the threat to accuse another of crime is the material matter in the state statute, and it is not material that the threat was pointed at a crime made such only by the Federal statute.

It is true that the offence of extortion by threats to accuse a person of a violation of any part of the internal revenue law is made a crime by virtue of the Federal statute. If there were no statute in regard to the sale of cigars other than in new boxes, as provided for in section 3392 of the Revised Statutes, a threat to accuse a person of doing such an act would not be a threat to accuse him of any crime, and hence would not be punishable. As the crime itself exists only by virtue of the above section and as the threat to accuse one of the commission of such an act is also provided for by another section, there might be some plausibility in the contention of the plaintiff in error that, under the Federal statutes above cited, jurisdiction of the United States courts was exclusive. We do not decide that such contention is well or ill founded, nor do we express an opinion thereon, because we do not regard it as necessary for our decision in this case.

The section which makes it an offence to extort money under a threat of informing in regard to an alleged violation of any internal revenue law (section 5484) is contained in title 70, denominated "Crimes," in the United States Revised Statutes, and in that title is found another section, which provides that—

"SEC. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Assuming that, but for this section, the state court would be without jurisdiction, we are of opinion that it takes the case out of the provisions of the other sections of the Revised Statutes above cited, namely, the twentieth subdivision of section 629, and section 711. Section 5328 must be construed as creating an exception to the general rule declared in these other sections in regard to the jurisdiction of the Federal courts. The New York Court of Appeals placed the same construction on that section, in a very well reasoned opinion prepared by Andrews, Ch. J., in the case of *People* v. *Welch*, 141 N. Y. 266–277. Although section 3392 is the sole foundation for the creation of the offence which the plaintiff in error threatened to accuse Greenwald of having committed, yet the jurisdiction of the state courts is neither taken away nor impaired on that account. The state statute provides for the punishment of the crime of extortion, committed as therein described, and when the Federal statute creates the crime the threat to accuse a person of the commission of such crime becomes itself a crime under the state statute, and the Federal statute which provides for extortion does not take away or impair the jurisdiction of the courts of the several States under their laws to proceed and punish as is therein provided for.

The jurisdiction of the state court over the crime of extortion when perpetrated under the circumstances stated in the indictment is at least concurrent with that of the courts of the United States.

The section (5328) was not intended to merely permit a state court to punish a different offence involved in the one act. It was intended to leave with the state court, unimpaired, the

same jurisdiction over the act that it would have had if Congress had not passed an act on the subject.

There is, also as we think, considerable weight to be attached to the contention that the Federal statute is not essentially the same as the state statute regarding extortion. In the state statute it is specified that the property must be obtained from another with his consent, and that such consent must be induced by a wrongful use of force or fear, while those words are lacking in the other statute. Without expressing an opinion upon the question whether the indictment and conviction could be sustained without the provisions of section 5328, Revised Statutes, we hold that, taking such section into consideration, the state court had jurisdiction in this case. The judgment, therefore, must be

Affirmed.

FOSTER *v.* PRYOR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 173. Argued and submitted February 25, 1903.—Decided April 6, 1903.

When the difference is deep and radical between two domains in which the same kind of property may be situated, the law which makes them one district for taxation, so that all the property of the same kind in the same district must be taxed alike, and no reasonable distinction be permitted, must itself be so plain and urgent that no other intention can be suggested.

There is no provision in the act of Congress of 1890 organizing Oklahoma, or in the territorial act of 1886, which was violated by the act of 1899, p. 216, Session Laws of Oklahoma, which provides that only taxes for territorial and court funds shall be assessed, levied or collected in any unorganized country, district or reservation attached to any county for judicial purposes, and the effect of which is to tax property in an organized county for more purposes, thereby making a different and higher rate than similar property is taxed in the unorganized territory attached to such county.

THIS is an action to enjoin the payment of certain taxes levied upon property belonging to the appellees (plaintiffs below) and

situated in an Indian reservation within the Territory of Oklahoma. The appellee, Hite, resides in the Ponca and Otoe Indian reservation within that Territory; the Stafford Land and Cattle Company is a corporation organized under the laws of the State of Texas and doing business in the above-named Territory; and the 101 Live Stock Cattle Company is a corporation organized under the laws of the State of Kansas. The appellees, severally, owned large numbers of cattle which were grazing in the Indian reservation, and they were assessed therein for purposes of taxation by the taxing officer of Noble County, to which such reservation had been attached for judicial purposes. The reservation is without the boundaries of Noble County and is not within those of any organized county of the Territory, and it comprises land owned and occupied by Indian tribes consisting principally of wild, unimproved and unallotted land used for grazing purposes. The reservation was duly attached to the county of Noble for judicial purposes, by order of the Supreme Court of the Territory, pursuant to the provisions of section 9 of the act organizing the Territory, approved May 2, 1890, 26 Stat. 81, 85.

By article 6, chapter 43, Session Laws of Oklahoma, 1895, it is provided:

"That section 13, article 2, chapter 70, of the Oklahoma statutes relating to revenue, be and the same is hereby amended so as to read as follows: Section 13. That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes, and the board of county commissioners of the organized county or counties to which such unorganized country, district or reservation is attached, shall appoint a special assessor each year, whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of a township assessor, and shall give a similar bond and take the same oath as required of such township assessor, and receive the same fees as a township assessor, and the officer whose duty

it shall be to collect the taxes in the organized county to which such country, district or reservation is attached shall collect the taxes, and is vested with all the powers which he may exercise in the organized county, and his official bond shall cover such taxes," etc.

In 1899, p. 218, Session Laws, the Oklahoma legislature passed an act which provided—

"That from and after the passage and approval of this act no taxes shall be assessed, levied or collected in any unorganized country, district or reservation which shall be or which may hereafter be attached to any county for judicial purposes, except taxes for the territorial and court funds. All acts and parts of acts in conflict herewith are hereby repealed."

The tax assessor of Noble County being of opinion that the law of 1899 was void for reasons hereafter stated, proceeded to assess for taxation under the act of 1895, *supra*, the cattle of the appellees which were grazing in the Indian reservation, instead of assessing such property for territorial and court funds only, as provided for in the act of 1899. The assessment for all purposes was at the rate of 26.2 mills on the dollar of valuation, divided as follows: For territorial purposes 5.2 mills, for court purposes 3 mills, for salaries 6 mills, for road and bridge fund 2 mills, for sinking fund 4 mills, for poor and insane 1 mill, for supplies 2 mills, for county school fund 2 mills and for contingent purposes 1 mill, making a total of 26.2 mills. If the assessment had been for territorial and court purposes only it would have been at the rate of 8.2 mills on the dollar of valuation.

The appellees insisted that the taxing officer had no right to assess them upon their property in the reservation at any greater rate than 8.2 mills for territorial and court purposes, as provided for by the act of 1899, while the appellants contended that the act of 1899 was void, and that the tax assessor had the power, and it was his duty under the act of 1895, to assess the property of the appellees situated in the reservation, for all purposes; or, in other words, for the whole 26.2 mills.

The trial court held in favor of the tax officials and dismissed the petition of the appellees, but upon appeal the judgment of

dismissal was reversed by the territorial Supreme Court and the tax declared invalid for more than 8.2 mills assessed for territorial and court purposes. 11 Oklahoma, 357. The tax authorities have brought the case here by appeal.

Argued by *Mr. Horace Speed* for appellants. *Mr. William R. Harr* and *Mr. William J. Hughes* were on the brief.

Submitted by *Mr. Henry E. Asp*, *Mr. S. H. Harris* and *W. L. Barnum* for appellees.

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

If the statute of 1899, limiting the right of assessment, is valid, it follows that the judgment of the Supreme Court of the Territory, setting aside an assessment for more than such limited amount, must be affirmed. But it is urged that the act of 1899 is void, and that, being void, the taxing officer was justified and required by the act of 1895 to make the assessment he did. The grounds upon which the appellants base their claim that the act of 1899 is invalid rest upon the provisions of section 6 of the organic act, approved May 2, 1890, 26 Stat. 81, and upon section 1 of the act approved July 30, 1886, 24 Stat. 170.

That portion of the sixth section of the act of May 2, 1890, material to the present inquiry, reads as follows:

"That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value."

Section 1 of the act approved July 30, 1886, 24 Stat. 170, provides:

"That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * * * * *

"For the assessment and collection of taxes for territorial, county, township, or road purposes."

The main objection offered to the act of 1899 is that it results in a violation of the rule of uniformity which, as appellants allege, must exist in the same taxing district with reference to the same kind of property. The appellants contend that the Indian reservation is, for taxing purposes, a part of the county of Noble, and therefore part of the same taxing district as that county, and that the taxation under the act of 1899, for that reason, violates the rule of uniformity above referred to. As a basis for the contention that it is the same taxing district, it is maintained that the order of the Supreme Court made by virtue of section 9, of the act of 1890, attaching the reservation to Noble County for judicial purposes, made it a part of the judicial district of that county, and that the subsequent act of the legislature in substance placed the reservation under the general taxing jurisdiction of Noble County, and therefore made it a part of the same taxing district, and, being a part of the same district, the personal property in the reservation must be taxed at the same rate, and for all the purposes that personal property is taxed in the organized county of Noble.

It must be remembered at the outset that the reservation was never any part of Noble County, for the legislature had no power to make it such. *Thomas* v. *Gay*, 169 U. S. 264, 275. It was, as its name implies, a reservation set apart by the general government as a home for the Indians, and as such it formed no part of any organized county. Although, by reason of the act of 1895, the personal property in the reservation was subject to taxation in the organized county to which it was attached for judicial purposes, but of which it formed no part, yet that act did not thereby make the reservation a part of the same taxing district as the county. The act of 1895 (and that of 1899) reached for taxation the owners of

cattle, or any other personal property situated in the reservation, and that was the full effect of each act. All other property than that above described was left untouched, and, we assume, could not have been taxed if owned by Indians, by reason of the treaties or agreements under which the reservation was set apart for the use of such Indians. The right of taxation in the reservation was not as full and entire, even under the act of 1895, as it is in an organized county. This is a most important, if not conclusive, distinction, between the organized county and the reservation when considering whether one and the same taxing district has been created by legislation which does not in terms purport to create it. That legislation was only for the purpose of thereby reaching for taxation a certain class of property in the reservation, and the whole balance that was in the reservation was left untouched. What is there in such legislation which necessarily creates a single taxing district, within which all property must be taxed alike?

Then, too, the property under the act of 1895 was assessed by a separate officer, and although the same officer who collected the taxes in the organized county was authorized and required to collect the taxes in the reservation, yet that fact did not make it part of the same taxing district so as to prevent the legislature from altering the proportion of the taxes which the owner of property in the reservation should be liable to pay as compared with the owner of property in the organized county to which it was attached for certain purposes only. It was simply a convenient method of collecting the taxes on property in the reservation; but the legislature was not thereby prevented from exercising the right to recognize the difference between property situated within an organized county and that which was situated in a reservation, and to make a difference in the rate of taxation in the two cases. If a separate taxing district was not created under the act of 1895, still less can it be contended that one was created by the act of 1899, which enacted a different rate of taxation than prevailed in Noble County.

Even the assessment of the same amount of taxes and their collection by the same officers that acted for the organized

county would not necessarily render the reservation part of the same taxing district as the organized county. The material and important fact remains that the reservation is no part of the county, but is a totally distinct and separate domain, set apart for a home for Indians under the care and custody of the general government, and that taxation therein is permitted only to a limited extent and upon certain kinds of property, not including Indians or their property; and the imposition and collection of those taxes which are permitted do not thereby render the reservation a part of the same taxing district as the organized county to which it is attached for judicial purposes. The difference between the two domains, the reservation and the organized county, is radical and wide. The lands in the former are, as we have said, mostly wild and uncultivated and used principally for grazing purposes, and the domain is the home of a different and distinct race from that occupying the organized county, the inhabitants of which are of civilized races, following the customs of civilized life, and in almost everything differing from their Indian neighbors. Property therein is clearly very differently placed than is the same kind in an organized county. Those who live and own property in an organized county receive more benefit from the taxes levied for general purposes than do the owners of property located in a reservation. The act of 1899 makes certain personal property in the reservations bear its proportion of the burdens of taxation for territorial and court purposes, from which such property derives some benefit. The owners of such personal property can derive very little, if any, benefit from the taxes raised for other purposes than those just mentioned. There is no township government existing there; no provision for the organization of school and road districts or for the establishment of other municipal governments, and hence it may be seen that, even assuming the power of the legislature to tax for all such purposes at the same rate as in an organized county, and to provide for the collection and payment of such taxes into the county treasury for disbursement for county purposes, yet still the injustice of such a rate of taxation would naturally appeal to the legislature and result in

some legislation of the kind passed in 1899. The territorial legislature has evidently recognized that fact and enacted that statute in consequence.

All this goes to show the legislature never intended to create a single taxing district of an organized county and a reservation composed of such different materials. As further evidence of the substantial difference between the two places, attention is called to the fact that the general laws providing for taxation in an organized county do not authorize such taxation in a reservation, even after it has been attached to a county for judicial purposes. There must be special legislative authority for it. *Wagoner* v. *Evans*, 170 U. S. 588, 592.

Whether the legislature by the act of 1897, providing the method of thereafter making assessments in townships by means of one assessor for each county, did thereby repeal the provision in the act of 1895, in relation to a special assessor for the Indian reservations, we do not determine, because even if such were the case and the assessor for the county were the one to make the assessment in the reservations also, the mere fact of the change of the officer who was to make the assessment did not on that account make a reservation part of the same taxing district as the county to which it was attached for judicial purposes, within the meaning of the rule requiring uniformity of taxation within the same taxing district, assuming such rule to apply to the Territory named.

The foundation of the rule which may be said generally to obtain, that there shall be uniformity in taxation of the same kind of property in the same taxing district, rests on the assumption that in such district the circumstances regarding the property to be taxed are ordinarily the same in substance, although there may, and necessarily must be, some differences as to the extent to which the different owners of property may be benefited by the taxes collected thereon, and it is to be assumed that an alteration as to rate would work an unjust and illegal discrimination in taxing property situated alike. When the difference is deep and radical between the two domains in which the same kind of property may be situated, the law which makes them one district for taxation, so that all the property

of the same kind in the same district must be taxed alike, and no reasonable distinction be permitted, must itself be so plain and urgent that no other intention can be suggested. No such case is now before us.

It is true the taxation in the reservation under the act of 1895 was for all purposes, and this court held that the act was not for that reason an illegal exercise of legislative power. It was recognized that there were differences in the amount of benefits derived from such taxation by the organized county as compared with the reservation, but it was not thought that, for that reason, the law was invalid. *Thomas* v. *Gay*, 169 U. S. 264. It was a matter of legislative discretion with which the courts had in general no concern.

It has not, however, been held that the legislature could not recognize the difference in circumstances and provide for a different rate of taxation for property in the reservation from that levied on property in the organized county to which the reservation was attached for judicial purposes. The power to make this distinction does not depend upon the existence of a separate officer to assess or to collect the tax.

If it required special legislative authority to tax at all, how can it reasonably be maintained by the taxing officer that the act which provides for the taxation, although at a reduced rate, is illegal? And if an act were once passed which authorized the same rate of taxation as in the organized county, could not the legislature repeal it? And if it could repeal, why could it not modify it by reducing the rate of taxation, although not totally exempting property from all taxation? If the legislature had repealed the act of 1895, and had passed no other, there plainly would be in that case no law for taxing the property in the reservation. If subsequently it passed an act for the taxation of such property at a reduced rate from that existing in the organized county, it could not be said there was any exemption from taxation, but on the contrary it would be the case of an act providing for taxation.

The only answer made by the appellants is the assumed fact that all property of the same kind in the same taxing district of this Territory must, in all circumstances, be taxed at the

same rate or must be wholly exempted, and that no discrimination can, in any event or under any circumstances, be permitted; otherwise there is a discrimination which is illegal. But if it be not in the same taxing district the reasoning fails, even if otherwise good.

The recognition by the legislature of the difference in the situation between Noble County proper and the Indian reservation attached to it for judicial purposes, and the taxation of the property in the latter at a different rate from that in the county, may be upheld upon the same principle as in the case of general city taxation, where the whole of the city is first assessed equally as a taxing district and then the more compact portions thereof are assessed at a greater rate and required to pay a greater proportionate share of the expense of the city government, because of the fact of the greater proportionate protection and benefit afforded by the police and fire departments and other like matters, to the portions of the city thus subjected to greater taxation.

Cooley, in his work on Taxation, p. 118, affirms the validity of such legislation, and refers in a note (3) to cases which establish it, and he dissents from the view taken by the Wisconsin court in *Knowlton* v. *Supervisors &c.*, 9 Wisconsin, 410, 421. Where the difference between the different portions of territory is plain and palpable the right of the legislature to recognize that difference and to provide for a difference in taxation cannot be denied without imposing, as said by Judge Cooley, restraints upon the constitutional power of the legislature, which cannot in reason be justified. Whether there is such a difference would generally be for the legislature to determine, although we would not say that the courts could not, in any possible state of facts, review that determination. In the case before us the legislative act providing for this difference in taxation amounts, in itself, to a provision for a different taxing district within the principles just stated, and certainly no one would say that it was not a most reasonable and just recognition of a plain difference in circumstances, which ought to lead to a difference in the proportion of taxation between the two places.

Whether the proper officer made the assessment or not is im-

material in this case. The defendants in error have not only not appealed from the decree of the Supreme Court, but they have paid the taxes assessed for the purposes mentioned in the act of 1899, and do not seek to recover them back in this case, and the question is of no consequence to them.

In the view we take of the case we are unable to see that any provision of the act of Congress of 1890, organizing the Territory, or the other act of 1886, in regard to Territories then or thereafter to be organized, has been violated by the territorial act of 1899, and the judgment of the Supreme Court of Oklahoma is, therefore

Affirmed.

FINNEY *v.* GUY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 180. Argued February 27, March 2, 1903.—Decided April 6, 1903.

Where a case turns upon the construction by a state court of a statute of another State, and not upon the validity of such statute, a decision on that question is not necessarily of a Federal character. It depends upon the particular facts of each case and the manner in which they are presented, how far such questions can be regarded as coming under the full faith and credit clause of the Constitution.

As decided in *Hale* v. *Allinson*, 188 U. S. 56, a receiver of an insolvent corporation appointed by the courts of Minnesota under the statutes of that State then existing cannot maintain an action outside of that State to enforce the statutory double liability of the stockholders; in refusing to allow such a receiver to maintain such an action, the courts of Wisconsin did not fail to give full faith and credit to the laws and judgments of Minnesota, under the Federal Constitution.

Where the law of a foreign jurisdiction has been proved as a fact, the evidence of a witness, stating such law and decisions as to its meaning and effect, does not preclude the court from itself consulting and construing such statute and decisions, and deducing its own opinion in regard thereto, *Eastern Building & Loan Assn.* v. *Williamson*, *ante*, p. 122; nor is the right and duty of the courts to themselves construe statutes and decisions of a foreign jurisdiction altered because such law and decisions are set forth in a pleading which is demurred to instead of being proved as facts on a trial.

Whether, apart from Federal questions, the courts of one State should permit an action of this nature to be maintained on the principle of comity, is a question exclusively for the state court to decide.

THIS action was commenced in a proper court of the State of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation of Minnesota and doing business in that State. The defendant demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the Supreme Court of the State, 106 Wisconsin, 256, and the case has been brought here by plaintiff to review the judgment of reversal.

The facts alleged in the complaint are in substance these: That during all the times therein mentioned the American Savings and Loan Association, one of the plaintiffs herein, was a corporation organized under the laws of the State of Minnesota, and on June 18, 1896, William D. Hale, another plaintiff in this action, was appointed receiver thereof; that the Farmers' and Merchants' State Bank was, on June 6, 1888, a banking organization, by virtue of the laws of the State of Minnesota, and doing business as such; that the bank became insolvent in June, 1893, and the entire net proceeds of the bank's assets amounted to the sum of $12,539.95, all of which had been paid over to the State of Minnesota on account of the indebtedness of the bank to the State of over $28,000, which was a preferred claim under the laws of that State; that its other debts amounted to the sum of more than one hundred thousand dollars, and it had no property to satisfy the same; that the defendant, Mary A. Guy, a resident of the State of Wisconsin, was the owner of three shares of the capital stock of the bank in her own right, and that she owned sixteen shares of the stock of the bank as executrix of the will of her husband and as legatee thereunder.

It was then averred that suit had been commenced in Minnesota in 1894 to enforce the liability of the stockholders of the bank under and by virtue of the laws and constitution of the State of Minnesota; that such suit had been commenced by the American Savings and Loan Association, which was a creditor of the bank, in behalf of itself and all other creditors who should come in and make themselves parties to the suit and

prove their claims therein, and against all the stockholders of the bank, process was, however, not served on this defendant, but only on those residing within the State; that such proceedings were had in the suit that judgment was duly rendered therein on April 28, 1897, in favor of the complainant, the American Savings and Loan Association, for the amount of the indebtedness of the bank to it, and also in favor of the other creditors of the bank, who had duly intervened, for the various amounts due them from the bank. It was also adjudged that the amount of the debts of said bank aggregated the sum of $10,6471.71.

It was then further averred in the complaint that Finney (one of the plaintiffs herein) was appointed receiver in the Minnesota suit for the purpose of collecting and enforcing the respective liabilities of the defendant stockholders, and that an order had been made authorizing and empowering him to proceed against those of the defendant shareholders residing in other jurisdictions in such other jurisdictions, for the purpose of enforcing the liabilities of such shareholders, and with full power and authority to distribute the proceeds of such action among the parties entitled thereto, after final payment in full, out of the proceeds, of the costs and expenses incurred, etc. It was then averred that pursuant to the instructions of the Minnesota court, Finney, as receiver therein, commenced this action against Mary A. Guy, and joined with him as plaintiffs all the creditors of the bank who had proved their claims in the Minnesota suit, and it was also averred that Mrs. Guy was liable to the creditors of the bank in the sum of $3800, double the amount of the par value of the three shares owned by her individually and of the sixteen shares formerly owned by her husband, and that she was the only stockholder who was a resident of Wisconsin, and therefore the only defendant in the case, and that the full amount of her double liability, if recovered, would be wholly insufficient to pay the indebtedness of the bank after applying everything that could be collected from all the other stockholders, some of whom were insolvent, some had been compromised with and from others nothing could be collected.

The complaint then set forth several sections of the General Statutes of the State of Minnesota of 1878, among them being sections 5905, 5906, 5907 and 5911, and it was averred that this action could be maintained by reason of such sections. They are the same as are set forth in *Hale* v. *Allinson*, 188 U. S. 56. It was then averred that decisions in the courts of the State of Minnesota had been rendered relating to the liability of stockholders under those statutes, in corporations organized under the laws of that State, as to the proper method of enforcing such liability. The complaint then referred to some twenty different decisions in the state courts of Minnesota by titles and gave a reference to the volumes in which they were reported, and it then stated what the law of Minnesota was under those decisions and statutes, as to the liability of stockholders, and the manner in which that liability could be enforced and the effect of a judgment recovered in a state court by a creditor in his own behalf and in behalf of all others similarly situated, and it averred that a judgment such as was obtained in the Minnesota suit was conclusive upon stockholders, even though they were not parties thereto, as to all questions of indebtedness of the bank and who were its creditors, and that defendant, though not served with process in that suit, was concluded by the judgment as to her liability as shareholder, except as therein stated. It also averred that the Minnesota decisions held that after such a judgment had been obtained under those statutes a suit could be maintained in the courts of another jurisdiction, similar to the one before us, and the complaint ended with a prayer for judgment that the defendant should pay the plaintiff the sum of $3800, with interest thereon since April 28, 1897, and that A. C. Finney, one of the plaintiffs, be appointed receiver herein, to collect the amount and distribute the same pro rata among the other plaintiffs.

Mr. Fred W. Reed for plaintiffs in error. *Mr. F. H. White* was on the brief.

Mr. Robert M. Bashford for defendant in error.

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

The demurrer raises the question whether the complaint states facts sufficient to constitute a cause of action. The plaintiffs contend that their cause of action is based upon the decisions and judgments of the courts of the State of Minnesota, and upon the statutes of that State, and that the Wisconsin Supreme Court in sustaining the demurrer has thereby failed to give that full faith and credit to the laws and judgments of the State of Minnesota and its courts which they receive in that State and which they are entitled to under the Constitution and laws of the United States, and that by reason thereof a Federal right has been denied them.

They urged that, under the judgment of the *American Savings & Loan Association* v. *Farmers' & Merchants' State Bank*, which was recovered in the Minnesota court, and is referred to in the foregoing statement of facts, the defendant is concluded as to her defence to the same extent she would have been had she appeared and contested her liability in the Minnesota courts, and that as a consequence the Wisconsin courts are bound to give the same effect to that judgment in their courts that it has in the courts of Minnesota; that if such effect had been awarded that judgment, then this action could have been maintained; and the Wisconsin court in sustaining the demurrer denied such effect to the judgment, which was a violation of a right founded upon the Federal Constitution.

It is stated by the Supreme Court of Wisconsin that that State for many years has had a statute for the enforcement of the liability of stockholders in corporations similar to that which exists in Minnesota, and that it had been frequently decided under such statute that an action of the nature of the one at bar could not be maintained in her courts, and also that it was against the public policy of Wisconsin to permit it; that the remedy under the Wisconsin statute was exclusive, and consisted in a suit in equity at the home of the corporation, in the nature of a partnership accounting, the parties to which would be all the creditors or a creditor in his own behalf and in behalf of all

others similarly situated who would come in and make themselves parties, and the stockholders who could be served with process in the State.

Whether a cause of action is stated in a pleading, is generally to be decided with reference to the law of the State where the action is pending. If the state court hold that no cause of action is set forth in the pleading and that it is against the public policy of the State to permit an action for such a purpose, we should generally hold that there was no Federal question involved in such determination. The plaintiffs, however, urge that there is here an exception to that rule founded upon the considerations just stated, and that if under the Minnesota law this action could be maintained, the courts of Wisconsin are bound to entertain jurisdiction to the same extent. It is not, however, the case that every decision regarding the proper construction of the statute of another State, involves a Federal question. Where the case turns upon the construction and not the validity of the statute, a decision of that question is not necessarily of a Federal character. *Johnson* v. *New York Life Insurance Company*, 187 U. S. 491, 496. Without precisely determining just how far questions of this kind can in all cases be regarded as coming under the rule giving full faith and credit to the public acts, records and judicial proceedings of another State, depending, as such questions must, upon the particular facts of each case and the manner in which they are presented, we may, nevertheless, examine the contentions of the plaintiffs in error to see how far they are justified in the law.

After quite a full examination of the Minnesota decisions on the question, we have just decided in *Hale* v. *Allinson*, 188 U. S. 56, that a receiver appointed in Minnesota, under these same statutes, could not maintain an action outside of that State to enforce the liability of a stockholder, and it was said that the courts of Minnesota had held the same thing for many years. An examination of the decisions of the Minnesota courts shows that they had held that the remedy provided by the statutes of the State for the enforcement of stockholders' liability was a suit in equity in that State by a creditor in his own behalf and that of all other creditors, against all the stockholders of the

corporation, or so many of them as could be served with process, and that it was exclusive, and no other remedy could be availed of even within the jurisdiction of the courts of Minnesota. That being the law of Minnesota, it would, of course, prevent an action outside the State, by a receiver as well as by any other plaintiff, to enforce the stockholders' liability. Hence, in the *Hale-Allinson* case, we held the receiver could not maintain such an action in a foreign jurisdiction and in a Federal court.

The case of *Allen* v. *Walsh*, 25 Minnesota, 543, has been cited as sustaining this rule. Many other cases have been cited as holding the same rule, an exclusive remedy under the statute and to be pursued only in the courts of the State. *Allen* v. *Walsh* does hold (and it has been followed by many others to the same effect) that the only remedy is that created by the statute, and that remedy is an action in equity in the home courts wherein all the creditors and all the stockholders are parties, or as many of the latter as can be served, and in that action all the rights of the different parties can be adjusted. The remedy being exclusive, the statute must be followed, and the result is that no other action to enforce the liability can be availed of in another State. This would call for an affirmance of the judgment but for the claim now urged by counsel for plaintiffs, that the case of *Allen* v. *Walsh* has been overruled by subsequent cases in Minnesota, and that the law is correctly set forth in the complaint. He calls attention to the fact that this case has not gone to trial upon an issue of any question of fact, but the questions to be determined have arisen on demurrer to the complaint; that the complaint avers as a fact that by the law of Minnesota such an action as this can be maintained in the courts of a foreign jurisdiction after a judgment has been recovered in an action in the state court, such as is referred to in the complaint, and that the defendant by demurring admits that the law is as stated in the complaint, and therefore the court is bound to give effect to the law of Minnesota such as is set forth in that pleading. This is too broad a claim to be maintained.

If the case had been on trial upon issues of fact, among them

being one as to what the law of Minnesota was, and the statutes as well as the decisions above mentioned had been proved and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those statutes and decisions, his testimony would not, even though uncontradicted, conclude the court upon that issue. Although the law of a foreign jurisdiction may be proved as a fact, yet the evidence of a witness stating what the law of the foreign jurisdiction is, founded upon the terms of a statute, and the decisions of the courts thereon as to its meaning and effect, is really a matter of opinion, although proved as a fact, and courts are not concluded thereby from themselves consulting and construing the statutes and decisions which have been themselves proved, or from deducing a result from their own examination of them that may differ from that of a witness upon the same matter. In other words, statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions.

It was stated by Mr. Justice Brewer, speaking for the court in *Eastern Building & Loan Association* v. *Williamson*, 189 U. S. 122, a case just decided and where the same question in substance was before us, as follows:

"But it is contended that the construction of the New York statutes as applicable to this contract was shown by the decisions of the courts of that State and the opinion of one learned in its laws; that there was no contradictory testimony, and, therefore, it was the duty of the South Carolina courts to find as a fact that such was the true construction."

This was the contention of the defendant, and then, after referring to the construction of the contract as contended for by the plaintiff, the Justice continued:

"It is said that the promise made in the certificate is expressly based upon 'full compliance with the terms, conditions and by-laws printed on the front and back of this certificate;'

that one of the conditions expressed on the face of the certificate is: 'The shareholder agrees to pay, or cause to be paid, a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn;' that it contained this further stipulation: 'Payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached,' and that these matters thus referred to had the effect of changing the absolute promise to a conditional one. All these were received in evidence, and when so received it became a matter of judicial construction to determine whether they had such effect, and that was a question which, nothing else being shown, was for the consideration of the courts in which the litigation was pending. In like manner, after the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other States are facts to be proved, yet when proved their construction and meaning are for the consideration and judgment of the courts in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel, for, as he states, his opinion is based on the statutes, the articles of incorporation and the decisions admitted in evidence, together with similar decisions of other States under like statutes, articles of incorporation and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. *Laing* v. *Rigney*, 160 U. S. 531. The duty of the court to construe and decide remains the same."

This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign State and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial.

In this case the statutes together with references to the decisions of the state courts are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them such as he thinks to be correct, but

the duty still remains with the courts to themselves determine from those statutes and decisions what is in truth the law of the foreign jurisdiction. The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as evidence of the law. The demurrer does not admit as a fact, that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them. Notwithstanding the averments in the complaint we are brought to an examination of the statutes and decisions referred to, in order to ourselves determine what the law of Minnesota is.

We are unable to see that the case of *Allen* v. *Walsh*, 25 Minnesota, 543, *supra*, has been overruled upon the material point in this case, by *Hanson* v. *Davison*, 73 Minnesota, 454, so as to call for a different decision than would be made under *Allen* v. *Walsh*, and the many similar cases. We have already referred to the *Hanson* case in *Hale* v. *Allinson*, 188 U. S. 56, *supra*, and do not regard it as necessary to continue the discussion here. It is enough to say that it is no authority for the contention that the former cases are overruled further than the issue presented in the case called for. The right to bring into the original case in equity in the state court after judgment had been obtained therein, a stockholder who was not served with process in that suit, but who appeared after judgment and after his property had been attached, was asserted in and decided by the state court, but it did not decide that the remedy in the state court as provided in the statute did not continue to be exclusive, nor did the state court assume to decide that any further action could be maintained in the courts of a foreign jurisdiction to enforce the stockholders' liability. No such issue was involved in the *Hanson* case, and the opinion regarding such question is only the opinion of the very able judge who gave it, upon an abstract proposition, as distinguished from an adjudication upon a point actually in issue, and in that case, in

speaking to that point, the judge only said he saw nothing in the statute to prevent such an action in the courts of another State, provided such courts would permit it. We think the law of Minnesota still remains upon this particular matter as stated in the former cases, which have not been overruled by *Hanson* v. *Davison*. This, in effect, has been held in the *Hale-Allinson* case, which we have just decided.

Nor is this case controlled or covered by *Whitman* v. *Oxford National Bank*, 176 U. S. 559, and *Hancock National Bank* v. *Farnum*, 176 U. S. 640. In the former case the special provisions of the Kansas statutes were referred to. It was stated to be the law in Kansas that it only required a judgment against the corporation and an unsatisfied execution returned, after which any creditor could sue any shareholder wherever he could be found. There was no suit in equity in the nature of a partnership accounting necessary. The liability of the shareholder, although statutory in origin, was held contractual in its nature, and under the statute the cause of action was transitory and could be maintained in any tribunal having jurisdiction where process could be served upon the individual shareholder, and in such an action the latter could set off debts due him from the company. The Kansas cases, expressing these views, were referred to in the opinion.

In the second case it was again held that under the statute and the decisions of the Kansas courts, after a judgment had been obtained against the corporation and an execution returned unsatisfied, the individual creditor could maintain an action against a single stockholder in any court of competent jurisdiction. Having the right to maintain such action, it was held that when it was commenced in another State and in a proper court thereof, the judgment which was obtained in Kansas must have the same faith and credit given it in the courts of another State that was given it in Kansas. Neither case is applicable to the one before us. The statutes are radically different, and no one creditor can maintain the action under the Minnesota statute, and if all unite, they must sue in the courts of that State.

Whether, aside from the Federal considerations just discussed,

the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the States, is a question exclusively for the courts of that State to decide. The right to maintain it under the facts of this case is not founded upon any provision of a Federal nature, and we cannot supervise the action of the Wisconsin court in this particular.

The judgment of the Supreme Court of Wisconsin must be

Affirmed.

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

MR. JUSTICE BREWER dissented.

THAYER *v.* SPRATT.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 207. Argued March 12, 1903.—Decided April 6, 1903.

On proceedings to cancel an entry which has been transferred, where the Land Department has notice thereof, and the records show the name and address of the transferee, the transferee has a right to notice.

Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence.

It appearing from the facts that at the time of making their entries entrymen were entitled to purchase lands under the act of Congress of June 3, 1878, for the sale of timber lands in Washington Territory and elsewhere, and that in the purchase of the land they fully complied with the laws of the United States and the rules and regulations of the Land Department; that the applications were allowed and certificates duly issued as applied for, and the lands included in the entries were at all times chiefly valuable for timber thereon and at that time unfit for cultivation; and that thereafter based upon a misconstruction of the act of 1878 the land office cancelled the entries on the ground that as the land could be cultivated after the removal of the timber it was not subject to entry as timber land:

Held, that the original entries were valid and that the conveyances of the original entrymen passed a good title to their grantee for which he was entitled to a patent from the United States.

THE plaintiffs in error in December, 1898, brought this action in the state court against the defendant for the purpose of quieting their title to certain land described as section 32 in township 9, etc., situated in Cowlitz County, State of Washington. They obtained judgment in their favor for the northwest and southwest quarters of the section, but the court gave judgment in favor of the defendant for the northeast and the southeast quarters of the same section, and directed that the patents for the two quarters of the section which had been issued on June 25, 1890, to plaintiffs' grantors should be held by the plaintiffs in trust for the defendant, and that the plaintiffs should execute a proper deed therefor, and in default of such deed of conveyance the decree of the court was to stand and be treated in the place of such deed. The plaintiffs appealed from that portion of the judgment just described to the Supreme Court of the State, where it was affirmed, 25 Washington, 62, and they have brought the case here for review.

The northeast and the southeast quarters of the section were entered in the proper land office in Washington under the act of Congress approved June 3, 1878, and entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory." 20 Stat. 89. These entries were made on May 26, 1883, and the entrymen, after payment for the land by them to the land office and the receipt of a certificate of such payment, and about six months thereafter, assigned and transferred the certificates to the defendant for a valuable consideration paid to them by him. After such transfers had been made and a record of the deeds of conveyance had also been made in the records of Cowlitz County, which was the proper office, the Land Department informed the register and receiver of the land office at Vancouver, Washington, that action had been suspended upon the entries based upon the report of the special agent regarding the lands, and the department directed the register and receiver to give notice to the original entrymen of a time and place when and where they

might be heard, and in default that their entry would be cancelled. The department also stated that it appeared from the report of its special agent that the lands had been transferred by warranty deed of March 13, 1884, to the defendant, and it therefore directed that notice should be given him as the transferee, but for some reason this direction was overlooked and no notice was ever given defendant of the pendency of any proceedings towards the cancellation of the certificates or either of them which had been transferred to him.

At the time he purchased the certificates the defendant resided in Alpena, Michigan, and resided there for thirty years, and the deeds to defendant, which were on record, showed his residence to be in that place.

The notices by mail to the entrymen were not received, the letters to them being returned as "uncalled for," and so it happened that there was no hearing before the Land Department upon the return of the order, and the entry was cancelled in the absence of both of the entrymen and the defendant, the transferee.

The action of the department was taken upon the report of one of its inspectors, which was founded, as stated in the report of such inspector, upon the fact that the land was not of the character provided for in the act, for the reason that, although covered by a heavy growth of valuable timber and chiefly valuable as such at that time, yet as it would be fit for cultivation when the timber should be removed, it was on that ground held that the land was not subject to entry under the timber act of 1878, *supra*. This was the sole and only reason upon which the Land Department rested its action in cancelling the entries and certificates.

After their cancellation, certain homestead entries were made upon these two quarter sections by Benjamin L. Hennis for the northeast quarter, and by Ellis Walker for the southeast quarter, patents were issued to them, and the plaintiffs deraign title from those patentees.

Upon the trial evidence was given by the defendant as to the character of his ownership; that he purchased the different quarter sections in good faith from each of the parties who

had entered them, and without any agreement in reference to the purchase before final proof, etc., and that he had never heard of the entrymen before he made the purchase from them through his agent, and paid them the sum of $800 for each quarter section, (double the price paid for the land by the entrymen to the government,) and that the total cost of the land, including his expenses paid to his agent and to the parties who made the locations, etc., amounted, as the defendant testified, to about $4400.

The defendant on the trial also gave evidence tending to show that the land in question had the finest quality of timber on it, and that in its then existing condition the land was chiefly valuable for timber and would probably run 200,000 feet to the acre. The land would have to be cleared and then it might be cultivated, but it would all have to be cleared first.

It was stipulated between the parties, on the trial, that certain papers named and on file in the office of the Commissioner of the General Land Office, and certain exhibits from the land office in Vancouver, in the State of Washington, relating to the proceedings in making the entry for the lands in question by the defendant's grantors, might be regarded as in evidence in the case and be considered by the court, and the copies of such papers then presented to the court were admitted to be "correct, full, true and complete transcripts of all proceedings of the land office at Vancouver, Washington, and of the General Land Office, Department of the Interior, Washington, D. C., touching . . . the timber land entry of Frank Smith, for the northeast quarter of section 32 (etc.), and also the timber land entry for the southeast quarter of section 32," etc. These papers showed that the entrymen for the northeast and the southeast quarters were entitled to enter the lands under the timber act, and that all the necessary facts required by the act and the Land Department officials had been proved by them to entitle them to enter the specific lands.

The finding of the court shows there has never been any dispute as to the actual condition of the land, but the entries were vacated and the certificates cancelled because the Land Department held the land was not of the kind to be entered un-

der the timber act of 1878, for the reason that, after the timber should be cleared, the land would be good agricultural land.

Mr. Joseph Simon for plaintiffs in error.

Mr. George C. Stout for defendant in error. *Mr. John H. Mitchell* and *Mr. T. H. Ward* were on the brief.

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

The decision of the Land Department as to the character of the land in question resulted from an erroneous construction of the timber act of June 3, 1878. There was no dispute as to the actual condition of the land, but the department held that land so situated could not be entered under the timber act. In this construction the department made a legal error. It has been held by this court that the act included lands covered with timber, but which might be made fit for cultivation by removing the timber and working the land. *United States* v. *Budd*, 144 U. S. 154. Mr. Justice Brewer, in delivering the opinion of the court in the above case, states as follows:

"Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for

cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation."

The lands in this case are within that description. The evidence shows that the timber was excellent, as good as any in that section of the country. It was as good as any ever examined by the witness, who had had large experience. In fact he said there was none better in that part of the country, and the quantity of the timber was large to the acre, but the land was not especially valuable for cultivation until it had been cleared.

Even though the decision of the Land Department was erroneous, yet having been made, and the entries and certificates cancelled, although without notice to defendant, they could not thereafter be used even as *prima facie* evidence of the validity of the original entries. It was perfectly easy to have given defendant notice of the proposed cancellation. He resided in Alpena, Michigan, and the deeds showed that fact, and the record shows the department was aware of their existence through the report of its special inspector. There is no hardship or inconvenience, therefore, in holding that, in a case, at least, where the residence is known, the transferee has the right to notice. If not known, a publication of notice ought at least to be made. It seems this is the practice of the Land Department.

It has been held in this court, in *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, and *Hawley* v. *Diller*, 178 U. S. 476, 488, that a cancellation of a certificate of entry was not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of the entry, but that it left the transferee without the right to use the entry certificate as *prima facie* evidence of the validity of the entry or of his subsequent claim. The transferee is, however, left free to prove the validity of the entry by any means other than the certificate. Although the assignment or conveyance of the certificates did not transfer the legal title to the

lands described therein, yet the transferee or grantee thereby became possessed of an equitable interest in the lands which could not be taken from him without some notice. The character of the certificates as a mere means of evidence could be and was destroyed, but the transferee was nevertheless not thereby deprived of his right to show the validity of the former entry.

In this case we think he has done so. He proved by his own evidence that he was a *bona fide* purchaser of the property for value paid to the entrymen, and that he had no agreement or understanding of any kind with them prior to the time that he purchased the land from them.

We do not refer to the *bona fide* character of the purchase by defendant from the entrymen for the purpose of thereby showing the defendant to be entitled to the benefit of that character under section 2 of the timber act of 1878. The reason that he is not so entitled is that by the assignment of the certificates he did not become clothed with the strict legal title to the land, but simply with an equity, and the act does not cover such a case. *Hawley* v. *Diller*, 178 U. S. 476, 487. We refer to the *bona fide* character of the purchase by defendant, for the purpose only of showing it was without any prior agreement or understanding with the entrymen, and was not in violation of the provisions of the timber act.

The stipulation between counsel that the papers on file in the Land Department might be regarded as in evidence and considered by the court, permitted the court to regard those papers as properly introduced in evidence and competent to be considered by it in the further consideration of the case. Those papers show a compliance on the part of the entrymen with all the provisions of the timber act and a valid entry under it in regard to the lands in question. As the entries had not been cancelled for any fraud in fact, but only upon an erroneous interpretation of the law by the department, the evidence of such error being apparent on the trial, the defendant did all he was required to do in order to show the entries valid, and if the plaintiffs wished to show any fraud in fact, to overcome the case made by the defendant, they were called upon to do so,

otherwise, the original proof being sufficient to warrant the issuing of the certificates, that proof would be regarded as sufficient on the trial of this suit.

There is not a word of any proof showing any fraudulent act on the part of the entrymen or of their transferee, the defendant herein, and, on the contrary, there is proof of an absence of any fraud and the *bona fide* purpose on the part of the entrymen to properly avail themselves of the act of 1878.

But however this may be, we are precluded by the finding of facts in the state court from looking at the evidence upon which such findings may rest. Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence. *Egan* v. *Hart*, 165 U. S. 188; *Gardner* v. *Bonestell*, 180 U. S. 362, 370; *Bement* v. *National Harrow Company*, 186 U. S. 70, 83; *Jenkins* v. *Neff*, 186 U. S. 230, 235.

By the findings in this case it appears that the entrymen at the time of making their entries were entitled to purchase the lands under the act of Congress of 1878, and that they duly made such application, duly verified by the oath of the applicants before the register of the land office, and that in the purchase of the land they fully complied with the laws of the United States and the rules and regulations of the Land Department, and that all the requirements of the timber and stone act in regard to making a legal and valid entry and purchase thereunder were fully complied with by the entrymen, and that thereafter the applications were allowed and certificates duly issued as applied for, and the lands included in the entries were at all times chiefly valuable for the timber thereon and at that time unfit for cultivation. It was also found that the action of the land office in cancelling the timber entries was based upon a misconstruction of the act of 1878, and that the department, by reason of such misconstruction, erroneously held that land covered with a heavy growth of valuable timber, if it could be successfully cultivated after the timber was removed, was not subject to entry as timber land under that act, although the timber on the land might be itself the chief element of the value

of the land, and the land could not be cultivated at all in its then condition.

Upon these findings it is apparent that the defendant showed the validity of the entries by his grantors, and that their conveyances to him passed a good equitable title to the lands in question for which he was entitled to a patent from the United States, and that as such patent was granted to appellants, the defendant was entitled to the relief given him by the judgment.

The judgment of the Supreme Court of the State of Washington is therefore

Affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* CARLIN.

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

No. 222. Argued March 20, 1903.—Decided April 6, 1903.

Where it is the special duty of the foreman of a gang repairing a bridge to see that the track is unobstructed when a train is about to cross, although it may be the duty of the men to keep their tools off the track, it is the foreman's duty to supervise them, and if, through his negligence, the track is not left unobstructed and one of the gang is injured, such negligence under the statutes of Texas in that regard is that of a vice-principal and not of a fellow-servant.

Where the facts in the case are that the workman was injured by being hit by a spike maul which had been left on the track and which was struck and thrown by the engine, the fact that the foreman himself, who is to some extent an interested witness, testifies that he had looked along the track and saw no obstruction, is not sufficient to take the question of his negligence away from the jury.

THE plaintiff in error brings this case here to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, 111 Fed. Rep. 777, affirming the judgment in the Circuit Court for the Northern District of Texas, entered

upon the verdict of a jury in favor of defendant in error on the trial of this action brought by him against the railway company to recover damages for personal injuries. On the trial it appeared that Carlin, the plaintiff below, was in the employment of the railway company in September, 1898, as a bridge carpenter. On that day he, with a number of others forming what is termed the bridge gang, of which George Welsh was foreman, was employed in making some repairs on a bridge near the Aledo water tank, not far from Weatherford, Texas. The bridge was over a creek, and was sixty to sixty-five feet long. The force got to work on the bridge about ten minutes after 8 o'clock in the morning under Welsh, the foreman. The surface of the bridge was plain; the ties were about eight inches apart, and there was nothing on top of them except the rails and the guard-rails, the rails being of ordinary size, and the guard-rails about ten inches from the rails and parallel with them. The guard-rails were eight inches wide and stood four inches above the ties, being let down over the ties about two inches, and were of wood. Some time after the men had been working on the bridge a freight train was seen approaching at the rate of from thirty to forty miles an hour. Within a very few minutes before the train was seen one of the workmen on the bridge had in his hand what is called a spike maul, used for the purpose of driving spikes. The maul was of iron with a handle about three feet long, the hammer being six, eight or perhaps ten inches in length, and the handle went into the middle of the head, which had a double face. Carver was the man who was using the maul a few minutes before the train came. The maul weighed about ten pounds. At the time Carver was using the maul, he had it out on the bridge with him. A witness for the defendant stated that he had been using the maul on the south side of the bridge for putting up the staging or scaffolding, and when he finished he handed it to some one on the top of the bridge, who handed it to Carver on the north side of the bridge, to spike on a brace. It was used but ten or fifteen minutes before the passage of the train. Carver stated he did not remember where he had put the maul when he had finished using it, but he said

he was always careful to put it out of the way so there would be no accident. He had nailed the last piece of timber on the bridge and got down on the ground and was about ten feet from the plaintiff, and had not been there over three or four minutes when the train passed. The witness saw no other spike maul or hammer there that morning than the one which he used, which was the regular spike maul described by the witness, and which he found after the train passed.

The train coming from the west was seen some little distance before it reached the bridge and the people on the bridge got out of its way, and as the train passed over the bridge towards the east the plaintiff, who was standing a short distance from the east end of the bridge, was struck by the spike maul on the leg and was so badly injured that amputation of the leg above the knee was necessary and was performed. The train on its passage across the bridge struck the spike maul and threw it in the direction that the train was going with such force toward the plaintiff as to effect the injury mentioned, although the train was not seen to strike the maul nor was the maul seen to strike the plaintiff. All that is known is that the train passed the bridge, and as it passed the maul struck the plaintiff, and the handle was broken close up to the head.

It was customary when workmen were engaged in repairing a bridge for the foreman to see that the bridge was cleared and unobstructed whenever a train was about to pass. It was the duty of the workmen to put their tools out of the way when a train was coming, but it was specially the duty of the foreman to see that the bridge was clear, and "that was his business and that was what he was for." Welsh, the foreman of the bridge gang, testified that he had no recollection of seeing any one using the spike maul that morning; that he had been around all parts of the bridge, both on top and underneath it, before the train had passed. He says when he saw the train coming he looked up and down the track to see if everything was clear, and did not see anything, and stepped one side when the train was three or four hundred yards from him. He said he had plenty of time if there had been anything on the bridge to have taken it off; that when a man was using tools and got

through with them he was supposed to take care of them and put them out of the way; that the foreman was liable to be anywhere about the bridge at any time, and could not be depended upon to be at any particular place, but if there were men working on top of the bridge it would be their duty to be on the lookout always, as they must expect a train at any time. He also said that he was foreman, and that as bridge foreman he had employed Carlin and had supervision over him, and had power to employ and discharge him as well as the other bridge men who were working there that morning.

The evidence was not disputed that, although it was the business of each workman to see to it that his tools were not in the way of an approaching train, yet that it was particularly the duty of the foreman to see that the bridge was cleared from all obstacles when a train came.

This is in substance the evidence submitted to the jury upon the question of the negligence of the defendant.

The judge charged that the burden of proof was upon the plaintiff to show that the defendant was negligent and that the plaintiff was injured thereby; that the defendant was bound to exercise ordinary care to furnish a reasonably safe place within which employés could perform their duties; that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company, and that the negligence of which the defendant was accused consisted in the failure on the part of the foreman of the bridge gang to use ordinary care to remove or to see and remove the spike maul before the arrival of the train at the bridge.

The court also charged that, if the jury believed from the evidence that the spike maul was left on the bridge by a fellow-servant of the plaintiff, and that, at the time the train approached, the foreman of the bridge gang was the only person upon the bridge, and that he could, by the exercise of ordinary care, have seen the spike maul and removed it from the track and from proximity thereto, and if they believed it was on the track or within proximity thereto, and if the jury believed that it was the duty of the foreman to use such care to see that the track was clear and no obstructions on it, or so near to it as to

be struck by a passing train, and if the jury believed that the foreman did not use that care, and that the spike maul was struck by the train and hurled against the plaintiff and caused the injuries, and if the jury believed it was the negligence of the foreman in failing to see and remove the spike maul, and if his negligence in that respect was the direct and proximate cause of the injuries sustained by the plaintiff, then the court charged that the plaintiff was entitled to recover, but that if the injury was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of the plaintiff, then the verdict should be for the defendant.

The court further charged that the defendant should not be held responsible for the consequences of an act of negligence which could not reasonably be foreseen, and that it was not actionable negligence to fail to do an act when it would not have been anticipated by a man of ordinary care and prudence that such failure to perform the act would result in injury to any one.

Various requests to charge were made by counsel for the defendant and refused by the court, not necessary to be here specifically mentioned.

The jury, as stated, found a verdict for the plaintiff.

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

Mr. F. E. Albright for defendant in error. *Mr. E. C. Orrick* and *Mr. J. E. Terrell, Jr.*, were on the brief.

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

Two grounds have been urged upon the court for reversing this judgment and granting a new trial. One was that the negligence of the railway company, if any, was that of a fellow-servant, for which it was not liable; and (2) that there

was no evidence of the negligence of the foreman, in failing to discover the maul or hammer upon the bridge, sufficient to warrant the jury in finding a verdict for the plaintiff.

The right to maintain this action is founded upon a statute of Texas, the material sections of which read as follows:

"ART. 4560*g*. All persons engaged in the service of any person, receiver, or corporation, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this State, who are entrusted by such person, receiver, or corporation with the authority of superintendence, control or command of other servants or employés of such person, receiver, or corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals of such person, receiver, or corporation, and are not fellow-servants with their co-employés.

"ART. 4560*h*. All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are follow-servants with each other. Employés who do not come within the provisions of this article shall not be considered fellow-servants." Sayles' Civil Statutes of Texas, 1897.

With reference to this statute, counsel for the defendant requested the court to charge the jury that—

"Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet, if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty that may be expected to be performed by any one of the men, irrespective of his grade or rank; that is to say, by the foreman and men alike as occasion and circumstances may require; then, in any such event, the act or duty of Welsh in this respect was one which existed between fellow-servants, and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

This charge was refused, and counsel for defendant excepted.

The court did charge that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company. This charge was duly excepted to by defendant's counsel.

Defendant contends that if the negligence which caused the accident was the failure of the foreman to see the maul or hammer upon the bridge and to remove it, it was not the failure to perform a duty peculiar to him, the foreman, and specially imposed upon him as such foreman within the meaning of article 4560*g*, because it was a duty resting equally upon all the members of the bridge gang. The testimony in regard to this question leaves no doubt as to the duty of the foreman, although it also appeared that when a man was using tools and got through with them he was supposed to put them out of the way where a train would not strike them, and it was his business to do so. The evidence showed in addition that it was the special business of the foreman to see that the track was unobstructed on the bridge when a train was about to cross, and that although the men were supposed to see that the track was clear, it was the foreman's business to supervise them and see that the men left a clear track as the train came on. This was his duty as foreman, and not as follow-workman, and the duty of care on the part of the workmen under him to keep the tools off the track when the train came on the bridge in no degree lessened the duty of the foreman to see that the men under him did as they ought, and that a free and unobstructed track was left for the train. In other words, it was the special duty of the foreman, as such, to see that the men performed their duty.

The negligent act of the foreman did not arise in the performance of the duty of a mere servant, although each servant was under an obligation to be careful, but it was the negligent act of the vice-principal in the performance of his duty as such. As it was the special duty of the foreman to see that the men performed their duty, his neglect so to do was the neglect of a duty which he owed not as fellow-servant but as vice-principal within the statute above cited.

Upon the second ground, we are of opinion that there was

evidence sufficient to go to the jury upon the question of the negligence of the foreman in failing to discover the maul upon the bridge immediately prior to the passage of the train. The foreman himself swears that he did look along the track just prior to the coming of the train, and that he did not see any obstruction on the track and did not see the spike maul in question. Whether he looked or not is under the evidence one of the material facts in the case. He says that he did, but we are of opinion that other facts proved in the case were of such a character as to make it proper to submit the question to the jury. The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness where his testimony relates to the question of the performance or non-performance of a duty which he owed on account of the position which he occupied. It was, therefore, a question for the jury as to what measure of credence should be given to his testimony. Of course, the mere absence of evidence that the foreman did his duty would not be equivalent to evidence, direct or circumstantial, that he did not, and it rested with the plaintiff to show negligence of the foreman for which the defendant would be liable.

But there are certain facts proved in this case which we think rendered it necessary to submit the question of negligence to the jury, notwithstanding the testimony of the foreman. We have here a bridge not more than sixty or sixty-five feet long —an open top bridge, the surface of which was plain. The ties for the rails were the usual distance apart, and there was nothing on top of them except the rails themselves. The guard-rails were ten inches from the track and parallel with it, and they stood up about four inches above the ties. There was, therefore, nothing to obstruct or prevent the view of the length of the bridge by any one at either end and nothing to prevent the discovery of the maul if the glance of the individual were anything more than casual or formal. The maul could not

have been hidden between the track and the guard-rails so as not to be above the track, for if the maul were lower than the track, the train could not have hit it, as it is perfectly clear that anything lower than the surface of the track could not be struck by the train. So it would seem quite obvious that if any one in the position of the foreman had looked, it would have been possible for him to have discovered this maul if it were there. Was it there? Workmen had been using the maul on the bridge during the morning and a few moments, not more than ten or fifteen minutes, prior to the crossing of the train. The maul was struck by it and hurled with great force, sufficient to break the handle, against the plaintiff, who was standing near the east end of the bridge. The man who was known to have used the maul a few minutes before the arrival of the train says himself that he has no recollection of what he did with it. Now, whether the maul were left exactly on the bridge, or just off the bridge, and so near the track as to be struck by the passing train, it is not necessary to determine, because if it had been left in a position just off the bridge, and yet so near the track as to be struck by the train, the failure of the foreman to see it and have it removed was the same as if it had been on the bridge. The maul being left so that it was struck by the train and hurled against the plaintiff, the failure of the foreman to see it might have been found by the jury to be a negligent failure, and it being his duty to see that the track was kept clear for the passage of trains, that failure was a neglect which was the proximate cause of the injury. To be sure, it was negligence on the part of the servant who left the tool there in the first place, but after such negligence had occurred the duty of the foreman arose, and he had plenty of time in which to perform it, to overlook the bridge where the track was and see that there was no obstruction for the passing train, and his failure to look, or looking, to discover the obstruction, thus became the immediate and proximate cause of the injury which followed.

There is no other cause assignable for this injury than the fact that the train did strike the maul, and that fact is proved from the fact that it was thrown in the direction in which the train was going. Counsel for the defendant admits that the evidence

shows that fact, but he avers that it does not appear that the maul was in such a position as to convict the foreman of negligence in not discovering it, and as to that fact counsel insists that the negligence of the foreman is disproved by the uncontradicted testimony.

The facts already stated rendered it necessary, in our judgment, to submit the question to the jury as to the negligence of the foreman, even although he testified that he looked and did not discover any obstacle on the bridge.

These two are the propositions particularly argued before us. We do not see in them any ground for disturbing the verdict of the jury.

We have looked at the other exceptions taken in the course of the trial and are of opinion that they do not show any error requiring a reversal of the judgment, and it is, therefore,

Affirmed.

THE CONEMAUGH.[1]

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

No. 97. Argued December 1, 2, 1902.—Decided March 9, 1903.

1. In 175 U. S. 187, and 178 U. S. 317, this court held that the collision between the Conemaugh and the New York in the Detroit River was the fault of both vessels and judgment was given in favor of the Conemaugh for one half of her damages less one half of the damages of the New York. In this proceeding *held*, that the New York against which judgments had been entered for damages to the cargo on the Conemaugh could not in this action recoup or set off any part of such damages against, or shift any part of such judgment upon, the owners of the Conemaugh, even though it should result in the New York paying more than fifty per cent of the total loss.
2. The mandate having provided for interest at the same rate that decrees bear in the courts of the State of Michigan, there was no error in view of the statutory provisions as to interest in Michigan, in computing the interest at seven per cent per annum.

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[1] Docket title—*Union Steamboat Company, claimant of the Propeller New York*, v. *Erie and Western Transportation Company.*

THE facts of this case are fully set out in previous decisions of this court, *The New York*, 175 U. S. 187; *Ex parte Union Steamboat Co.*, 178 U. S. 317.

The steamer Conemaugh, owned by respondents, and the propeller New York, owned by the petitioner, collided in the Detroit River, November 11, 1891. The Conemaugh for herself, and as bailee of her cargo, filed a libel against the New York for the sum of $70,000 damages in the District Court for the Eastern District of Michigan. Subsequently certain underwriters of the cargo of the Conemaugh filed an intervening petition in the cause. Subsequently the owners of the New York filed a cross libel against the Conemaugh for $3000 damages sustained by the New York in the collision. No answer was filed to this cross libel.

The District Court held the New York to have been solely in fault, and passed a decree against her. The Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court on the ground that the Conemaugh had been solely in fault, and adjudged that her owners pay the owners of the New York, petitioners here, the damages sustained by the New York. The case was then brought here by certiorari, and both vessels were pronounced to have been in fault. The decrees of the lower courts were reversed and the damages caused by the collision ordered to be divided. The following is the material part of the judgment and mandate:

"On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said United States Circuit Court of Appeals in the cause be and the same is hereby reversed; the claimant of the Conemaugh and the claimant of the New York each to pay one half of all costs in this cause.

"And that the said Erie and Western Transportation Company recover against the Union Steamboat Company $276.75 for one half of the costs herein expended, and have execution therefor.

"And it is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this court, with in-

terest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan."

Upon the return of the case to the District Court that court made its decree in favor of the several intervening underwriters upon the cargo for their respective claims, with interest at seven per cent from July 3, 1896. The court also decreed that the owners of the cargo and their underwriters, other than the intervenors, by reason of the collision, sustained damages in the sum of $19,627.67, "for which the said Erie and Western Transportation Company appears in this suit as trustee only." And it was adjudged and decreed "that said trustee recover from the said Union Steamboat Company and its surety, in trust, for the said owners of and underwriters on cargo, the aforesaid sum of $19,627.67, with interest thereon at the rate of seven per cent per annum, from July 3, 1896, until paid, and that it have execution therefor."

Judgment was also given in favor of the Conemaugh for one half of the damages of that steamer, less one half of the damages of the New York, with interest.

At the hearing in the District Court on the return of the mandate the petitioner "submitted a decree to the effect that both vessels were in fault for the collision, and that the damages resulting therefrom be equally divided between the Erie and Western Transportation Company, owner of the Conemaugh, and the Union Steamboat Company, owner of the New York; that such damages amounted in all to the sum of $74,319.49, of which certain intervening underwriters of the cargo were entitled to, and recovered from the steamboat company, $19,841.56; that the transportation company, as trustees for the underwriters and owners of the cargo of the Conemaugh, not intervening, suffered damages in the sum of $19,627.67; that, as owner of the propeller, it had suffered damages in the sum of $30,508.46, aggregating the sum of $50,136.13; that the transportation company recover of the petitioner one half of $50,136.13, less one half the sum of $19,841.56, decreed to be paid to the intervening petitioners, etc.

"The court, however, declined to enter this decree; refused to permit the petitioner to recoup any sum that it might pay

to the owners or underwriters of the cargo of the Conemaugh, from any sum that was due from the steamboat company for damages sustained by the Conemaugh, so that such company was compelled to pay of the total damages about seventy-six per cent instead of fifty per cent." 178 U. S. 317, 318.

The action of the District Court was affirmed by the Circuit Court of Appeals, 108 Fed. Rep. 102, and the case was then brought here.

Mr. C. E. Kremer for petitioner. *Mr. F. C. Harvey* and *Mr. W. O. Johnson* were on the brief.

Mr. Harvey D. Goulder for respondent. *Mr. S. H. Holding* and *Mr. F. S. Masten* were on the brief.

Mr. Wilhemus Mynderse for intervenors. *Mr. F. H. Canfield* was on the brief.

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

1. One main and several subsidiary propositions are asserted by petitioner. The main proposition is that in all cases of collision, if both vessels are in fault, the damages resulting are to be equally divided between the owners of the vessels.

The subsidiary propositions are that if one of the offending vessels pay more than half the damages to a third or innocent party she may recoup or set off such excess against any claim for damages which the other vessel may have without bringing in the other vessel as a co-defendant under admiralty rule 59, or filing other pleadings than an answer to the libel. In such case it is insisted that all the parties are before the court. And further, that it is not necessary upon an appeal to the Circuit Court of Appeals, or to this court, that the pleadings show a demand for recoupment—the hearing in both courts being a trial *de novo*.

The main proposition asserted may be conceded. It was the basis of our decision when the case was here on the first certio-

rari and determined the judgment rendered. 175 U. S. 187. And if under some circumstances the other propositions could be applied, (which is not necessary to decide,) they cannot be under the circumstances of this case. The petitioner made no claim for a division of damages upon the original trial of the case. It asserted its own innocence and the entire guilt of the Conemaugh, and submitted that issue for judgment. It sought to escape all liability, not to divide liability, and on the issues hence arising judgments were entered against it, not only for the Conemaugh, but for the cargo owners, some having intervened, others still being represented by the Conemaugh. Petitioner maintained the same attitude in the Circuit Court of Appeals and in this court. After the decision in this court it changed its attitude, and for justification says it had no earlier opportunity to do so. It urges that the decision of the District Court was completely against it; the decision of the Circuit Court completely for it; and that the judgment from which its right of recoupment arose was rendered by this court.

But the controversy as presented by the pleadings was not only between the Conemaugh and the New York, but between the latter and cargo, and this court did not disturb the judgment obtained by the cargo owners against the New York. Explaining our decision we said:

"The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court."

The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owners' judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The

New York, having been in fault, was responsible to the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate.

2. Our mandate directed that a decree be entered "with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan." The District Court and the Circuit Court of Appeals found the rate to be seven per cent. This is assigned as error.

The statute which provided for interest on judgments and decrees in Michigan at seven per cent was enacted in 1838, and has been carried forward with amendments into the various compilations of the statutes, and appears as section 4865, Compiled Laws of Michigan of 1897. It is as follows:

"Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of seven per centum per annum: *Provided*, That on a judgment rendered on any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding ten per centum."

This section, it is insisted by appellants, was repealed by a statute passed in 1891, which statute was entitled "An act to regulate the interest of money on account, interest on money, judgments, verdicts, etc.," and provided as follows:

"SEC. 1. The People of the State of Michigan enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent per annum: *Provided*, That this act shall not apply to existing contracts whether the same be either due, not due, or part due."

"SEC. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

Subsequently the rate was reduced to five per cent by a statute passed May 25, 1899, which reads as follows:

"SEC. 1. That section one of act number one hundred and fifty-six of the Public Acts of eighteen hundred and ninety-one, entitled 'An act to regulate the interest of money on account, interest on money, judgments, verdicts, etc., the same being compiler's section one thousand five hundred ninety-four of volume three of Howell's Annotated Statutes and section four thousand eight hundred fifty-six of the Compiled Laws of eighteen hundred ninety-seven, be and the same is hereby amended to read as follows:

"SECTION 1. The People of the State of Michigan enact: That the interest of money shall be at the rate of five dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding seven per cent per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be either due, not due or part due."

According to its title the act is one to regulate the interest of money on account and interest on money judgments. Section one, however, provides only "that the *interest of money* shall be at the rate of five dollars upon one hundred dollars for a year." It is urged, however, that section one must take meaning from the title of the act, and that by "interest of money" is meant "interest of money on account" and "interest on money judgments," and having that meaning it repeals section 4865, *supra*. But money on account and money judgments are distinguished in the title, and it is hard to suppose that the former was intended to include the latter in the body of the act. They are distinguished also in the prior statutes. "Interest of money" was provided for in section 3 of the act of 1838 in substantially the same language as in the acts of 1891 and 1899, and, it is certain, that it was not intended thereby to include interest on judgments and decrees. The

latter were provided for in section eight of the act of 1838, which became section 4865, and as such has been given a place in the compiled laws of the State ever since.

If it is anomalous, as urged by counsel and as observed by the Circuit Court of Appeals, for legal interest in the State to be fixed at five per cent, and judgments left to bear seven per cent, we cannot correct the anomaly. Nor can we regard the words "interest of money" to have been suddenly given a meaning in 1891 or 1899 different from that which they had borne for over fifty years in the statutes of the State with the intention to work by implication the repeal of a provision with which for the same length of time they were regarded as consistent.

Decree affirmed.

ZANE *v.* HAMILTON COUNTY.

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

No. 115. Argued and submitted December 5, 1902.—Decided April 6, 1903.

Where the highest court of a State has decided that the act of the legislature under which bonds were issued by a county is unconstitutional and such decision is in conformity with the prior decisions of that court, the bonds, having been illegally issued, do not constitute a contract which is protected by the Constitution of the United States.

THE case is stated in the opinion of the court.

Mr. George A. Sanders for petitioners.

I. There was ample legislative authority for the issue of the bonds and coupons in controversy, under the act of March 10, 1869. The declaration avers the citizenship of the plaintiff as that of another State. Gives copy of one of the bonds and coupons, and avers the others are of similar tenor and effect, states when, and for what purpose, the bonds were issued, rate

of interest, and when and where payable. That they were made, executed and delivered by the duly authorized officials of the defendant county in part payment of a subscription for stock of the St. Louis & Southeastern Railway Company, to that company, or bearer, under and by virtue of the authority of a majority of all the legal voters in said county, by their votes at an election held in said county, *pursuant to law*, on the 3d day of November, 1868, and also by the authority given by the provisions of certain acts of the General Assembly of the State of Illinois. That they were issued in part payment of a subscription made by said county under and by virtue of the authority aforesaid to the capital stock of said St. Louis & Southeastern Railway Company, the whole subscription of the county being $200,000. That the bonds were duly registered by the State Auditor November 1, 1871, under the act of April 16, 1869. That the plaintiff purchased the bonds and coupons for an investment in the usual course of business for a good and valuable consideration somewhere on or about February 1, 1874, and long before there was any default in the payment of the interest or principal of the bonds and without any notice whatever of any supposed want of legislative power, or irregularity in their issue.

All these facts are admitted by the general demurrer, and the bonds and coupons must be held valid obligations of the defendant if there was legislative authority for their issue.

There can be no doubt that there is ample legislative power in the act of incorporation of the St. Louis & Southeastern Railway Company for the issue of the bonds in question, and especially under section 20 in that act. This construction has been given to this act in a number of cases.

II. The act of incorporation of March 10, 1869, was not in violation of the constitution of 1848. Counsel for the defendant strenuously insists that the act has been held in violation of section 23, article 3, of the Illinois constitution of 1848, which provides that "no private or local law which may be passed by the General Assembly shall embrace more than one subject and that shall be expressed in the title." Constitution of Illinois of 1848, section 23, article 3. See Revised Statutes of Illinois, Hurd, 1897, page 39.

The first adjudication concerning this issue of bonds was in a chancery proceeding commenced by the county of Hamilton to restrain and enjoin the levy and collection of taxes to pay interest on these bonds. That case was removed to the Federal court of the Southern District of Illinois, and the bonds were held "valid, legal and binding obligations of the said county." This decree was never appealed from, reversed or in any manner set aside or annulled.

Later, a decision in an *ex parte* proceeding (unknown bondholders being served only by newspaper publication) was rendered by the state Supreme Court in the case of *The People* v. *Hamill*, 134 Illinois, 666, holding this issue of $200,000 of bonds void for want of legislative power to issue them. That the act of March 10, 1869, was in violation of section 23, article 3 of the constitution of 1848, and therefore conferred no power for their issue; in 1896, the United States Circuit Court of Appeals rendered a decision in the case of *Austin* v. *Hamilton County*, 22 C. C. A. 128; 79 Fed. Rep. 208, in which other bonds and coupons of this issue than those mentioned in the decree of June 5, 1881, were involved, affirming the decision of the court below on the ground that the plaintiff *was not a bona fide holder of some of the bonds and coupons* involved, having presumably purchased them after a knowledge of the decision of the state Supreme Court in the case of *The People* v. *Hamill*, 134 Illinois, 666. And see *Franklin County* v. *German Savings Bank*, 142 U. S. 99.

The position of the counsel for the defence that the decision in the case of *Bolles* v. *Hamilton County*, 20 C. C. A. 401, is *res adjudicata* as to the case at bar is untenable. See *Woodbury* v. *City of Shawneetown*, 20 C. C. A. 400; 74 Fed. Rep. 205.

In these decisions the Appellate Court never passed upon the only question presented under the demurrer in the case at bar, to wit, the constitutionality of the act of March 10, 1869, save in the *Austin* v. *Hamilton County* case where it sustains the decree of the Federal court below of June 5, 1881, when it says, this question equally with others "were determined by the decree."

III. Counsel for the defence insists that there was no law

granting any power whatever to issue the bonds in controversy in existence when the vote was taken.

There is now no question, under the decisions of the Federal courts but that the legislature had power to ratify, confirm and legalize the exercise of any power by public corporations, which it might have authorized in the first instance. *Bolles* v. *Brimfield*, 120 U. S. 759; *Anderson* v. *Santa Anna*, 116 U. S. 364; *Grenada County* v. *Brogden*, 112 U. S. 271.

IV. The act of March 10, 1869, incorporating the St. Louis & Southeastern Railway Company is not unconstitutional by reason of its title; nor is it a local or private act. Illinois Revised Statutes, Hurd's 1897, article 3, section 23, page 39; *Unity* v. *Burrage*, 103 U. S. 447, October term, 1880; *Belleville &c. Railroad Company* v. *Gregory*, 15 Illinois, 20; *Fireman's Benevolent Association* v. *Lounsbury*, 21 Illinois, 511; *Schuyler County* v. *People*, 25 Illinois, 181; *O'Leary* v. *County of Cook*, 28 Illinois, 534; *Erlinger* v. *Boneau*, 51 Illinois, 95; *People* v. *Brislin*, 80 Illinois, 423; *Binz* v. *Weber*, 81 Illinois, 288. The act cannot, therefore, be held to be open to the constitutional objection, even under the state court decisions. *San Antonio* v. *Mehaffy*, 96 U. S. 315; *Jonesboro City* v. *Cairo & St. Louis Railroad Co.*, 100 U. S. 192; *Johnson* v. *The People*, 83 Illinois, 431; *Mount Clair* v. *Ramsdell*, 107 U. S. 147; *Supervisor* v. *C., B. & Q. R. R. Co.*, 44 Illinois, 229; *City of Ottawa* v. *People*, 48 Illinois, 223; *City of Virden* v. *Allen*, 107 Illinois, 506.

Nor is the act of March 10, 1869, a local or private act. Section 21, of the act, Private Laws of Illinois, vol. 3, 1869, is as follows, to wit: "This act shall be deemed a public act and shall be liberally construed for all purposes therein expressed and declared, and shall be in force from and after its passage." See Abbott's Law Dictionary.

Acts creating public corporations are public statutes. *Portsmouth Livery Company* v. *Watson*, 10 Massachusetts, 9; *Pollock* v. *McClurken*, 42 Illinois, 37; *Bumhaum* v. *Webster*, 5 Massachusetts, 266.

V. The decision of the state Supreme Court in *People* v. *Hamill*, 134 Illinois, 666, is not conclusive, and is not the law of the

land, nor of the State of Illinois. Both state and Federal courts were not in accord with it before, and are not since, it was rendered June 16, 1888, as will clearly appear by the above citations. The decisions of the state Supreme Court, as shown above, have been uniformly against the decision rendered in that case. *Pana* v. *Bowler*, 107 U. S. 540; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Burgess* v. *Seligman*, 107 U. S. 33.

We admit the rule that no recital can supply the want of legal authority for the execution of the bonds, but insist that the act of March 10, 1869, gave plenary legislative authority for the issue of the bonds and was not repugnant to the constitution of 1848, and that the admitted facts averred in the declaration and the recitals on the bonds are sufficient in law for a *bona fide* holder of the bonds to recover judgment thereon.

VI. The equities of this case are all with the plaintiff. It would seem an anomaly in jurisprudence for the courts to hold that a part of an issue of bonds issued at the same time and date, executed and delivered by the same officials, under the same statute, on the same vote, for the same purpose and of the same tenor and effect, should be held valid and a part void, for want of power to issue them.

Mr. J. M. Hamill for respondent.

I. The bonds were void on their face. There was no authority of law for issuing these bonds and an examination of the acts referred to on the face of each bond supposed to confer authority will demonstrate that the bonds were issued without authority of law and are void.

The Supreme Court of Illinois in *The People ex rel. Standefer* v. *Hamill*, 134 Illinois, 670, 671, held section 20 of the act incorporating the St. Louis and Southeastern Railway Company to be in violation of article 3 of section 23 of the constitution of 1848, citing, *Belleville &c. R. R. Co.* v. *Gregory*, 15 Illinois, 20; *City of Virden* v. *Allen*, 107 Illinois, 505; *Lockport* v. *Gaylord*, 61 Illinois, 276; *Middleport* v. *Ætna Life Ins. Co.*, 82 Illinois, 562.

The act of April 16, 1869, Public Laws of Illinois, 1869, p. 319,

the only remaining act recited on the face of the bonds purporting to show authority for issuing them, grants no power or authority to issue bonds, but only provides when such bonds have been issued under authority of law how they shall be paid. It is contended that the recitals in the bonds estopped the defendant from denying their validity and it is claimed that on their face they import a compliance with the law under which they were issued. But counsel have failed to show that there was any law authorizing the issue of the bonds. This court has never intended to decide, and has never decided even where the rights of *bona fide* holders have been involved, that where the bonds have been issued without legislative authority they are valid and binding against the municipal corporation issuing them. *Northern Bank of Toledo* v. *Porter Township*, 110 U. S. 615. This court said in *Cohens* v. *Virginia*, 6 Wheat. 264, and in *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287, that it was a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which they are used; and see *Post* v. *Supervisors*, 105 U. S. 668; *Katzenberger* v. *Aberdeen*, 121 U. S. 176; *Dixon County* v. *Field*, 111 U. S. 92; *McClure* v. *Township of Oxford*, 94 U. S. 432; *Crow* v. *Oxford*, 119 U. S. 221; *Kelly* v. *Millan*, 127 U. S. 150.

If it appears upon the face of the bonds sued on as in this case, that they were issued under a certain act mentioned in the bonds and that act is void, the bonds themselves will be void. *Gilson* v. *Dayton*, 123 U. S. 59; *Lippincot* v. *Town of Pana*, 92 Illinois, 34; *Gaddis* v. *Richland County*, 92 Illinois, 126; *Barns* v. *Town of Lacon*, 84 Illinois, 464; *Middleport* v. *Ætna Life Ins. Co.*, 82 Illinois, 564; *Marshall* v. *Sillimon et al.*, 61 Illinois, 223.

An examination of every case cited by counsel for plaintiff in error will show that in each of these cases there was legislative authority given to issue the bonds. These decisions, therefore, have no application to the facts in this case. The courts have never held that where there was no legislative power given to issue the bonds, the corporation was estopped from denying want of authority. Recitals in bonds issued under legisla-

tive authority may estop the municipality from disputing their authority as against a *bona fide* holder for value, but when the municipal bonds are issued in violation of law, or a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds. *Lake County* v. *Rawlins*, 130 U. S. 662; *Lake County* v. *Graham*, 130 U. S. 674; *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230.

This court has held that it will abandon its former decision construing a state statute if the state courts have subsequently given to it a different construction. *Fairfield* v. *County of Gallatin*, 100 U. S. 54, 55; *Green* v. *Neal's Lessee*, 6 Pet. 291; *Sudam* v. *Williamson*, 24 How. 427.

The decisions of the highest judicial tribunal of a State are entitled to great and ordinarily decisive weight. *Rich* v. *Mentz Township*, 134 U. S. 632; *Meriwether* v. *Muhlenberg County Court*, 120 U. S. 354; *Claybourne County* v. *Brooks*, 111 U. S. 400, 410.

When the construction of the constitution or the statute of a State has been fixed by an unbroken series of decisions of its highest court, the courts of the United States accept and apply it in cases before them. *Township of Elmwood* v. *Mercy*, 92 U. S. 289; *Township of Oakland* v. *Skinner*, 94 U. S. 255; *Barnum* v. *Okolona*, 148 U. S. 393; *Burgess* v. *Seligman*, 107 U. S. 33; *Austin* v. *Hamilton County*, 76 Fed. Rep. 208.

II. Bonds issued in violation of constitution are void. Municipal bonds in Illinois, issued since the adoption of the constitution of 1870 as these bonds were, are *prima facie* invalid, and the burden of proof rests upon the plaintiff to show affirmatively that they were authorized under existing laws by a vote of the people prior to that time. *McClure* v. *Township of Oxford*, 94 U. S. 429; *Buchanan* v. *Litchfield*, 102 U. S. 278; *German Savings Bank* v. *Franklin County*, 128 U. S. 526; *Jackson County* v. *Brush*, 77 Illinois, 59.

These bonds were issued in violation of separate section 2 of the constitution of 1870 which went into force July 2, 1870. It is well settled that all negative or prohibitory provisions even in a constitution execute themselves, making void all acts done in violation of such provisions, the same as if in violation

of express statutory law. *Law* v. *People*, 87 Illinois, 385; *Fuller* v. *City of Chicago*, 89 Illinois, 282.

The bonds on their face bear date October 23, 1871, and therefore every purchaser of them was bound to know that they were issued after the positive prohibition of the constitution had been adopted, preventing every municipality in the State from voting to become a subscriber to the capital stock of any railroad or private corporation. *Concord* v. *Robinson*, 121 U. S. 169.

The courts concur with great unanimity in holding that there is no authority in municipal corporations to incur debts or borrow money in order to become subscribers to the capital stock of a railway corporation and that such power must be conferred by *express grant.* Dillon on Municipal Corporations, 4th ed. vol. 1, sec. 161; *Kelly* v. *Milan*, 127 U. S. 139; *Norton* v. *Dyersburg*, 127 U. S. 160; *Wells* v. *Supervisors*, 102 U. S. 625; *Lewis* v. *City of Shreveport*, 108 U. S. 282, 283.

If the power to issue bonds in aid of a railway company does not exist, they are void into whosesoever's hands they may come. Dillon on Municipal Corporations, 4th ed. vol. 1, sec. 163; *Marsh* v. *Fulton County*, 10 Wall. 676; *Allen* v. *Louisiana*, 103 U. S. 80.

A municipality must have affirmative legislative authority to enable it to subscribe to the capital stock of a railroad corporation before its officers can bind the body politic to the payment of bonds purporting to be issued on that account, and if it has not such authority the bonds will be void into whosesoever's possession they may come. *McClure* v. *Township of Oxford*, 94 U. S. 432; *Township of East Oakland* v. *Skinner*, 94 U. S. 255; *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625.

It is claimed that by subsequent ratification the county may make legal and valid bonds that, when they were issued, were illegal and void. The legislature never made any attempt to ratify, confirm or legalize these bonds. Even the legislature had no power to ratify and confirm bonds that were issued without authority of law and in violation of the constitution. Dillon on Municipal Corporations, 4th ed. vol. 1, sec. 463.

Corporate ratification without authority from the legislature cannot make a municipal bond valid which was void when issued, for want of legislative power to make it. *Lewis* v. *City of Shreveport*, 108 U. S. 282; *Marsh* v. *Fulton County*, 10 Wall. 676.

The legislature itself cannot confer any power on the county to ratify bonds issued without authority of law and in plain violation of the constitutional prohibition.

As no legislative authority or grant of power by the legislature to the county to enable it to subscribe to the capital stock of the railroad company, and issue bonds in payment of such subscription, is shown in the declaration, or on the face of the bonds, there was no power in the county to issue them, and the bonds having been issued after the constitution went into effect, and in plain violation of the constitutional prohibition, the bonds are absolutely void into whosesoever's hands they may come, and as bonds that are void can create no liability against the county, the demurrer to the declaration was properly sustained.

Mr. Justice McKenna delivered the opinion of the court.

This is an action brought in the United States Circuit Court for the Southern District of Illinois on five coupon bonds which were issued to the St. Louis and Southeastern Railway Company, under a statute of the State of Illinois. The petitioner alleges she is a *bona fide* purchaser of the bonds. A copy of the bonds is inserted in the margin.[1] The following is a copy of the coupons attached to the bonds:

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[1] United States of America.

No. 36. Bond of $1000.00

Hamilton County.

Interest seven per cent. Payable semi-annually.

State of Illinois.

Know all men by these presents, that the county of Hamilton, in the State of Illinois, acknowledges itself indebted and firmly bound to the St. Louis and Southeastern Railway Company, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which sum said county for value received promises to pay the said company, or bearer,

"$35.00. $35.00.

McLeansboro, Hamilton County, Illinois.

January 1, 1872.

"The county of Hamilton, in the State of Illinois, promises to pay the sum of thirty-five dollars on the first day of January, 1892, lawful money of the United States of America, being six months' interest on bond No. 46 for one thousand dollars, issued on subscription to the St. Louis and Southeastern Railway Company.

"This coupon is payable in the city of New York.

"J. W. MARSHALL, *Clerk.*"

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in the city and State of New York, twenty years after date, payable at any time before this bond becomes due after five years at the pleasure of said county of Hamilton, with interest thereon from the date hereof at the rate of seven per cent per annum, payable semi-annually on the first days of January and July in each year, on the presentation and surrender, at the place in said city of New York, where the treasurer of the State of Illinois pays the interest and debt of said State, of the coupons hereto attached as they severally become due.

This bond is one of two hundred of like tenor and amount, of same issue, and it is issued under and by virtue of the authority given by a majority of all the legal voters in said county, by their votes, at an election held in said county, pursuant to law, on the third day of November, A. D. 1868, and also by the authority given by the provisions of an act of the general assembly of the State of Illinois, in force March 10, A. D. 1869, entitled "An act to incorporate the St. Louis and Southeastern Railway Company."

This bond is also issued under the provisions of an act of the general assembly of the State of Illinois, in force April 16, A. D. 1869, entitled "An act to fund and provide for the payment of the railroad debts of counties, townships, cities and towns."

This bond is issued in part payment of a subscription made by said county under and by virtue of the authority aforesaid, to the capital stock of the St. Louis and Southeastern Railway Company, in the sum of two hundred thousand dollars.

In testimony whereof, the said county of Hamilton has executed this bond, by the county judge of said county under the order of the county court of said county, signing his name hereto, in open court, and by the clerk of said court, in obedience to the order thereof, attesting the same and affixing hereto the seal of the said court, in open court.

Done at the court house at McLeansboro, in said county, on this the 23d day of October, Anno Domini 1871.

[SEAL.]

T. B. STEELE,

County Judge of Hamilton County, Ill.

The bonds were a part of an issue of two hundred of like tenor and amount, save as to dates of issue, registration and numbers. There was a general demurrer filed to the declaration, which was sustained, and the case was taken to the Circuit Court of Appeals for the Seventh Circuit. That court affirmed the judgment of the Circuit Court. 104 Fed. Rep. 63.

The question presented is the validity of the statute of the State under which the bonds were issued. The Circuit Court of Appeals followed the case of *The People ex rel.* v. *Hamill*, 134 Illinois, 666, and (quoting from the case) held that the statute was invalid "because section 20 of the act mentioned was void, as being in violation of the provision of the constitution of the State, that 'no private or local law . . . shall embrace more than one subject, and that shall be expressed in the title.'"

It was alleged in the declaration and the bonds recited that they were issued under the provisions of an act of the general assembly of the State of Illinois, in force March 10, 1869, entitled "An act to incorporate the St. Louis and Southeastern Railway Company," and also under the provisions of an act in force April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns."

The act of April 16, 1869, was a mere registration act, and, it is conceded, conferred no authority to issue the bonds. Ample authority, however, it is insisted, was given by the act of March 10, 1869. Sections 15, 16 and 17 provided for the subscription by counties and cities and incorporated towns to the stock of the company, and the terms of issue and payment of the bonds, and sections 20 and 21 provide as follows:

"Sec. 20. And the said company may lease or purchase, upon such terms as may be agreed upon, any other railroad or parts of railroad, either wholly or partially constructed, which may constitute or be adopted as part of their main line; and by such lease or purchase, they shall acquire and become vested with all the rights and franchises pertaining to said road or part of road in the right of way, construction, maintenance and working thereof. And the county court of Gallatin County is hereby

authorized and empowered to subscribe to the capital stock of this company the one hundred thousand dollars, or any part thereof, heretofore voted by a majority of the legal voters of said county to the Shawneetown branch of the Illinois Central Railroad Company. And the county court of Hamilton County is hereby authorized and empowered to subscribe to the capital stock of this company the two hundred thousand dollars, or any part thereof, heretofore voted by a majority of the legal voters of said county to the Shawneetown branch of the Illinois Central Railroad Company. And the county court of Jefferson County is hereby authorized and empowered to subscribe to the capital stock of this company the one hundred thousand dollars, or any part thereof, voted by a majority of the legal voters of said county to the Mount Vernon Railroad Company. And it shall not be necessary to submit the question of making the several subscriptions in this section mentioned to the vote of the legal voters of said respective counties: *Provided*, That nothing herein shall be so construed as to prevent either of the counties mentioned in this section subscribing any other or larger amounts to the capital stock of this company than the amounts mentioned in this section.

"SEC. 21. This act shall be deemed a public act, and shall be liberally construed for all purposes therein expressed and declared, and shall be in force from and after its passage."

As we have seen, this act was declared by the Supreme Court of the State in *The People ex rel.* v. *Hamill*, 134 Illinois, 666, to be in violation of the constitution of the State, and that the bonds issued under it were void. This decision, plaintiff in error contends, is contrary to prior decisions interpreting the constitution of the State, and under the faith of which she purchased the bonds, and she insists that a contract hence arose which is protected by the Constitution of the United States. To support the contention a number of decisions are cited, but we do not consider it necessary to review them. The conclusion of plaintiff in error is but a deduction from them, and we need only consider the more direct cases.

In *Johnson* v. *People*, 83 Illinois, 431, 436, it was decided that the provisions of the constitution, that "no private or local

law . . . shall embrace more than one subject, and that shall be expressed in the title," did not require that the subject of the bill should be specifically and exactly expressed in the title, and it was concluded that when the title calls attention to the subject of the bill, although in general terms, it fulfills the requirement of the constitution. In *City of Ottawa* v. *The People ex rel.*, 48 Illinois, 233, it was held that the "adjuncts to the subject are not required to be expressed, or the *modus operandi*."

In *The Belleville &c. Railroad Co.* v. *Gregory*, 15 Illinois, 20, (1853) and *Supervisors of Schuyler Co.* v. *People ex rel. R. I. & Alton R. R. Co.*, (1860), 25 Illinois, 181, it was held that a subscription to the stock of a railroad company by a municipal corporation was so far germane to the incorporation of the railroad as not to require specific mention in the title of an act providing for the incorporation of such road. But whatever may be said of the reasoning of those cases, the contention of plaintiff in error goes beyond it. If an incorporation of a railroad and a subscription to its stock are parts of the same subject, the incorporation of one road and the transfer to it of the stock authorized to be taken in another road are certainly not parts of the same subject, more particularly when the subscription to the stock of the latter depended upon and was based upon the vote of the people of the county. And this the Supreme Court decided in *The People ex rel.* v. *Hamill*, *supra*. It was also decided that the act of 1869 was not a private and local act. The court said:

"It is seen, the act of March 10, 1869, to which reference is made as giving the requisite authority to the county to subscribe for the stock and issue the bonds, is 'An act to incorporate the St. Louis and Southeastern Railroad Company.' That is all it purports to be by its title. The constitution of 1848, under which this act was passed, contained a restriction that 'no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title.' This is a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created, is germane to the object

expressed in the title, *Belleville &c. Railroad Co.* v. *Gregory*, 15 Illinois, 20; *City of Virden* v. *Allan*, 107 Illinois, 505, the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, affects, adversely, the corporation from which the subscription voted is to be diverted, and is, therefore, clearly not germane to the title of the act, and section 20 must therefore be held to have been inhibited by the constitution of 1848, and is for that reason void and of no effect. *Lockport* v. *Gaylord*, 61 Illinois, 276; *Middleport* v. *Ætna Life Insurance Co.*, 82 Illinois, 562."

It was held in *The Belleville &c. Railroad Co.* v. *Gregory*, *supra*, that the provision of the constitution of that State could not be evaded by declaring a private act to be a public one.

From these views it follows that the bonds of plaintiff in error, having been illegally issued, do not constitute a contract which is protected by the Constitution of the United States.

Judgment affirmed.

DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY *v.* OSBORN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Argued January 15, 1903.—Decided April 6, 1903.

1. Where the plaintiff in error claimed and set up a right under the Constitution of the United States, and the decision of the Supreme Court of the State was tantamount to the denial of that right, there is a Federal question and a motion to dismiss will be denied.
2. Under the laws of the State of Michigan the commissioner of railroads has power to compel a street railroad to install safety appliances in accordance with law, the cost to be shared between it and a steam railroad occupying the same street, notwithstanding that the steam road is the junior occupier of the street.
3. There is a difference between ordinary vehicles and electric cars which

the State may, in the exercise of its police power, recognize without denying the company operating the electric cars the equal protection of the laws.

Where the objection that a statute does not provide for notice is taken for the first time in this court, and the record shows that there actually was notice given, it is not open to the plaintiff in error to complain that the statute did not provide for such notice.

THIS case involves the legality of an order of the commissioner of railroads of the State of Michigan requiring the plaintiff in error and the Union Terminal Association of Detroit, at their own cost and expense, to maintain and operate safety gates and derailing and signalling appliances at Clark avenue in said city. The order is inserted in the margin.[1]

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[1] STATE OF MICHIGAN, }
Office of the Commissioner of Railroads. }

In re application of The Common Council of the city of Detroit for additional protection at the Clark avenue crossing of the tracks of the Union Terminal Association in the city of Detroit, county of Wayne, Michigan.

Application having been received by the commissioner of railroads from the common council of the city of Detroit, Wayne County, Michigan, for additional protection at the Clark avenue crossing of the tracks of the Union Terminal Association in said city of Detroit, Wayne County, Michigan;

And after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, as well as the arguments of the representatives of the said railroad company above named in relation thereto, and having decided after due deliberation that the public interests required said additional protection at the said crossing;

Now, therefore, by authority vested in me by law, it is hereby ordered:

That within sixty days from date hereof, you, the said Union Terminal Association Railway Company, cause to be constructed and thereafter operated and maintained, safety gates, and derailing and signalling appliances to be operated day and night by a watchman from a tower. Said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of movements of all trains or cars on both of the respective lines. Derailers shall be provided and placed in the tracks of the Fort Wayne and Belle Isle railway, not less than seventy-five feet from clearance point of crossing, and signals shall be placed on the tracks of the Union Terminal Association at a distance of not less than 600 feet from said crossing. Said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked.

The order was made and issued under act 171 of the Public Acts of the State of 1893, section 5 of which provides as follows:

"The commissioner of railroads shall, as soon as possible after the passage of this act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

The statute and order are attacked as depriving the plaintiff in error of its property without due process of law, because compliance with the order "will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and if the same are constructed, in the maintenance and repair thereof."

The plaintiff in error is a street railroad company incorporated under the laws of Michigan, and operates a railroad on certain streets of the city of Detroit, including Clark avenue. It succeeded in ownership and operation to a company known as the Fort Street and Elmwood Avenue Railway, which was also a street railway corporation. The latter company was authorized to construct its road on Clark avenue, and under its grant did construct and operate its road thereon. "At the time the track was constructed," (we quote from the opinion of the Supreme Court of the State,) "on Clark avenue there was no railroad, or highway, street, lane, or alley, or crossing of any kind, over Clark avenue between Fort street and the River

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And it is further ordered that cost and expense of the construction, maintenance and operation of said gates, tower and derailing and signalling appliance, shall be borne by the Union Terminal Association and the Fort Wayne and Belle Isle Railway Company, equally, share and share alike. This appliance to be constructed in accordance with plans to be submitted to and approved by the commissioner of railroads within thirty days from date hereof, and such appliance to be further approved by the commissioner of railroads before being put into use. This order is subject to modification at any time when in the opinion of the commissioner of railroads the public safety will be more effectually secured.

road. In 1882 or 1883 the Wabash railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road of any kind, either that of a railroad, or a public highway, a private way, road, street, or alley. In the year 1893 or thereabouts the Union Station was opened at the corner of Third and Fort streets, in Detroit; and since that time said station has been used jointly by the Wabash, the Detroit, Lansing and Northern, the Flint and Pere Marquette, the Detroit and Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accommodate the increased traffic. These tracks are used as approaches to the Union Station, and incoming and outgoing trains and cars of all the foregoing roads, except the Canadian Pacific Railroad, pass over said tracks. There are thirty-eight regular daily passenger trains crossing Clark avenue upon these tracks. Besides this, the Canadian Pacific uses the station as an eastern terminus, connecting with the other roads for purposes of through east and west traffic."

In 1893, the legislature of the State passed the act hereinbefore set out, and under its authority the defendant in error made the order complained of.

The case was submitted upon the petition of relator (plaintiff in error), and the answer of respondent (defendant in error), and the mandamus prayed for denied. 127 Michigan, 219. This writ of error was then sued out.

Mr. John C. Donnelly for plaintiff in error. *Mr. Michael Brennan* was on the brief.

Mr. Fred A. Maynard for defendant in error. *Mr. Horace M. Oren*, attorney general of the State of Michigan, was on the brief.

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

1. A motion is made to dismiss the writ of error on the

ground that the record exhibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States, and the decision of the Supreme Court of the State was tantamount to the denial of that right. *Kaukauna Co.* v. *Green Bay &c. Canal Co.*, 142 U. S. 254.

2. The argument of plaintiff in error on the merits is that it was the first to occupy Clark avenue; that at that time there was no public highway or street crossing at such avenue; that subsequently the steam railroads laid their tracks, the Wabash Railway Company being the first to do so, but installed no safety devices of any kind, "though it were the junior company;" that the tracks on the other railroads were subsequently constructed and are controlled by the Union Terminal Company. It is hence asserted that the plaintiff in error cannot be made liable for any part of the cost of safety devices, because it is the settled constitutional law of Michigan that its occupation constituted no additional burden upon the highway, but is simply a method of using the highway for the purpose of public travel and "in direct furtherance of the purpose for which the highway was established, that the street railroad company in contemplation of the law bears no different relation to the highway than that of any other person using the highway for the moving of vehicles or for any other method of public or private travel, and cannot, as between others using the highway for like purposes, be required alone to bear the expense of installing and maintaining safety devices at steam railroad crossings designed for the protection of all the traveling public."

And further, it is also a well established principle of the constitutional law of Michigan, that a junior road seeking to cross another cannot shift any portion of the expense of maintaining safety devices without compensation, though the senior company did not insist upon the installation of the devices or compensation at the time the tracks of the junior company were constructed. In other words, it is asserted that the dangerous condition arose and yet arises from the steam railroads, and on them alone can the cost of safety devices be legally imposed.

3. It is also insisted that the law is unconstitutional because it does not provide for notice.

(1) It was conceded by the Supreme Court of the State that it was the law of the State that the compensation for the damages caused by crossing the tracks of a railroad by another railroad or by a highway included the cost of making the highway safe. But the court said: "An examination of these cases will show they were all cases where it was sought to obtain a right of way either for a railroad across a highway, or for a highway across a railroad, or a crossing for one railroad over the right of way of another; and none of the cases relate to the question involved here, as to who shall bear the expense of additional safeguards ordered upon roads which have crossed each other for a long period of time."

And besides this element of time, the court said that there were other elements of damage which were either too remote or depended upon the relation of the roads to the State. Both elements are important. The conditions which exist to-day could not have been contemplated years ago, or be the measure of the rights and relations of the respective roads. Those rights and relations were necessarily determined at the time the crossings were made. What could not be foreseen could not have been made a ground of action, and if the growth of business and population can give rights to either of the bisecting roads it is not clear how the police power of the State can be limited in its control over either of them. The Supreme Court of the State recognized this and fortified its views by Michigan cases.

In *The Flint & Pere Marquette R. R. Co.* v. *Detroit & Bay City R. R. Co.*, 64 Michigan, 350, the court in an elaborate opinion expressed the rules of compensation when the right of one road to cross the tracks of another was sought by condemnation proceedings. In that case compensation was claimed not only for the use of the crossing, but for the cost of maintaining signals or a crossing system, cost of a watchman, and cost of stopping trains. These items were rejected. There was some uncertainty in the evidence, and the items for maintaining signals or the crossing system were disallowed on that ground,

but the court pointed out the difference between a "structural change in the property" for which compensation should be given, and those things which may be required by the legislature in the exercise of police regulations, as to which the roads "stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedidience to its requirements." And such regulations, it was observed, "are as binding upon an existing road as one newly organized." The court cited the case of *Mass. Cent. R. R. Co.* v. *Boston, C. & F. R. R. Co.*, 121 Massachusetts, 124, where Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, expressed the law as follows:

"A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as all individuals or bodies politic and corporate, owning land or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. *Commonwealth* v. *Boston & M. R. R. Co.*, 3 Cush. 25, 53; *Old Colony Railroad Co.* v. *Plymouth*, 14 Gray, 155; *Grand Junction Railroad Co.* v. *County Commissioners of Middlesex*, 14 Gray, 553. But it is not entitled to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing the bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad. *Proprietors of Locks and Canals* v. *Nashua & L. R. R. Co.*, 10 Cush. 385, 392; *Boston & W. Railroad Co.* v. *Old Colony Railroad Co.*, 12 Cush. 605, 611; *S. C.*, 3 Allen, 142, 146; *Old Colony Railroad Co.* v. *Plymouth*, 14 Gray, 155."

It is however contended that a street railway has a different relation to a street than that which a steam railroad has; that the former "acquires a right to use the same in common with

other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be, if such railroad were not built across it at all."

It may be that this difference is recognized as to abutting property owners or crossing railroads, but it cannot be recognized as limiting or affecting the power of the State to regulate the management of the roads in view of the danger of their operation to the public. Whether electricity be the motive power or steam be the motive power there is enough danger in the operation of either to justify regulation. The record in this case shows that there are thirty-eight daily passenger trains crossing Clark avenue, and that the cars of the plaintiff in error pass every few minutes. It is manifest, as the Supreme Court of the State observed, that the crossing "is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars," and that the danger is caused by both. In such situation the city is surely not powerless to act, nor before acting must it ascertain the exact quantum of damage caused by each road, and by that standard assign the cost of protecting the public. See *Railroad Co.* v. *Street Ry. Co.*, 89 Maine, 328.

It is also objected to the order that it deprives plaintiff in error of the equal protection of the laws. The argument to support this contention is an extension of that which claims that the use of the street by the plaintiff in error "is merely an adaptation of the highway to the particular means of travel." And it is deduced that an electric street railway has an equality of rights with ordinary vehicles. That we think there is a difference between ordinary vehicles and cars propelled by electricity, which may be recognized by the State in the exercise of its police power, we have sufficiently indicated.

(2) The objection that the statute does not provide for notice

seems to be made for the first time in this court. It is not mentioned in the majority opinion nor in the dissenting opinion. It is not particularized in the petition for the writ of error nor in the assignment of errors. In the petition for this writ of error it is recited that the plaintiff in error in its application for mandamus claimed that the order of the railroad commissioners was invalid because it deprived plaintiff in error of its property without due process of law and denied it the equal protection of the laws. And also recited that on the "issue framed therein said cause went to a final hearing." The cause was submitted on petition and answer, and the petition alleged "that notice was given by respondent to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order." It is therefore not open to the plaintiff in error to complain that the statute does not provide for notice.

Judgment affirmed.

UNITED STATES *v.* MISSION ROCK COMPANY.

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

No. 198. Argued March 11, 1903.—Decided April 13, 1903.

The State of California upon its admission into the Union acquired absolute property in, and dominion and sovereignty over, all soils under the tide-waters within her limits, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject to the paramount right of navigation over the waters, so far as such navigation might be required for the necessities of commerce with foreign nations or among the several States, the regulation of which is vested in the general government. *Shively* v. *Bowlby*, 152 U. S. 1.

The State of California pursuant to an act of legislature issued its patent in 1872 for certain submerged lands in San Francisco Bay, about fourteen acres and upwards, which the patentee's grantees improved by filling in and building docks and warehouses. Within the boundaries were two small rocks or islands one fourteen one hundredths of an acre and the other one one hundredth of an acre in area. In 1899 the President made

an order reserving the two rocks and describing them as of the above mentioned fractional acreage for naval purposes. The United States demanded possession of the original islands and of the adjacent property appurtenant thereto.

Held, That as to all the premises except the two rocks or islands, which were awarded to the United States, the grantee under the state patent had good title and could not be ejected.

Held, That in the absence of explicit directions the President's order could not be construed as appropriating such valuable property as that adjacent to the rocks and islands as being appurtenant thereto.

EJECTMENT brought in the Circuit Court of the United States, Ninth Circuit, Northern District of California, by the United States against the California Dry Dock Company. Pending the hearing the latter company sold and transferred its title to the Mission Rock Company, a corporation, which thereupon entered into possession of the property. By stipulation the Mission Rock Company was substituted as defendant, and an amended and supplemental complaint was filed.

The property sued for was described by metes and bounds, and it was alleged constituted a "tract of land, being a square, including the rock known as Mission Rock, and containing 14.69 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian." Damages and rents and profits were also prayed in the sum of $355,000.

By consent the case was tried by the court, and its findings as far as material are as follows:

"II. At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause and marked Exhibit 'A.'

"III. The areas of these rocks or islands above ordinary high water mark at the time of the admission of the State of Cali-

fornia into the Union were as follows: The one on the chart called 'Mission Rock' had an area of fourteen one hundredths (14–100) of an acre; the other had an area of one one hundredth (1–100) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the extent that they were covered and uncovered by the flow and ebb of the tide varied from ten to twenty-five feet, depending on their steepness. Both rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half a mile of the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland and surrounded and now surrounds them.

"IV. The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican governments.

"V. No approved plat of the exterior limits of the city of San Francisco as provided by the terms of section 5 of the act of July 1, 1864, 13 Stat. 332, has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

"VI. On the thirteenth day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

"'EXECUTIVE MANSION, *January* 13, 1899.

"'It is hereby ordered that the Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one hundredths of an acre and one one hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"'WILLIAM MCKINLEY.'

"VII. On the day of March, 1864, the United States surveyor general for the State of California extended the public survey so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

"VIII. On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled 'An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor,' which act was printed in the statutes of California for the years 1870–1871, at page 801, is hereby referred to and made part hereof.

"The lands herein described include the lands sued for in this action.

"On the 11th day of July, 1872, the State of California, in conformity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

"After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain and sale, dated May 1, 1878, purporting to convey the said lands to the California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named company has not since said date conveyed to any person or corporation the said lands.

"IX. The California Dry Dock Company, upon going into possession of said lands so conveyed, undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about four acres, upon which extensive warehouses were built by it, and wharves erected for the accommodation of shipping.

"Since the issuance of the state patent hereinbefore referred to the patentee thereof up to May 1, 1878, the California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present

time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof."

The conclusion of the court was that the United States was entitled to the lands sued for, without damages or rents and profits, and judgment was entered accordingly.

The Circuit Court of Appeals reversed the judgment, and remanded the cause with instructions "to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one hundredths of an acre and one one hundredth of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California; and as respects the remainder of the land sued for, that the plaintiff take nothing." 109 Fed. Rep. 763. This writ of error was thereupon sued out.

Mr. Solicitor General Richards for the United States.

I. Upon the acquisition of California from Mexico, under the treaty of Guadalupe Hidalgo, May 30, 1848, 9 Stat. 922, all the territory then belonging to Mexico became the property of the United States, both the tide lands and the upland. Excepting the lands which Mexico, prior to the treaty, had granted or in any way disposed of, the United States became the owner of all the land in California. The tide or submerged lands the United States took in trust for the future State of California. *San Francisco* v. *Le Roy*, 138 U. S. 656, 671; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 183. All the rest it held in absolute ownership.

In all the cases where the land, under this doctrine, went to the original States when the Revolution took place, and to the subsequent States upon their admission to the Union, it was submerged land—land under water, not land above water. The submerged lands which went to the State were lands entirely under water. *Martin* v. *Waddell*, 16 Peters, 367; *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57; *Illinois Cen-*

tral Railroad v. *Illinois*, 146 U. S. 387; *Shively* v. *Bowlby*, 152 U. S. 1.

II. Conceding that, upon the admission of California into the Union, the State took and has since held the ownership of the tide lands, or the submerged lands, or the navigable waters with the soils under them, to be used in trust for the people in the furtherance of navigation and commerce, the island or islands known as Mission Rock remained the property of the United States, because they never had been nor are they now tide land, or submerged land, or soil under navigable waters.

The purchase of over fourteen acres of submerged land surrounding these rocks or islands shows conclusively that the rocks or islands were not submerged land. The submerged land was purchased because of the location of the islands. Without the islands, the soil under the navigable waters of the bay of San Francisco a half mile from shore would have been worthless. The submerged land was bought upon the condition that a marine railway and dry dock should be built at Mission Rock. This of itself is sufficient to show the possible use and value of this island, not as submerged land, but as "fast land," land above water, permanently fixed, and capable of a valuable commercial use. If valuable to a private individual or corporation for improvement as a site for docks and warehouses, Mission Rock was equally valuable to the United States as a site for naval, military, or commercial purposes. See *Commonwealth* v. *Shaw*, 14 S. & R. 9.

III. But it is insisted that upon the admission of California, all property "above and below high water," not reserved by the United States in the act of admission, passed to the State. This is novel doctrine, and cannot be sustained. *Newhall* v. *Sanger*, 92 U. S. 761; *Leavenworth Railroad Co.* v. *United States*, 92 U. S. 733; *Wilcox* v. *Jackson*, 13 Pet. 498; *Doolan* v. *Carr*, 125 U. S. 618; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273; *Grisar* v. *McDowell*, 6 Wall. 363.

IV. That the title to Mission Rock and the adjacent island never passed to the State of California and still remains in the United States, is conclusively shown by the fact that, by the act under which the defendant claims, the State of California

never attempted to convey any title to it. The act is entitled, "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor." It attempts to convey, not Mission Rock, but only the submerged land inclosed in a square measuring 800 feet on each side, surrounding Mission Rock. The island or islands included in the square were, by clear implication, excluded from the proposed grant.

However the patent may read, it cannot extend the grant made by the legislature, which is defined by the act. Under the act nothing but the submerged land, which was ascertained by the survey to contain fourteen and thirty-five one hundredths acres, was paid for and conveyed. There is no ambiguity in the act; but if there were, the doubt would be resolved against the grantee. All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. *Dubuque etc. R. R. Co.* v. *Litchfield*, 23 Howard, 66, quoted with approval in *Leavenworth etc. R. R. Co.* v. *United States*, 92 U. S. 733, 740; *Rice* v. *Railroad Co.*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420; *Delaware Railroad Tax Case*, 18 Wall. 206, 225.

V. The right by the grantee of the State to reclaim the submerged lands surrounding Mission Rock being subordinate to that of the United States as the owner of the island, no title as against the United States ever passed by the patent or the grant on which it was based.

VI. The State of California did not have unqualified ownership over the submerged lands of San Francisco Bay. It held these lands in trust for the public. It could only convey them to be used for public purposes, and the only public purposes for which these lands could be used was a purpose which required the ownership and use of Mission Rock. The State, therefore, had no power to convey the lands to be held distinct from Mission Rock and in opposition to the title of the United States to one of its islands. *Shively* v. *Bowlby*, 152 U. S. 1, distinguished; *Stockham* v. *Browning*, 18 N. J. Eq. 390; *Blakslee Mfg. Co.* v. *Blakslee &c. Works*, 129 N. Y. 155.

VII. Before California was admitted into the Union, the United States might have granted Mission Rock, and, along with it, the right to use the submerged land and the navigable waters covering it, which surrounded the island. It might have granted Mission Rock and the submerged land about it for use for the purposes set out in the California act relied on in this case. But the United States preferred to reserve Mission Rock for national uses. When the United States reserved Mission Rock for national uses, it also reserved the right to use the surrounding navigable waters and submerged land, for without them no national use could be made of the island. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 215; *Scranton* v. *Wheeler*, 179 U. S. 141.

VIII. The United States had the absolute and unqualified ownership of Mission Island. The United States might have sold Mission Island to any individual and conveyed an absolute title. What would this absolute title to Mission Island have included? To determine this, the nature and location of the island must be considered. It was situated in the bay of San Francisco, half a mile from the shore, surrounded by navigable waters. It was not susceptible of cultivation. It contained no mineral except the rock of which it was composed. It was valuable only for use for war, naval, or commercial purposes, as a site for a fort, a coaling station, warehouses and docks, etc. To be used for any of these purposes it was necessary that access should be had from the island to the navigable waters surrounding it; and for this purpose that the contiguous submerged land should be filled up and docks and wharves constructed. This right of access was a property right incident to the ownership of the island. *Dutton* v. *Strong*, 1 Black, 1 (1861); *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57; *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387; *Yates* v. *Milwaukee*, 10 Wall. 497; *R. R. Co.* v. *Schurmeir*, 7 Wall. 272; *Lake Superior Land Co.* v. *Emerson*, 38 Minnesota, 406; *Hanford* v. *St. Paul &c. R. R. Co.*, 43 Minnesota, 104; *Union Depot &c.* v. *Brunswick*, 31 Minnesota, 297; *Clement* v. *Burns*, 43 N. H. 609; *Bell* v. *Gough*, 23 N. J. L. 624; *Providence Steam Engine Co.* v. *Providence Steamship Company*, 12 R. I. 348, 363; *New*

Jersey Zinc and Iron Co. v. *Morris Canal Co.*, 44 N. J. Eq. 398; *Goodsell* v. *Lawson*, 42 Maryland, 348, 362; *Nichols* v. *Lewis*, 15 Connecticut, 137; *Scranton* v. *Wheeler*, 179 U. 141.

IX. The improvements made at Mission Rock were of such character that they necessarily became, when made, a part of the island itself, impossible to be separated, and therefore the property of the owner of the island. The right of the United States to recover the island consequently carries with it the right to recover the property attached to and made a part of the island. *Ledyard* v. *Ten Eyck*, 36 Barbour, 102; *Nichols* v. *Lewis*, 15 Connecticut, 137, and cases cited.

X. It is stated in the third finding that in 1850, when California was admitted into the Union, Mission Rock had an area above high water mark of fourteen one hundredths of an acre, and the adjacent rock or island an area of one one hundredth of an acre.

It is now conceded that by depositing many thousand tons of rock on the submerged land under the shallow water around and contiguous to Mission Rock and the adjacent island, the area has been increased to about four acres.

The United States is entitled to recover the entire area claimed by the defendant company, that is, the fourteen and sixty-nine one hundredths acres, because that amount is claimed by the defendant, is held in possession by the defendant, and if necessary to the defendant in order to occupy and use Mission Island, it is equally essential to the United States.

To recover Mission Rock as it once stood would be a victory as barren as the rock itself. *Martin* v. *Waddell*, 16 Peters, 367; *Den* v. *Jersey Co.*, 15 Howard, 426; *Frisbie* v. *McClernin*, 38 California, 568; *Coburn* v. *Ames*, 52 California, 385.

XI. As to the action of the government officer who fixed the harbor or dock lines surrounding Mission Island, that officer acted simply upon the visible facts presented to him. Having no authority to determine questions of title, his action can in nowise be held to estop the government.

XII. The order of the President may be read without reference to the act of July 1, 1864. If, as the Circuit Court of Appeals held, this act had no relation to Mission Rock and the

adjacent islands, "which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city," the order of the President may be read, not as a reservation under that act, but as an appropriation of Mission Island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes. An appropriation, not in the sense of a condemnation for public purposes of private land, but as a designation of the particular public use to which these islands, long set apart from sale, were to be finally and permanently devoted. See *Grisar* v. *McDowell*, 6 Wallace, 363, 381; Opinion Attorney General MacVeagh, 17 Opinions, 160.

If a private corporation had without authority filled in the land and constructed permanent wharves, piers, docks, etc., making them a part of the islands, then the reservation operated as an appropriation of these additions to the realty, for reasons before stated.

If there are any equitable claims to compensation on the part of the defendant, growing out of the cost of the improvements made, these may safely be left to the consideration of Congress.

Mr. Charles Page, with whom *Mr. Edward J. McCutchen* and *Mr. Samuel Knight* were on the brief, for defendants in error.

I. The submerged or tide lands became the property of the State on its admission. This right of property included the right to dispose of the land in its discretion, subject only to the right of control by the national government, if such disposition should interfere with the primary use of the waters over them as a means of commerce. *Pollard's Lessee* v. *Hagan*, 3 Howard, 221; *Shively* v. *Bowlby*, 152 U. S. 1; *Illinois Central Railroad* v. *Illinois*, 146 U. S. 434; *Fort Leavenworth Co.* v. *Lowe*, 114 U. S. 526; *Martin* v. *Waddell*, 16 Peters, 414; *San Francisco* v. *Le Roy*, 138 U. S. 671; *Knight* v. *United States Land Association*, 142 U. S. 186; *Weber* v. *Harbor Commissioners*, 18 Wallace, 65; *Lowndes* v. *Huntington*, 153 U. S. 1. The *Illinois* case further holds that the fact that there is no tide land in

the Great Lakes, does not affect the right of the State. That right is the right to the soil under its navigable waters, 146 U. S. 436. See also *Morris* v. *United States*, 174 U. S. 236; *Mann* v. *Tacoma*, 153 U. S. 273; *Knight* v. *United States Assn.*, 142 U. S. 183; *Hardin* v. *Jordan*, 140 U. S. 381; *Packer* v. *Bird*, 137 U. S. 382; *Co. of St. Clair* v. *Lovingston*, 23 Wall. 64–68; *Barney* v. *Keokuk*, 94 U. S. 336–338; *Gilman* v. *Philadelphia*, 3 Wall. 726; *Mumford* v. *Wardwell*, 6 Wall. 436; *Smith* v. *Maryland*, 18 How. 74; *Goodtitle* v. *Kibbe*, 9 How. 471; *Pacific Gas Co.* v. *Ellert*, 64 Fed. Rep. 434; *Oakland Water Front Case*, 118 California, 182. The claim of ownership in such lands is recognized by the statute of the State in the Civil Code, sec. 670.

The right of the State to its navigable waters includes the right to the fish in them and the use of the beds for the planting of oysters to the exclusion of the citizens of other States. *Macready* v. *Virginia*, 94 U. S. 391; *Smith* v. *Maryland*, 18 How. 74; *Trustees* v. *Lowndes*, 40 Fed. Rep. 630.

The United States may appropriate tide lands though sold by the State, if the necessities of commerce shall require them, but if they have been improved they can be taken only upon due compensation made. *Scranton* v. *Wheeler*, 57 Fed. Rep. 812; *Monongahela* v. *United States*, 148 U. S. 312; *Assante* v. *Charleston Bridge Co.*, 41 Fed. Rep. 365; *Rhea* v. *Newport*, 50 Fed. Rep. 16; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1; *Mobile* v. *Kimball*, 102 U. S. 699.

The lands covered by tidewaters were the property of the State, and the State's title, conveyed to Tichenor, and thereafter conveyed to the Mission Rock Company, vested in the latter absolute dominion therein, subject only to such regulations of the United States with reference to the keeping open of navigable channels as its officers might make. These have been made and complied with.

If the title to the submerged lands vested in the defendant in error and its predecessor, they had the right to improve them by filling in, and the area thus made available by being brought above the water level, belongs to the grantee of the State re-

gardless of the ownership by the United States of lands adjoining such submerged lands, if there be such ownership.

II. "Mission Rock" and the adjacent rocks, caps above the water's surface, were and are parts of the tidal lands, within the meaning of the constitutional principle which gives to each of the sovereign States its navigable waters and the soils under them. *Pollard* v. *Hagan*, 3 How. 230; *Shively* v. *Bowlby*, 152 U. S. 1.

III. The admission of the State on an equal footing with the original States gave to it all property above and below high water, not already given into private ownership or not reserved by the United States in the act of admission. The reservation in that act was of "public lands." These rocks were not "public lands." *Nichols* v. *City of Boston*, 98 Massachusetts, 42; *Shively* v. *Bowlby*, 152 U. S. 1; *People* v. *Godfrey*, 17 Johns. 230; *Fort Leavenworth* v. *Lowe*, 114 U. S. 538; *Pollard's Lessee* v. *Hagan*, 3 How. 223; *Mann* v. *Tacoma Co.*, 153 U. S. 273; *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Leavenworth etc. Railroad* v. *United States*, 92 U. S. 733; *Doolan* v. *Carr*, 125 U. S. 618; *Morris* v. *United States*, 174 U. S. 237; *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387.

If the foregoing cases establish the rule that no settlement could lawfully be made on Mission Rock under the preëmption or homestead acts, it is clear that the rock is not "public land." *State* v. *Pacific Guano Co.*, 22 S. C. 50; *Allegheny* v. *Read*, 24 Pa. St. 39.

IV. The act of 1864 did not relinquish any claim of the United States to tidal lands or to rocks in the bay. The act referred to lands on the mainland, hence the President's reservation of "Mission Rock" was nugatory.

V. Assuming that "Mission Rock" was included in the meaning of the act, then the title passed to the city of San Francisco. It has not since been revested in the United States, so that the latter can maintain ejectment for the rock.

Ejectment cannot possibly lie to recover lands, the title to which has been conveyed by the plaintiff subject to an exception which is undefined in the grant. The exception was void

for uncertainty. *Brown* v. *Allen*, 43 Maine, 590; *Mooney* v. *Cooledge*, 30 Arkansas, 640; *Darling* v. *Crowell*, 6 N. H. 421; *Andrews* v. *Todd*, 50 N. H. 565; *Waugh* v. *Richardson*, 30 N. C. 470; *S. C.*, 8 Iredell, 470; *Benn* v. *Hatcher*, 81 Virginia, 25; *Butcher* v. *Creel's Heirs*, 9 Gratt. 201; *Shoenberger* v. *Lyon*, 7 W. & S. 184; *Stambaugh* v. *Hollabaugh*, 10 S. & R. 357.

We have not entered into a discussion of littoral rights or those of accretion. These are clearly inapplicable, whatever the law may be, *first*, because the defendant in error is the undoubted owner of the lands surrounding the rocks upon which its predecessor created the area of land now above tidewater, which area is termed "accretions" by the government's counsel; *second*, because the President has not set apart the "accretions" by his order, but only the land containing fourteen one hundredths of an acre known as "Mission Island" and the "small island northeast thereof," which contains one one hundredth of an acre.

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

"It will be observed," as was said by the Circuit Court of Appeals, "that the judgment of the Circuit Court was not limited to the two rocks or islands embraced in the executive order of January 13, 1899, the one covering fourteen one hundredths and the other one one hundredth of an acre, but awarded the government the entire tract of fourteen and sixty-nine one hundredths acres, including the warehouses and other improvements constructed by the defendant and its predecessors in interest." The Circuit Court of Appeals confined the recovery of the plaintiff to the rocks proper and awarded the submerged lands to the defendant. The controversy then is, which party has the title to the latter. The defendant in error is the successor of the rights and title of the California Dry Dock Company, that company being grantee of Henry B. Tichenor, who received the patent for the lands on the 11th of July, 1872, from the State of California, in pursuance of and in conformity with an act of the legislature of the State, entitled "An act

to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor." Stat. California, 1869–70, p. 801.

Had the State the title to convey? The plaintiff in error, in effect, contests this, and asserts besides a right to the submerged land as an easement appurtenant to the islands.

The title and dominion which a State acquires to lands under tidewaters by virtue of her sovereignty received elaborate consideration, exposition and illustration in the case of *Shively* v. *Bowlby*, 152 U. S. 1–58. Prior cases are there collected and quoted, among others, *Weber* v. *Commissioners*, 18 Wall. 57, 65. From the latter as follows (and the case concerned tide lands in California): "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." And Mr. Justice Gray said, delivering the opinion of the court in *Shively* v. *Bowlby*: "Each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

This right is an attribute of the sovereignty of the State, and it follows that in the exercise of the right, as said by Mr. Justice Gray, the State may "dispose of its tide lands free from any easement of the upland proprietor." The facts of the case emphasized its doctrine. Shively was the owner of

the upland. Bowlby was the grantee of the State of Oregon of the tide lands in front of Shively's property. The grant was sustained. The sovereignty of California and the rights and powers dependent upon it are as complete as those of other States. How has California chosen to exercise them? In other words, what is the law of California as to the title and rights of riparian or littoral proprietors in the soil below high water mark? Upon the answer to these question the present litigation must be determined. The title papers of the defendant contain an act of the legislature of the State conveying the lands in controversy in private ownership, and the history of the State shows that the act was in accordance with the policy and practice of the State.

The legislature, commencing at the first session after the admission of the State into the Union, made grants of the tide lands to municipalities under conditions which contemplated their being conveyed to and held in private ownership. Among these was the act of March 26, 1851, known as the "Beach and Water Lot Act." It was entitled "An act to provide for the disposition of certain property of the State of California." Section 1 provided that "all the lots of land situated within the following boundaries according to the survey of the city of San Francisco, and the map or plat of the same now on record in the office of the recorder of the county of San Francisco, are known and designated in this act as the San Francisco Beach and Water Lots; that is to say, beginning at the point," etc. Then follows a description by streets, which includes a portion of the bay. Section 2 grants the use and occupation of the land for ninety-nine years and confirms grants of lands sold by authority of the ayuntamiento, or town or city council, or by any alcalde of said town or city; and section 4 makes the boundary line described in the first section a permanent water front of the city. These acts came up for consideration, and the character of the title conveyed was defined in *Smith* v. *Morse*, 2 California, 524; *Eldridge* v. *Cowell*, 4 California, 80, 87; *Chapin* v. *Bourne*, 8 California, 294; *Hyman* v. *Read*, 13 California, 445; *Holladay* v. *Frisbie*, 15 California, 630, 635;

Wheeler v. *Miller*, 16 California, 125; *City and County of San Francisco* v. *Straut*, 84 California, 124.

These cases all expressed under varying facts the validity of the title conveyed by the acts of the legislature. They are reviewed in *Pacific Gas Imp. Co.* v. *Ellert*, 64 Fed. Rep. 421.

In *Taylor* v. *Underhill*, 40 California, 473, Mr. Justice Temple said, speaking of lands below high water mark: "The State can probably sell the land and authorize the purchaser to extend the water front so as to enable him to build upon this land. . . ."

The decisions cover a period of many years and have become a rule of property and the foundation of many titles. As said by Circuit Judge Ross, delivering the opinion of the Circuit Court of Appeals: "A large and valuable part of the city of San Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of and subsequent to the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by many hundred grantors under the city and State, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuilding of a great city upon the bay, and with the encouragement and consent of the general government."

There is nothing inconsistent with these views in *Shirley* v. *Bishop*, 67 California, 545; *People* v. *Gold Run Ditch and Mining Co.*, 66 California, 138, 151; or in *Heckman* v. *Swett*, 99 California, 303. In *Shirley* v. *Bishop* there was no question of riparian rights. The defendants attempted, under a franchise from the city of Benicia, to erect a wharf within three feet of the plaintiff's wharf, and parallel to it for sixty feet in the navigable waters of the straits of Carquinez, and beyond the water front, established by an act of the legislature of the State. The building of the wharf was restrained. The other two cases expressed the general doctrine that the title of the State to the lands covered by navigable waters is held in trust for the public. That doctrine is declared in all of the cases. It has a conspicuous illustration in the *Lake Front Case*, (*Illinois Central Railroad* v. *Illinois*,) 146 U. S. 387, 463. The doctrine and its limitations

are expressed in *Heckman* v. *Swett*, 99 California, 309, and in *Shively* v. *Bowlby*. The court said in *Heckman* v. *Swett*: "Navigable streams and the shores to ordinary high water mark are held by the State in trust for the public; but qualified rights therein may be granted, so far as they are not inconsistent with, or are in aid of the principal use, viz., for the purposes of navigation." In other words, the rights granted must be in aid of commerce; and it is recognized, as we have seen, in judicial decisions and established by practical examples that the conveyance by the State of its title to tide lands to be held in private ownership free from any easement of the upland proprietor, is in aid of commerce, and therefore in strict performance of the State's trust. See, in addition to the other cases, *Oakland* v. *Oakland Water Front Co.*, 118 California, 160.

2. A claim was made in the Circuit Court of Appeals by the plaintiff in error under section 5 of the act of Congress of July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California." 13 Stat. 333. By that section the title of the United States to the lands within the corporate limits of the city of San Francisco was relinquished and granted to the city "for the uses and purposes" specified in a certain ordinance of the city called the Van Ness ordinance, which ordinance had been ratified by the legislature of the State. Answering and disposing of the contention of the plaintiff in error, the Circuit Court of Appeals said: "Those uses and purposes . . . had no relation whatever to the rocks or islands here in controversy, which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city." This is not contested here, but it is urged that "the order of President McKinley may be read, not as a reservation under that act, but as an appropriation of Mission Island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes." There are two answers to the contention. The order of the President explicitly designates the islands proper, and besides limits the areas appropriated to "fourteen one hundredths of an acre and one one hundredth of an acre respectively." At the time the order

was made the land in controversy had been reclaimed by the California Dry Dock Company, and upon it were "extensive warehouses," which had been built by that company, "and wharves erected for the accommodation of shipping." The property was so valuable that the plaintiff in error regarded itself damaged by its withholding in the sum of $250,000, and the rental thereof was alleged to be $5000 per annum. It is not conceivable that the President, by his order, intended to appropriate so valuable a property without explicit declaration, or to leave the appropriation to result as "appurtenant" to the rocks.

Judgment affirmed.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION *v.* DENSON.

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

No. 206. Submitted March 12, 1903.—Decided April 27, 1903.

The highest court of Alabama has held that under the constitutional and statutory provisions of that State any act in the exercise of its corporate functions is forbidden to a foreign corporation which has not complied with the constitution and the statute in regard to filing instrument designating agent and place of business, and that contracts resulting from such acts are illegal and cannot be enforced in the courts.

Held, that this applied to a building and loan association of Tennessee making a loan in Tennessee secured by certain shares of its own stock and also by mortgage on certain real estate in Alabama, and that although the association had complied with certain provisions of the law, the fact that it had not designated an agent as required by the constitution and statutes was a bar to the foreclosure of the mortgage in the courts of Alabama.

SUIT to foreclose a mortgage given by the respondents to the petitioner to secure a note for the sum of $5000, given as evidence of a loan made by petitioner to respondents. The petitioner is a building and loan association, and a corporation of the State of Tennessee; the respondents are citizens of Ala-

bama. One of the defences of respondents is that the transactions were illegal because petitioner had not complied with the laws of Alabama in regard to foreign corporations doing business in the State. This is the only defence with which we are concerned. The Circuit Court rendered a decree foreclosing the mortgage, which was reversed by the Circuit Court of Appeals, and the bill was directed to be dismissed. 107 Fed. Rep. 777. The case was then brought here by certiorari.

The constitution of the State of Alabama provides as follows:

"4. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State." Constitution Alabama, Art. XIV.

The material parts of the Code of the State passed in execution of the constitution are as follows:

"1316. Foreign corporation must file instrument of writing designating agent and place of business in this State.—Every corporation not organized under the laws of this State shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." Code Alabama, 1896.

"1318. Unlawful for foreign corporation to transact business in this State before declaration filed; penalty.—It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections

shall, for each offence, forfeit and pay to the State the sum of one thousand dollars.

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.—It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offence, forfeit and pay to the State the sum of five hundred dollars." Code Alabama, 1896.

There was no point made on the by-laws of the association, and by agreement they were omitted from the record on appeal to the Circuit Court of Appeals and are also omitted here. And it was also stipulated "that the complainant is a corporation chartered and organized under and in accordance with the public statutes of the State of Tennessee, authorizing the creation of corporations for carrying on the business of building and loan associations; that its principal office and place of business is, and was at the time the loan involved in this case was made, and has ever since continuously been, in the city of Chattanooga, State of Tennessee; and that the loan to defendant, William H. Denson, involved in this case was made in accordance with the power and authority conferred on complainant by its charter, and in the manner prescribed by its by-laws."

The note executed by respondents was as follows:

"$5000.00. CHATTANOOGA, TENNESSEE, *June* 10, 1895.

"On or before nine years from date I promise to pay the Chattanooga National Building and Loan Association, at its home office, Chattanooga, Tennessee, five thousand dollars with interest on the sum of twenty-five hundred dollars, at the rate of six per cent per annum, payable monthly.

* * * * * * * *

"It is further understood that this note is made with reference to and under the laws of the State of Tennessee, and if paid before seven years from this date such rebate from the premium included herein will be allowed as the board of directors of said association shall deem equitable."

The omitted part recited that the note was for money borrowed on fifty shares of stock, and expressed certain conditions of the non-payment of the note when due, or the non-payment of premiums or assessments; and also expressed the right of petitioner in case of such non-payments to collect the debt though not due and to foreclose the mortgage. The mortgage covered lots in the city of Gadsden, Elowah County, State of Alabama. It repeated the note and its conditions and contained others. The facts connected with the execution of the note and mortgage are stated by the Circuit Court of Appeals as follows:

"The complainant below, the Chattanooga National Building and Loan Association, is, and was at the time the loan to Mr. Denson was made, a corporation under the laws of the State of Tennessee, with its principal office in the city of Chattanooga, in that State. Among its corporate functions was the authorization, and, so far as we are advised, its sole business was, to loan its funds to its stockholders on real estate security. It had no local office or agent in Alabama, but it had a traveling agent, whose business it was to solicit subscriptions to its stock, and to obtain applications for loans, and submit the same to the home office of the association at Chattanooga.

"On the 25th of April, 1895, appellant Denson, who was a resident of Gadsden, Alabama, on the suggestion and at the solicitation of the agent, signed at that place a written application for fifty shares of stock in the association, complainant below, appellee in this court. This application was forwarded by the agent to whom Mr. Denson delivered it to the home office, where the stock was issued, and returned to the agent, to be by him delivered to Mr. Denson. On the same day on which he applied for his stock, Mr. Denson signed a written application to the association for a loan of $2500 on fifty shares of stock he had applied for. He offered a premium of $2500 for the loan, and proposed to secure the loan and premium, if his application should be granted, by a mortgage on certain real estate in Gadsden, Alabama, which he represented to be of the value in all of about $9000. This application was accompanied by the report of two parties, selected by the associa-

tion, fixing the value of the property which Denson proposed to mortgage at $8000, and the certificate of an attorney, also selected by the association, with reference to the condition of the title. This application was forwarded by the agent to the home office in Chattanooga, where it was submitted, along with other applications, to the board of directors, by whom the application was granted, and the loan directed to be made in accordance with the charter and by-laws of the association. Thereupon a note and deed of trust were prepared at the home office, and were sent to the agent by whom Mr. Denson's application had been taken and forwarded; and at the same time the check of the association on the Chattanooga National Bank of Chattanooga, Tennessee, in favor of W. H. Denson, for the sum of $2367.50, was sent to one D. P. Goodhue, of Gadsden, with instructions to him to deliver said check to Mr. Denson when he should have executed and delivered the note and deed of trust. Upon the execution of the note and deed of trust by Denson and wife, and the delivery of the same to the agent, all at Gadsden, Alabama, the agent delivered to Denson the check for $2367.50, directing him to present the same to the First National Bank of Gadsden, which would pay the same. The check was presented to the said bank, and the face thereof paid over to Denson, as the cashier said, 'under an understanding with the said Building and Loan Association, and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation.'"

And the following testimony of the secretary of the association was quoted:

"At the time the loan to defendant Denson was made, complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the State of Alabama, and had paid a tax or license fee required under the laws of the State of Alabama for foreign corporations proposing to do business in that State; and complainant's officers supposed and understood that the payment of this fee or tax was the only condition with which it was necessary for them to comply in order to be entitled to do business in that State. Subsequently, however, and some months after the loan to de-

fendant Denson was made, complainant was informed by an attorney in the State of Alabama that the Alabama statutes required foreign corporations doing business in Alabama to designate a local agent on whom process against the association could be served, and also a local place of business in that State. Thereupon complainant promptly designated such local agent and place of business, and continued up to the second of October, 1899, to pay the license tax or fee required of non-resident corporations doing business in Alabama, and to keep a local agent and place of business in that State."

Mr. Robert Pritchard and *Mr. T. B. Sizer* for petitioner.

Mr. Oscar W. Underwood and *Mr. William H. Denson* for respondents.

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

The question presented by the case is, did the loan made by petitioner and the taking for security the note and mortgage under the circumstances presented by the record constitute a doing of business in the State, within the meaning of the constitution and laws of the State?

It was said by the Supreme Court of Alabama, *Beard* v. *The Union & American Publishing Company*, 71 Alabama, 60, that to constitute a doing of business within the State "there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created." It was held, however, that receiving a subscription to a newspaper, or collecting the money therefor was not doing business in the State "within the principle." In a subsequent case, *Dudley* v. *Collier & Pinckard*, 87 Alabama, 431, the court announced that "a loan or borrowing of money by or from" a foreign corporation is a doing of business within the State, and "is an unlawful act, subjecting both the agents and company to a heavy penalty." The provisions of the statute prescribing penalties were considered, and their effect was declared to be not only to punish offenders against the statute but to render

their contracts void. Many cases were cited in support of the conclusion as a proper deduction from the imposition of the penalties. And the principle was applied to make illegal a contract with an agent for services rendered in procuring a loan for the use of the corporation.

In *Farrior* v. *New England Mortgage Security Co.*, 88 Alabama, 275, it was said that the constitution prohibited the making of a single contract or the doing of a single act of business by a foreign corporation in the exercise of a corporate function, as well as the engaging in or carrying on its business generally. To the same effect are *Mullens* v. *American Freehold Land Mortgage Co.*, 88 Alabama, 280; *Ginn* v. *New England Mortgage Security Co.*, 92 Alabama, 135; *Sullivan* v. *Sullivan Timber Co.*, 103 Alabama, 371.

These cases constitute an interpretation of the constitutional and statutory provisions, and clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the constitution and statute, and that the contracts hence resulting are illegal and cannot be enforced in the courts.

The petitioner is a building and loan association. Its corporate purpose is to lend money to its stockholders. The respondent Denson was one of its stockholders, and manifestly, regarding the essence of the transactions between them, they constituted a doing of business within the State of Alabama. But, it is insisted, that on account of the form and terms of the instruments and by operation of law the loans must be regarded as having been made in Tennessee. It is said: "The note and mortgage were drawn in Tennessee, and by their express terms were payable there. The note is dated on its face at Chattanooga, Tennessee, and expressly stipulates that it 'is made with reference to and under the laws of Tennessee.'" And further, that the petitioner's part of all the transactions was performed in the State of Tennessee, "and only those acts which the borrower was required to do *as a condition precedent* to the loan of the money to him were performed in Alabama." It is hence deduced that the business done must be regarded as having been done in Tennessee.

Counsel has discussed at some length the situs of contracts and by the law of what place their obligation is determined. We think, however, that the discussion is not relevant. It withdraws our consideration from the constitution and statute of Alabama; and, it is manifest, the contention based upon it, if yielded to, would defeat their purpose. The prohibition is directed to the doing of any business in the State in the exercise of corporate functions; and there can be no doubt that petitioner considered that it was exercising such functions in the State. Its secretary testified that "at the time the loan to defendant Denson was made complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the State of Alabama, and had paid a tax or license fee required under the laws of the State of Alabama for foreign corporations proposing to do business in that State, and complainant's officers supposed and understood that the payment of this fee or tax was the only condition with which it was necessary for them to comply in order to be entitled to do business in that State." The application of Denson was presumably solicited as other applications were, and if what was done in pursuance of it did not constitute doing business in the State, the effect would be, as expressed by the Circuit Court of Appeals, that petitioner "and other foreign associations engaged in the same business of loaning money on real security, may safely flood the State of Alabama with soliciting agents, make all the negotiations for loans, take real estate securities therefor, and fully transact all other business pertaining to their corporate functions as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the State, nor pay any license tax or fee, as required of non-resident corporations doing business therein."

The case of *Fritts* v. *Palmer*, 132 U. S. 282, does not relieve from the effect of the Alabama decisions and from the necessity of following them. The action was ejectment to recover certain real property in Colorado. The title of one of the parties was derived through the Comstock Mining Company, a Missouri corporation, which, before its purchase of the property, had been en-

gaged in the prosecution of its mining business in the State, but it had not complied with the constitution and statutes of the State prescribing the terms upon which foreign corporations might do business in the State. The constitutional provision was substantially like that of Alabama, but the statutes were materially different, and, besides, there had been no decision of the Supreme Court of Colorado interpreting the statutes. The only penalty expressed in the statutes was the imposition of personal liability upon the officers, agents and stockholders of the corporation for any and all contracts made within the State during the time the corporation was in default. It was held that the fair implication was that "in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes." And it was said that it was not for the judiciary, at the instance of or for the benefit of private parties, to forfeit property which had been conveyed to the corporation and by it to others. *Fritts* v. *Palmer*, therefore, was but the interpretation of a particular statute, and there is not a word in it which denies or questions the power of a State to make void the contracts of a foreign corporation which is doing business in the State in violation of its laws.

It is urged by petitioner that it thought it had complied with the law of Alabama, and it was not an intentional offender against it, and, therefore, should not be "repelled from court." But the latter consequence has been decided to result from noncompliance with the statute, and we cannot grant an exemption from it. The statute makes no distinction between an inadvertent and a conscious violation of its provisions, and a familiar legal maxim precludes a defence based on that distinction. Nor can the payment of the license fee be urged as a justification for omitting to comply with the statute. Such payment was one condition to be performed by a foreign corporation; the designation of a known place of business and an authorized agent was another, and was of so much importance as to be enjoined by the constitution of the State.

It is contended that this case cannot be distinguished from *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227, and must be ruled by that case.

We think there is a marked distinction. In the *Bedford* case the contract was legally entered into and was entitled to be enforced. In the case at bar the contract was made in violation of the statute of Alabama, and it cannot, therefore, claim the protection given to the contract in the other case.

Decree affirmed.

MR. JUSTICE HARLAN dissents.

GORDON *v.* RANDLE.

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

No. 229. Argued April 7, 1903.—Decided April 27, 1903.

Under the rules of the Supreme Court of the District of Columbia, the January terms begin on the first Tuesday of January. The effect of January 1 being a holiday, when it falls on Tuesday, is not to prolong an October term which ends on December 31, and postpone the commencement of the January term until January 8, but only to postpone the exercise by the court of its duties until the following day.

It is too late, therefore, after January 1, to make a motion to prolong the October term, which motion under the rules must be made before the end of that term.

The rule prolonging the term is to be exercised when invoked; there is no duty imposed upon the court to prolong the term of its own motion.

THE case is stated in the opinion of the court.

Mr. S. Herbert Giesy for plaintiff in error. *Mr. Holmes Conrad* was on the brief.

Mr. J. J. Darlington for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The purpose of this writ is to review an order of the Court of Appeals of the District of Columbia, made March 12, 1901, denying a petition for mandamus to require Andrew C. Bradley, at that time an Associate Justice of the Supreme Court of the District of Columbia, to settle a bill of exceptions.

The plaintiff in error brought suit against defendant in error, in the Supreme Court of the District of Columbia, on the 20th day of April, 1897, to recover the sum of $5900, on several causes of action. They need not be described nor the defences which were interposed to them. It is enough to say that upon the issues made a verdict resulted for defendant in error, on the 16th of November, 1900.

On December 14, 1900, a motion for new trial was made by plaintiff and denied by the court, and judgment entered on the verdict. The plaintiff prayed for and was allowed an appeal to the Court of Appeals of the District. The case was tried and judgment entered at October term, 1900, which expired December 31, 1900, unless it had been continued, and this resulted, it is contended, from the following proceedings: On the 7th day of January, 1901, the plaintiff through his attorney deposited with the clerk fifty dollars in lieu of a bond on appeal, and moved the court that October term be prolonged by adjournment in order to prepare a bill of exceptions. The motion was overruled on the ground that October term had ended on the 31st of December, 1900. Notice was given by the attorney for the plaintiff that he would present the "bill of exceptions to the court for settlement before Justice Bradley in the Circuit Court number 2." The bill was presented in pursuance of the notice, but Justice Bradley declined to settle the bill on the ground that October term had not been prolonged. The petition now under review was then presented to the Court of Appeals praying "that the writ of mandamus may issue, requiring Andrew C. Bradley, an Associate Justice of the Supreme Court of the District of Columbia, to settle the bill of exceptions in this cause." The petition was dismissed.

The rule of the court in regard to bills of exceptions is as follows:

"SEC. 2. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term but not concluded until after the expiration of the term,

in which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions."

The case presents some anomalies. The mandamus was prayed against Justice Bradley for refusing to act officially, but the citation in error was directed to Arthur E. Randle, and he alone is defendant in error here. He was a party in the original cause, but not a party in the proceedings for mandamus. Making him a party here is attempted to be justified by the death of Justice Bradley and the action of the Court of Appeals in not entertaining the petition for mandamus. The immediate answer would seem to be that mandamus is itself an action, and can only, like other actions, be prosecuted against the parties to it, and that one of two effects resulted from the death of Justice Bradley, either the action abated or could only be continued against the person who succeeded to his office and duty.

But passing this, we think the main contention of plaintiff in error is untenable. The argument of plaintiff is that the purpose of the rule was to allow thirty-eight days for the settlement of bills of exceptions, and to afford time to do so the rule provided that the term might be prolonged by adjournment, and the duty of prolonging the term was imposed on the court. We do not so interpret the rule. It provided the means for parties to secure the necessary time to present bills of exceptions. The court was not required to anticipate the intention of parties. Its duty under the rule, like its other duties, was to be exercised when invoked.

But it is also insisted that a motion to prolong the term was made in time. The argument to support this is that October term did not end on the 31st of December, 1900, but continued until the 7th of January, 1901, because by Rule 3 of the Supreme Court of the District of Columbia the January terms of the Circuit Court commence on the first Tuesdays in January, and that the first Tuesday of January, 1901, fell on the first of January, which, being a holiday, and therefore, as it is insisted, a *dies non*, the term did not commence until the following Tuesday, the 8th of January. We cannot concur in the contention. The term commenced on the first of January

and the only effect of the holiday was to deprive the court of the power of doing any business and to discharge those who had been required to attend until the succeeding day, when the general duties and powers of the court could be legally exercised. It follows, therefore, that there was no error in refusing to settle the bill of exceptions, and the petition for mandamus was properly denied.

Order affirmed.

PULLMAN COMPANY *v.* ADAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 138. Argued and submitted December 19, 1902.—Decided March 2, 1903.

By sections 3317, 3387 of the Mississippi Code of 1892, a tax is imposed "on each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad track [in the State] over which the company runs its cars." Section 195 of the state constitution declares sleeping car companies to be common carriers. On the assumption that such companies would be held free to abandon the business taxed if they see fit, the tax is not void as an interference with commerce between the States. *Crutcher* v. *Kentucky*, 141 U. S. 47, distinguished; *Osborne* v. *Florida*, 164 U. S. 650, followed.

THE case is stated in the opinion of the court.

Argued by *Mr. William Burry* for plaintiff in error. *Mr. J. Runnells* was on the brief.

Submitted by *Mr. Marcellus Green*, *Mr. W. R. Harper* and *Mr. W. H. Potter* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for taxes brought by the revenue agent of the State of Mississippi against the Pullman Company. The defendant in due form raised the objection that the tax law

was void as an interference with commerce between the States. Judgment was given for the plaintiff in the local state court, and the judgment was affirmed by the Supreme Court of the State. 78 Mississippi, 814. The case then was brought here by writ of error.

The tax in question was imposed by the following sections of the Mississippi Code of 1892: "§ 3317. A tax on privileges is levied as follows, to wit: . . . § 3387. Sleeping car companies: On each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars." We assume that the last words mean what afterwards was expressed by an amendment, "over which the company runs its cars in this State."

The Pullman Company is an Illinois corporation. Its sleeping cars were carried by various railroad companies, and all of them were carried into the State from another State, or out of the State to another State, or both. But such cars in their passage also carried passengers from point to point within the State, and a specific fare was collected by the servants of the Pullman Company. The company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its commerce between the States, while at the same time, it argued, it was compelled to assume that burden by § 195 of the state constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above mentioned § 3387 unconstitutional are the errors assigned.

If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it

would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne* v. *Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

As the validity of the tax is thus bound up with the effect of the section of the state constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrased in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid. But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the Supreme Court was correct for the reason sufficiently stated above.

Judgment affirmed.

NATIONAL BANK AND LOAN COMPANY *v.* PETRIE.

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

No. 166. Argued and submitted February 24, 1903.—Decided March 9, 1903.

Where a national bank has sold certain bonds and the vendee has obtained a judgment for the purchase money in a state court on the ground that the sale was induced by false representations of the president of the bank, the judgment will not be reversed on the ground that the sale of the bonds was without the authority of the bank and was illegal and void. The fraud is prior to the sale and authorizes a rescission; nor can the bank claim that the fraud was perpetrated by an agent who did not represent it for illegal purposes. The bank must adopt the whole transaction or no part of it.

THE case is stated in the opinion of the court.

Submitted by *Mr. Henry Purcell* and *Mr. John Lansing* for plaintiff in error.

Argued by *Mr. Elon R. Brown* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover money paid to the plaintiff in error for certain bonds. One defence set up in the answer was that the bank was a national bank, and that the sale of the bonds was without the authority of the bank, and was illegal and void. Judgment went against the bank, it was affirmed by the appellate division of the Supreme Court, 46 App. Div. 634, and by the Court of Appeals, 167 N. Y. 589, and the case now comes here by writ of error. The ground of the action is that the sale was induced by false representations of the president of the bank. We do not state these particularly, because the findings and rulings of the state court with regard to them are not open. We have to deal with no question except the defence attempted under the United States statute, and therefore need not inquire whether they contained a stronger infusion

of fraud than is allowed to vendors in the way of praising their wares.

As we are of opinion that the defendant in error is entitled to keep his judgment, it does not matter so much as otherwise it would whether the result is reached by a dismissal of the writ, on the intimation of *Walworth* v. *Kneeland*, 15 How. 348, 353; see *Conde* v. *York*, 168 U. S. 642, 649, or by an affirmance of the judgment. We shall assume that the defence under the statute was such a claim of immunity as to entitle the plaintiff in error to come here. *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 72; *McCormick* v. *Market Bank*, 165 U. S. 538, 546. On that assumption, however, we do not perceive how the defence is made out on the record. The complaint, to be sure alleges that the bank was acting unlawfully in selling the bond, but it does not appear that Petrie knew the fact, and it would be a strong thing to charge him with notice or a duty to make inquiries as to how the bank was conducting its business, or to make the validity of the sale depend upon the fact alone, irrespective of the purchaser's knowledge. See *Miners' Ditch Co.* v. *Zellerbach*, 37 California, 543, 578, 579; *New York & New Haven Railroad* v. *Schuyler*, 34 N. Y. 30, 73; *Madison & Indianapolis Railroad* v. *Norwich Saving Society*, 24 Indiana, 457, 462. The sale might have been lawful. It was not necessarily wrong. *First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*, 92 U. S. 122, 128. However, we need not stop at this preliminary difficulty or another suggested by the answer, on which no point was made. The answer alleges that the sale was without the authority or consent of the bank, and was not within the course of its regular business, which looks a good deal like an attempt to deny that there ever was an effective sale and yet to keep the price.

The declaration goes upon a rescission of the contract. It contains ambiguous language, but the allegations of tender of the bond and that the tender still is kept good make the ground sufficiently clear. The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from

withdrawing from the bargain on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone the law might, or might not, leave the parties where it found them. See *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 60, 61; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 150. But a person does not become an outlaw and lose all rights by doing an illegal act. See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong. See *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 151. It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act. But unless this means that there was no sale, as the answer and a part of the argument seem to suggest, in which case, of course, Petrie must have his money back, the answer is that if the bank relies upon the sale it must take it with the burden of the fraud. It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. Such was *First National Bank of Allentown* v. *Hoch*, 89 Penn. St. 324. Here the attempt is to recover outside of it, treating it as set aside. An action for damages caused by fraudulent representations which induced a contract, affirms the contract and relies upon it, *Whiteside* v. *Brawley*, 152 Massachusetts, 133, 134, and therefore may be subject to the same defences as an action brought directly upon the contract. *Weckler* v. *First National Bank of Hagerstown*, 42 Maryland, 581, 595, 597, seems to have been

an action of this character in respect of a sale on commission by the bank. We express no opinion as to an action of that kind. See *Thompson* v. *Saint Nicholas National Bank*, 146 U. S. 240, 251; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made. The record discloses no error reëxaminable here.

Judgment affirmed.

MR. JUSTICE MCKENNA took no part in the consideration and disposition of this case.

NATIONAL BANK AND LOAN COMPANY *v.* CARR.

No. 165. Argued with No. 166 and by the same counsel.

MR. JUSTICE HOLMES: This case is similar in substance, pleading and argument to the foregoing, with the additional fact that the president of the bank acted as the confidential adviser of the defendant in error and did not reveal to her that the bonds belonged to the bank or that he was on both sides of the transaction and interested against her. As soon as she found out that the bank was the seller she repudiated the sale.

Judgment affirmed.

BROWNFIELD *v.* SOUTH CAROLINA.

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

No. 172. Argued February 25, 1903.—Decided March 9, 1903.

Where a negro moves to quash an indictment on the ground that he is denied the equal protection of the laws and his civil rights under the Constitution and the laws of the United States by the exclusion of negroes from the grand jury, but the record does not show that he proved or offered to prove the truth of the allegations on which the motion was based, this court cannot interfere with the judgment.

THE case is stated in the opinion of the court.

Mr. J. L. Mitchell and *Mr. W. J. Whipper* for plaintiff in error. *Mr. E. M. Hewlett* was with them on the brief.

Mr. John S. Wilson and *Mr. W. H. Townsend* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here by writ of error to the Supreme Court of South Carolina. The plaintiff in error has been convicted of murder, and the error alleged is that the grand jury was composed wholly of white persons, and that all negroes, although constituting four fifths of the population and of the registered voters of the county, were excluded on account of their race and color. The plaintiff in error is a negro, and he says that in this way he has been denied the equal protection of the laws and of the civil rights guaranteed to him by the Constitution and laws of the United States. *Carter* v. *Texas*, 177 U. S. 442. The case was taken to the Supreme Court of the State by appeal and the judgment of the trial court was affirmed. 60 S. C. 509.

We have stated the error which is alleged. The trouble with the case is that we are not warranted in assuming that the allegations are true. The record contains an agreed statement called a brief, in which it appears that the defendant below made a motion to quash on the grounds stated, and in which it is said that the defendant offered to introduce testimony to support these grounds. But this agreed statement is "signed with relation to case as settled by judge." It appears that the parties agreed that the judge before whom the case was tried should "make a statement as to his rulings upon the motion to quash the indictment, and also as to the motion to challenge the arrays of grand and petit jurors in the case, and also as to requests to charge, and such statement shall be the agreed statement for the purposes of this appeal." The challenge of the array referred to was upon the same grounds as the motion to quash.

In pursuance of this agreement the judge made a statement of the grounds on which he overruled the motion. "Because the statement of facts set out in the grounds for quashing the same, did not appear from the records or otherwise. . . . In the absence of any showing to the contrary, I was bound to assume that the jury commissioners had done their duty."

The foregoing language is quite inconsistent with there having been an offer to prove the allegations of the motion, as is the further fact that the record discloses no exception to the supposed refusal to hear evidence offered to that end. If these considerations were not enough, we have, in addition, the absence of any suggestion of a refusal to admit evidence in the reasons for appeal to the Supreme Court, and the statement of the Supreme Court that it was not contended at the hearing of the appeal that there was any offer to introduce testimony on the point "other than the offer therein made." The last words refer, we assume, to the concluding words of the motion: "All of which the defendant is ready to verify." Upon the whole record we are compelled to infer that the statement that the defendant offered to introduce evidence was inserted in the so-called brief by his counsel, but was not agreed to except so far as it might be confirmed by the statement of the judge, and that he did not confirm it. We see no ground for the suggestion that this fact was outside the matters submitted to the judge, and therefore must be taken to have been admitted. Evidently that was not the understanding on the part of the State. It is suggested that the allegations of the motion to quash not having been controverted and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does not require a written answer. It appears from the grounds on which the judge decided it, apart from anything else, that the allegations were controverted, and under such circumstances it was necessary for the defendant to make an attempt to introduce evidence. The formal words of the motion were not enough. *Smith* v. *Mississippi*, 162 U. S. 592, 601.

A provisional objection is made to the constitution of South

Carolina, in case it should be held to exclude negroes from the jury. But the ground of the motion was not that negroes were excluded by an invalid constitutional provision, but that they were excluded in the administration of the law, although they were qualified under it to serve. The case involves questions of the gravest character, but we must deal with it according to the record, and the record discloses no wrong.

Judgment affirmed.

MR. JUSTICE MCKENNA took no part in the consideration and disposition of this case.

PARDEE *v.* ALDRIDGE.

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

No. 137. Argued January 19, 20, 1903.—Decided March 16, 1903.

Where a railroad company mortgages its road including all appurtenances and appendages of said railroad, and the property of said company now acquired, or which may be acquired, used for and pertaining to the operation of said railroad, a sale under such mortgage does not include property acquired by the company after the mortgage for the purpose of subdivision and sale; and it is a question for a jury to determine, whether the land so purchased was to be used for and pertaining to the operation of the railroad or not.

A suit to foreclose a mortgage is not a proceeding *in rem* which will bind persons who are not parties thereto, and the fact that the decree covered the property in question does not conclude strangers to the suit.

THE case is stated in the opinion of the court.

Mr. Maxwell Evarts for plaintiffs in error. *Mr. R. S. Lovett* was on the brief.

Mr. W. J. Moroney for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of trespass to try title to land brought by

Aldridge and others, trustees, against Pardee and others, the plaintiffs in error. The only parcels here in controversy are two tracts, known as the Hughes and Slaughter tract and the Mays tract. Both parties claim title under the Texas Trunk Railroad Company. Pardee claims under the foreclosure of a mortgage made by the railroad company and some incidental proceedings. Aldridge claims under a sale outside of the mortgage. The question in the case is whether the mortgage embraced these tracts.

Although it may not be necessary, we will state the title on each side a little more in detail before discussing the questions of law. On March 22, 1880, the Texas Trunk Railroad Company mortgaged its road, "including all appurtenances and appendages of said railroad, and the property of said company now acquired or which may be acquired, in the State of Texas, used for and pertaining to the operation of said railroad." This was to secure bonds. Later in the same year, although the deed was dated earlier, the Hughes and Slaughter tract was conveyed to the railroad. The Mays tract was conveyed the next year. On January 31, 1883, there was a decree of foreclosure on the mortgage in the United States Circuit Court, and there was a sale on the first of the following May. The purchasers organized a new company, under the old charter, but a distinct organization, as permitted by the local law. In 1885 the property of the second company was sold by the sheriff, on execution following a judgment in the state court, and also by the United States marshal, under an order of sale for failure to pay certain sums as provided in the original foreclosure proceedings. The same persons purchased at both sales and organized a third company, still under the old charter. On August 30, 1888, the third company made a mortgage of the railroad. A bill to foreclose this was filed in the United States court on September 4, 1891, a decree of foreclosure was made in 1895, and Pardee, the plaintiff in error, purchased at the sale, for the benefit of himself and C. P. Huntington. Thus it will be seen that the title of the plaintiffs in error depends, as we said, on the question whether the original mortgage embraced the land in suit.

Before the first foreclosure, but after the execution of the mortgage, suits were begun against the first corporation, and in 1887 a judgment was rendered against it in one of them. On this judgment executions were issued and the parcels of land in suit were sold to the trustee for Downs and his associates, the defendants in error. The trustee brought a suit to try title against the trustees and surviving directors of the first company and a receiver of the third company, and got judgment on April 7, 1898. The defendant directors and trustees also executed a deed to him, and he afterwards conveyed to the present trustees for Downs. If the first mortgage embraced the land, Downs got no rights, but except for that question and one other to be mentioned, his title is not in controversy here, and we do not go into it in detail. The trial court gave judgment for Pardee and Huntington as to the tracts in question, but the judgment was reversed by the Court of Civil Appeals, and final judgment was entered in that court in favor of the trustees for Downs. 24 Tex. Civ. App. 254. A writ of error was refused by the Supreme Court of the State. The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. *Dupasseur* v. *Rochereau*, 21 Wall. 130. See *Sweringen* v. *St. Louis*, 185 U. S. 38, 41. As we are of opinion that the judgment of the Court of Appeals was right, it is less important than otherwise it would be to discuss the grounds upon which we think that there is jurisdiction, and we shall proceed at once to the merits of the case.

If the disputed parcels of land came under the mortgage when they were acquired, they did so as "property used for and pertaining to the operation of said railroad." At the trial evidence was taken on the question whether these parcels were used for or did pertain to such operation. The defendants in error disclaimed to the extent of a right of way one hundred feet wide, fifty feet on each side of the center line of the railroad. But there was testimony that the company, when it purchased, intended, after using what was necessary for tracks on the west side, to lay out the rest of the Hughes and Slaughter land in lots and sell them to the employés of the road. So as

to the Mays tract; what was needed was taken for tracks and to get sand, and the rest was to be cut up into lots. Both parcels were returned each year for taxation as "lands and town lots . . . exclusive of right of way and depot grounds," in the inventory of the company. The judge instructed the jury to return findings on two special issues to the following effect: As to the Hughes and Slaughter land, the intention of the company was to put there the main track, part of the sheds, and whatever switches and side tracks should be necessary to the operation of the road, and if they did not occupy all of the land to sell lots on the eastern side to its employés. The land was was not cut up and no lots were sold. The company built its main track on the west side, a Y extending eastwardly across the land to beyond its centre, and a small house, used as a ticket office and car shed. This was the only land the road owned in Dallas when it terminated, and if it had been constructed and operated properly it would have needed as much as twenty-five acres (the size of the tract) for terminal purposes. As to the Mays tract, the intention was as above stated. The main track was built across it on the east, and a spur track was built to reach the sand. It would be necessary to use sand properly to construct and operate the road.

The foregoing findings were merely the result of rulings on the evidence. But the jury found, on other special issues submitted to them, that all but one hundred feet off the west boundary of the Hughes and Slaughter tract was acquired for the above stated purpose of subdivision and sale, that any use of the rest of the land in connection with the operation of the railroad, except the hundred feet, was only of a temporary character, and that there was no such use of the rest of the land except of so much as was occupied by the Y. There was evidence that the company expected to use another tract for terminal purposes, although it never got the deed. The jury further found that no part of the Hughes and Slaughter tract above what was disclaimed was necessary for the construction, equipment or operation of the railroad when the first mortgage was foreclosed. Also, they found that all of the Mays tract was acquired for the purpose of subdivision and sale. As there

was evidence warranting these findings, and as the findings dealt with pure matters of fact, which it was the province of the jury to determine, so far as there was a conflict between them and those which were made under instructions, those which expressed the free judgment of the jury would prevail. We have no concern with the arguments which are urged here in favor of different conclusions. It is enough that there was some evidence to support the free findings of the jury, and that being so, those findings establish the facts, as was held by the Court of Appeals.

On the findings which we have recited the land in dispute was not property used for and pertaining to the operation of said railroad, and the ruling of the Court of Appeals was right. Some point is made of the disclaimer, which is said to have been arbitrary in amount and not based on evidence. But a party may disclaim what he likes, in advance of the evidence, and is not bound to give reasons for his course.

One matter remains to be mentioned. A receiver appointed in the second foreclosure suit brought a bill in equity in the United States court against certain persons who had purchased the land in question on other execution sales. One ground of the bill was that the property was subject to the mortgage, and on July 16, 1895, it was so decreed. It is argued that although the trustees for Downs were not parties to this bill, they in some way were affected by the decree, that the proceeding was *in rem*, and that the decree brought the property into the custody of the court so as to invalidate the sale. *Wiswall* v. *Sampson*, 14 How. 52. But a suit in equity is not a proceeding *in rem* properly so-called. It does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the defendants. Of course, the adjudication in such a suit does not conclude strangers. As to the decree bringing the property into the custody of the court in such sense as to invalidate the sales under which Downs claims, the receiver being a receiver of the mortgaged property only, and there being no representative of the equity of redemption or of Downs's interest

before the court, it is not to be presumed that any act was done inconsistent with outstanding rights as now established, or that the receiver was put in possession of property which was not embraced in the mortgage. The receiver was in possession of the road, and his right to the portion of the land over which the railroad ran is not disputed, but it does not appear that he held the residue under an adverse claim, or at all. Although declaring his right to the residue to be paramount to a third person, the court left all others free to assert their claims. There is nothing to show that the mode in which the trustees for Downs asserted their rights was unlawful or void. Probably nothing was done under the suit in equity beyond the entering of the decree on July 16, 1895. The principal sale took place before that date.

Judgment affirmed.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.

KNOXVILLE WATER COMPANY *v.* KNOXVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 212. Argued March 13, 1903.—Decided March 23, 1903.

The Knoxville Water Company was incorporated to construct waterworks near Knoxville with power to contract with the city and inhabitants for a supply of water and "to charge such price for the same as may be agreed upon between said company and said parties;" the general act under which the company was incorporated provided that it should not interfere with or impair the police or general powers of the municipal authorities, and they should have power by ordinance to regulate the price of water supplied by such company. The company in 1882 contracted for an exclusive privilege for thirty years to construct works, and after fifteen years to convey to the city at a price to be agreed upon or fixed by appraisal, and to "supply private consumers at not exceeding five cents per hundred gallons." Subsequently the city passed an ordinance reducing the price of water to private consumers below that rate. In an action to enforce penalties for overcharging the later rate,

Held, that there was no contract on the part of the city to permit the

charge named therein; and that the charter having been accepted subject to the provision of the general act reserving the power in the municipal authorities to regulate the price of water, the subsequent ordinance was not void either as impairing the obligation of a contract, or as depriving the company of its property without due process of law.

THE case is stated in the opinion of the court.

Mr. Charles T. Cates, Jr., for plaintiff in error. *Mr. Heber J. May* was with him on the brief.

Mr. G. W. Pickle for defendant in error. *Mr. J. W. Culton* was with him on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a complaint for a penalty against the Knoxville Water Company for charging and collecting water rates in excess of the rates fixed by the ordinances of the city of Knoxville. The water company pleaded that the ordinances relied on violated the obligation of contracts between the city and itself, and deprived it of its property and liberty without due process of law, and so was contrary to the Constitution of the United States. The case was tried on appeal before a single judge, who made a special finding of facts, on which the Supreme Court of the State entered a final judgment for the plaintiff. 107 Tennessee, 647. The company then brought the constitutional questions here by writ of error.

The water company was incorporated in Tennessee in 1882 to construct waterworks in or near Knoxville, with power to contract with the city and inhabitants for the supply of water, and to "charge such prices for the same as may be agreed upon between said company and said parties." This incorporation was under a general act which provides as follows: "And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company." Acts of 1877, c. 104, § 2. In the same year, 1882, the company made a contract with the city by which it agreed to

construct its works and to furnish water, the city gave the company exclusive privileges for thirty years and agreed to make certain payments, etc., and it was mutually agreed, among other things, that, after fifteen years, the city should have the right to purchase the works at a price to be fixed by appraisers if not agreed upon. The contract contained three distinct parts, first, the promises of the company; next, those of the city; and last, the mutual undertakings. In the first part the company undertook as follows: "Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons," subject to an immaterial proviso. These are the words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.

After the contract was made the company built its works and furnished water. Later it took over contracts between two other concerns and neighboring towns and consolidated with one of the other concerns, which was a corporation. The towns on their side were made a part of Knoxville and the whole water supply was brought under the original contract. But these facts do not alter or affect the present case and need not be stated in detail. The company went on furnishing water and charging rates within the contract limit, to the satisfaction of the city, it may be assumed, until within a year or two, when the city passed an ordinance which cuts down the rates which the company had been charging, and asserts its right to charge.

The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Ragan* v. *Aiken*, 9 Lea, 609. They are words

of a company which was notified by the act which called it into being of the power expressly conferred upon the city "by ordinance to regulate the price of water" which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities cannot complain of them or repudiate them, nor can the company which they have formed. *Rockport Water Co.* v. *Rockport*, 161 Massachusetts, 279. This consideration answers a portion of the company's argument as to its rights under the Fourteenth Amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim.

We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its customers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law.

With the construction which we give the contract between the company and the city the argument that the obligation of

that contract is impaired must fall. It is argued here that the reduction of rates is not reasonable, and is or may be taking a first step towards a compulsory purchase of the company's plant at an unfairly low price, by cutting down its value. We may assume with the Supreme Court of Tennessee that if rates were reduced unreasonably a judicial remedy would be found. We may assume further that an attempt to affect the price of the company's plant in that way, if the city should elect to purchase, would not be allowed to succeed. But no such questions are before us. There is no evidence and no presumption that the ordinance rates were unreasonable or were fixed with sinister intent. The judgment of the Supreme Court of Tennessee states that the question was not considered by it, and is expressed to be without prejudice to later litigation concerning the reasonableness of the rates. If the question is open here it is open only in form, and no error is shown.

A part of the argument was directed against the validity of the ordinance because of a failure to notify an alderman who was out of the State, but we see no sufficient ground for undertaking to revise the judgment of the state court on that point.

Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 91, 92; *Browne* v. *Turner*, 176 Massachusetts, 9, 15. The contracts recognize the possibility of change, as the agreement is to pay for the water in accordance with the rates "now or hereafter in force." This constitutional objection hardly is open on the pleadings, but we have given the company the benefit of the doubt so far as to consider it. We discover no error in the record, and the judgment of the Supreme Court of Tennessee must be affirmed.

Judgment affirmed.

MR. JUSTICE WHITE, MR. JUSTICE MCKENNA and MR. JUSTICE DAY, not having been present at the argument, took no part in the decision of the case.

SAN DIEGO LAND AND TOWN COMPANY *v.* JASPER.

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

No. 193. Argued March 10, 1903.—Decided April 6, 1903.

In this action it was held that the rates for water fixed by a board of supervisors under the statute of California of March 12, 1885, did not amount to a taking of the water company's property without due process of law.

THE case is stated in the opinion of the court.

Mr. John D. Works for appellant. *Mr. Bradner W. Lee* and *Mr. Louis R. Works* were on the brief.

Mr. A. Haines for appellees. *Mr. T. L. Lewis* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought in the Circuit Court against the board of supervisors of San Diego County and others for the purpose of having certain water rates which have been fixed by the board declared void. It is alleged that the rates are so low as to amount to a taking of the plaintiff's property without due process of law. The Circuit Court decided that it did not appear that the rates would have that effect and dismissed the bill, whereupon the plaintiff appealed to this court.

By a statute of California approved March 12, 1885, the board of supervisors of the counties are to fix the maximum water rates in cases like the present. They are authorized to proceed to a hearing upon a petition of twenty-five inhabitants who are taxpayers, and the rates when fixed are to be binding for not less than one year. Subject to that limitation they may

be reëstablished or abrogated upon a similar petition or a petition of the water company subjected to the regulation. The rate was fixed in this case upon a petition of twenty-five taxpayers. The present bill made the petitioners parties as well as the board, and alleged that they were not water takers, but were induced to petition by the consumers, in order that the latter might not admit that any rates other than those originally fixed by the company could be established by any one. The petitioners, after a demurrer by them to the bill was overruled, failed to answer and the bill was taken *pro confesso* as against them. On these facts, before coming to the merits, the appellant contends that this bill should be dismissed. It says that the only parties in interest have made default and that the ordinance regulating the rates was procured by a fraud upon the supervisors, with the consequence, we suppose it to be intended, that the ordinance should be set aside on that ground without going further into the case.

The preliminary objections may be disposed of in a few words. The default of the petitioner is relied upon as the ground of expressions in one or two cases here and elsewhere, that the duties of the supervisors are judicial in their nature. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354; *Jacobs* v. *Board of Supervisors*, 100 California, 121, 130. The conclusion drawn is that when the original plaintiffs disappear the case is at an end. We need not stop to consider to what extent or for what purposes the proceedings before the supervisors properly may be termed judicial. See further *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 750; *Cambridge* v. *Railroad Commissioners*, 153 Massachusetts, 161, 170. It is obvious that they are not so in such a sense as to do the appellant any good. The petitioners did not complain of injury to any private interest of theirs. They had none. They appeared on behalf of the public only and asked purely legislative action in the form of a general rule for the future to govern the public at large. *San Diego Land & Town Co.* v. *National City*, *ubi supra*; *Spring Valley Water Works* v. *San Francisco*, 82 California, 286; *Smith* v. *Strother*, 68 California, 194; *Janvrin, Petitioner*, 174 Massachusetts, 514. As soon as such a

rule was established, if not as soon as a hearing was begun, the petitioners were merged in the public affected by the rule. The present bill is an independent proceeding to have the ordinance declared void. In such a case the body making the regulation is the usual, proper and sufficient party respondent, and the default of those who set the original proceedings in motion is immaterial, so long as it defends the case.

The charge that there was a fraud practiced on the board hardly deserves mention, except for the undue warmth with which it has been pressed. There are no allegations in the bill sufficient to open the question. The board is here adhering to and defending its action, professing still to be satisfied. There is no indication of its fraud or attempt at fraud. The course adopted was adopted for reasons which appear on the face of the bill, the situation was made plain at the hearing before the supervisors, and we see no evidence that the parties did more than exercise their legal rights.

Coming now to the merits, the first thing to be noticed is that the ordinance complained of took effect in November, 1897, and that after a year from that date the appellant was free to apply for a modification of the rates. It did not do so. There is no allegation or suggestion that the board is corrupt or that it purposes and intends, without regard to evidence, to adhere to unjust rates so as to destroy or impair the value of the appellant's works. Under such circumstances the question arises whether this is much more than a moot case, in view of the principles adverted to in *Tennessee* v. *Condon*, *ante*, p. 64, or at least whether the appellant should not be required to exhaust its other remedies before coming into court. In any event, the limited effect of the ordinance must be taken into account when we are called on to declare it "such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754. In a case like this we do not feel bound to reëxamine and weigh all the evidence, although we have done so, or to proceed according to our

independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.

The scheme of the California statute is as follows: The board is to estimate the value of the property actually used and useful in furnishing the water, and the annual reasonable expenses, including the cost of repairs, management, and operating the works. The cost of permanent improvements is not to be included under this last head, but "when accomplished shall be included in the present cost and cash value of such work." Then the board is to adjust the rates so that the net receipts and profits of the water company shall be not less than six nor more than eighteen per cent upon the said value of the used and useful property. The board in this case estimated the value of the plant to be $350,000, and the returns at the rates fixed to be $34,442, or six per cent on the value and the expenses necessary to maintain and operate the plant, which were found to be $13,442.

The main object of attack is the valuation of the plant. It no longer is open to dispute that under the Constitution "what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757. That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses. We see no reason to doubt that the California statute means the same thing. Yet the only evidence in favor of a higher value in the present case, is the original cost of the work, seemingly inflated by improper charges to that account and by injudicious expenditures, (being the cost to another company which sold out on foreclosure to the appellant,) coupled with a recurrence to testimony as to the rapid depreciation of the pipes. In this way the appellant makes the value over a million dollars. No doubt cost may be considered, and will have more or less importance according to circumstances. In the present

case it is evident for reasons some of which will appear in a moment that it has very little importance indeed.

The property of the company and its predecessor consisted not only of the waterworks, but of a large amount of land. On the evidence the waterworks may be estimated at about a quarter of the total value. The earlier company was unable to raise the money it needed. Its bonds for $500,000, secured by mortgage, were not worth more than 95, and an attempt to raise a further loan on mortgage failed. The whole amount that the market and interested stockholders were willing to lend on all the security it could offer was $650,500. The company was put into the hands of a receiver, who issued some certificates, which, we infer, were made a paramount lien. Then, by arrangement with the stockholders who were willing to go on, the mortgage was foreclosed and all the property was sold to those stockholders for the nominal sum of $889,163.33, which was equal to the amount of outstanding certificates and bonds, and was paid by turning them in. This was in 1897, a few months before the passage of the ordinance complained of. The purchasers organized the present corporation, and the above-mentioned sum is the cost of the land and waterworks to it. The appellant protests that this is not a fair value for the property of the company. We doubt whether it is not a liberal allowance. The officers of the two companies at the time thought that they got more than they could have got in any other way. But at all events, it is decided that the price is evidence, we might say more important evidence than the original cost. *Dow* v. *Beidelman*, 125 U. S. 680. If the supervisors were convinced by it we certainly could not say, as matter of law, that they were wrong. Of course, as we indicated the other day in *Knoxville Water Co.* v. *Knoxville*, *ante*, p. 434, if an attempt had been made to cut down values by the reduction of rates the courts would know how to meet it. But there is nothing of that sort in this case.

The valuation of property for the purposes of taxation may not be technical evidence in a court of law, yet it may be considered in coming to a decision whether the action of the supervisors was unfair, especially if, as was testified, it was sworn

to by the officers of the company. The total valuation for 1897 was somewhat less than the price got at the sale, and that of the plant was $155,000.

Another circumstance was adverted to by the Circuit Court which we may mention. Whether the facts were stated with perfect accuracy or the reasoning from them was absolutely correct we need not stop to consider. The only question for us is whether it came to a right result. In reaching its conclusion the Circuit Court mentioned the drought from which that part of the country has suffered since the passage of this ordinance. At about that time the supply began to fall off. In December of the following year the reservoir was empty. The appellant asks us to take judicial notice that the rainfall has not been sufficient for the past five years to fill the storage reservoir of any large water company supplying water for irrigation in Southern California, but contends that the fact is immaterial to the point before us.

Of course it is hard to answer the proposition that value expressed in money depends on what people think at the time, That determines what they will give for the thing, and whether they think rightly or wrongly, if they or some of them will give a certain price for it, that is its value then. Nevertheless. it has been held, under some circumstances, even in ordinary suits, that when events have corrected the prophecy of the public, the facts may be shown and a more correct valuation adopted. *Twycross* v. *Grant*, 2 C. P. D. 469, 544; *Peek* v. *Derry*, 37 Ch. D. 541, 591 (not reversed on this point by 14 App. Cas. 337); *Whiting* v. *Price*, 172 Massachusetts, 240. See *National Bank of Commerce* v. *New Bedford*, 175 Massachusetts, 257, 262. We think that upon the question before us subsequent events may be considered. The facts mentioned would tend to depreciate the market value of the plant, and very much depreciate the value of the services rendered to consumers during the year when the ordinance necessarily was in force. This consideration is the only answer that needs to be made to elaborate calculations by the appellant of the worth of the services to consumers, beyond adding that it does not appear that

the supervisors did not give them what little weight they deserve upon the issues which the supervisors had to decide.

It is said that, if the drought is considered, the way in which it was met by digging wells and pumping also ought to be taken into account. That, however, was the private affair of the company. It was a voluntary act for which additional charges were made, and has little or no bearing on the issue, less even than the drought, to which we do not attribute much. It seems, however, that soon after the first year consumers, in order to get pumped water, contracted to pay ordinance rates and an extra charge, by a voluntary arrangement with the company, and for all we know that voluntary arrangement may be going on to this day, and may be one reason why the company has not applied to have the rates revised.

If the price paid by the present company for all the property was the fair value, the evidence available, such as the proportion between the valuations of the different parts by the company, the proportion between the assessment and taxation of the different parts and the testimony of an expert, indicates that the supervisors were liberal in valuing the plant at $350,000. Indeed, the proportion adopted is not a principal point of complaint.

A subordinate complaint is made, however, that the rates will not yield a net income of six per cent, even upon the valuation adopted. The counsel for the appellees contends, on the other hand, that that valuation was a good deal too high, that too much was allowed under the head of expenses, that the supervisors should have taken into account income from domestic rates, and finally sets up a claim that goes to the bottom of the whole assessment. By an amendment of the California statute, approved March 2, 1897, the act is not to invalidate or to interfere with contract easements for the flow and use of water. It is contended that the owners of water rights described in *Osborne* v. *San Diego Land & Town Co.*, 178 U. S. 22, which it is said now have been decided to be valid, (*Fresno Canal & Irrigation Co.* v. *Park*, 129 California, 437; *San Diego Flume Co.* v. *Souther*, 90 Fed. Rep. 164; 104 Fed. Rep. 706; 112 Fed. Rep. 228,) are entitled to water upon merely paying their share of

the expenses, and that all the water takers have water rights. We shall say nothing on these points.

We will say a word about the opposite contention of the appellant, that there should have been allowance for depreciation over and above the allowance for repairs. From a constitutional point of view we see no sufficient evidence that the allowance for six per cent on the value set by the supervisors, in addition to what was allowed for repairs, is confiscatory. On the other hand, if the claim is made under the statute, although that would be no ground for bringing the case to this court, it has been decided by the Supreme Court of California that the statute warrants no such claim. *Redlands, Lugonia & Crafton Domestic Water Co.* v. *Redlands*, 121 California, 312, 313. We go no further into detail. We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one. From this point of view there is only one other matter to be mentioned.

The supervisors in determining the rates assumed that the amount of water available for outside irrigation, apart from the amount used and paid for by National City, was enough for a little over 6000 acres, and on that point there is no serious dispute. Then they fixed the rates as if the company supplied this 6000 acres, although such was not the fact. Of course, the amount actually received for the water actually furnished was correspondingly less than the receipts as estimated by the supervisors upon their assumption. If there were no force in any of the arguments for the appellees which we have passed by, the result of this mode of estimate might be that the appellant did not get six per cent on the total value of its plant. But here again we have to distinguish between constitution and statute. If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two thirds of the contemplated

number should pay a full return. The only ground for such a claim is the statute taken strictly according to its letter.

But when a case is brought here on a constitutional ground which wholly fails, we certainly shall not be astute to support it upon another which we could not consider apart from the failing foundation, and which has nothing to commend it but the letter of the law. The statute of California no doubt was contemplating the case of waterworks fully occupied within the area which they intended to supply. It hardly can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied. At all events we will not be the first to say so. If necessary to avoid that result we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute. Upon the whole case we are unable to say that the Circuit Court should have declared the rates confiscatory. They are the rates which were fixed by the original company at the start, with prophecies, which the purchasers who believed them think amounted to a contract, that they never would be higher. If the original company embarked upon a great speculation which has not turned out as expected, more modest valuations are a result to which it must make up its mind.

Decree affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

No. 190. Argued March 9, 10, 1903.—Decided April 6, 1903.

Under the act of March 3, 1871, c. 122, 16 Stat. 573, the rights of the Southern Pacific Railroad Company were subordinate to those of the Texas Pacific Railroad Company. When the Texas Pacific grant was

declared forfeited by the act of February 28, 1885, the forfeiture did not vest the Southern Pacific with the lands forfeited but the forfeiture enured to the benefit of the United States.

THE case is stated in the opinion of the court.

Mr. Maxwell Evarts and *Mr. L. E. Payson* for appellants.

Mr. Special Attorney Joseph H. Call for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to quiet title brought by the United States against the plaintiff in error. It comes here by appeal from a decree of the United States Circuit Court of Appeals, 109 Fed. Rep. 913, affirming a decree of the Circuit Court, 94 Fed. Rep. 427, in favor of the United States. The United States claims under forfeiture of a grant made to the Texas Pacific Railroad Company in its charter, and the Southern Pacific Railroad Company under words in the same charter which are construed to make an incidental grant to it. The principal land in controversy is land within the place limits of the Southern Pacific under the said grant and within the twenty mile limit of the Texas Pacific, being land situated where the road of the former company and the contemplated track of the Texas Pacific met at Yuma on the Colorado River in the southeastern corner of California. The United States contends that this land was excepted from the Southern Pacific grant.

The charter is the act of March 3, 1871, c. 122, 16 Stat. 573. By § 9 it grants to the Texas Pacific by words in the present tense "ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States," etc. By § 12, "said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated

route within the Territories, and twenty miles within the State of California, to be withdrawn from preëmption, private entry, and sale." The Texas Pacific filed its map of general route in August, 1871, and in October, 1871, the Secretary of the Interior withdrew the odd sections according to the statute, including the land in question.

By § 23 of this same charter, for the purpose of connecting the Texas Pacific Railroad with San Francisco, the Southern Pacific was authorized to construct a line to the Texas Pacific road at or near the Colorado River, "with the same rights, grants, and privileges, and subject to the same limitations," etc., as in the act of July 27, 1866, "*Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company." It was decided in *United States* v. *Colton Marble and Lime Co.*, 146 U. S. 615, that this proviso excluded the indemnity lands of the Atlantic and Pacific road and that the Southern Pacific took nothing in them, even after a forfeiture of the Atlantic and Pacific grant. But it is said that the Atlantic and Pacific had filed a definite location, and it is contended on several grounds that there is not a similar exception in this case.

In the first place, it is denied that the Texas Pacific is included under the words last quoted: "or any other railroad company." But we think it too plain for extended argument that it is included by those words. It was called into being and was an "other railroad" at the moment when the proviso took effect. In fact, it was the only other railroad, so far as has been suggested to us, to which the words could apply. It received a grant for its main line, while that to the Southern Pacific was for a branch. By the contemplated junction of the latter with the former there would arise a conflict for which it was proper to provide, and natural to provide as the statute did.

Next it is said that the Texas Pacific had no prospective rights at the moment when the act was passed, and that is said to be the moment when her priorities were fixed. We cannot take the words of the proviso so narrowly. The Atlantic

and Pacific had not fixed its definite location when the act was passed, and yet in the decision which we have cited its indemnity lands were held excepted from the Southern Pacific grant. See *United States* v. *Southern Pacific R. R.*, 146 U. S. 570, 573; *Southern Pacific Railroad* v. *United States*, 183 U. S. 519, 522. As to the phrase "prospective rights," no doubt it is inartificial. The adjective changes the very nature of the substantive. A prospective right is not yet a right. It is only an expectation having a certain intensity of reasonableness. But it is plain, for instance, that when the lands were withdrawn along the general route of the Texas Pacific under § 12, that road had a prospective right to the whole of its place lands which the Southern Pacific could not affect by anything which it might do later. The statute is not governed by the ordinary rule as to contemporaneous grants. The Southern Pacific was not intended or allowed to interfere with what the Texas Pacific might take.

The strength of the appellant's case is in a somewhat attenuated line of reasoning. The Texas Pacific act refers to the act of July 27, 1866, for the rights conferred on the Southern Pacific. c. 278, 14 Stat. 292. The last mentioned statute is an act incorporating the Atlantic and Pacific Railroad Company. By § 18 the Southern Pacific is authorized to connect with the Atlantic and Pacific and is to have similar grants of land with that company. By § 6 there is a provision for the withdrawal of lands along the general route of the Atlantic and Pacific somewhat like that which has been mentioned as contained in § 12 of the Texas Pacific charter. It may be argued that it is implied by § 18 of the Atlantic and Pacific charter that there is to be a similar withdrawal of the land there granted to the Southern Pacific, and that this implied provision is carried over by a further implication to the grant to the Southern Pacific in § 23 of the Texas Pacific charter. The Southern Pacific filed the location of its general route in April, 1871, before the filing by the Texas Pacific, and as the grant to the Texas Pacific by § 9 was only of lands not sold, reserved or otherwise disposed of by the United States, it may be said that the Southern Pacific has got a preference, much as the Texas Pacific

would have got one had the Southern Pacific done nothing before the Texas Pacific filed the location of its general route.

It must be admitted that if this argument is correct in its premises it puts a good deal of a strain on the proviso in favor of the prospective rights of the Texas Pacific. For at the time when the Southern Pacific filed the location of its general route the prospective rights of the Texas Pacific were not determined otherwise than by its incorporation and the indications and promises in its charter. Nevertheless we are of opinion that the argument cannot prevail. It is only by a stretch that the provision for withdrawal of lands along the general route of the Atlantic and Pacific could be extended to the grant to the Southern Pacific in the Texas Pacific charter, and if it be so extended it is such a remote and probably unconsidered consequence of a reference to a reference that it cannot be allowed to outweigh the plain intent of the proviso in § 23, reinforced by the express arrangement for withdrawal in favor of the Texas Pacific in § 9. Assuming that proviso to refer to the Texas Pacific, it indicates a plain intent to except from the grant to the Southern Pacific the land that in the natural course of events would be covered by the location of the former road. The conflict of interests naturally would be limited to the point of connection at Yuma. There might be no other. As to that land, the plain object of the proviso was to avoid a race of diligence by giving priority to the main line of the chartered road over the connecting branch. Our decision is in accord with the settled construction and practice in the Department of the Interior following a ruling of the late Mr. Justice Lamar when Secretary of the Interior. *Texas Pacific Railroad and Southern Pacific Railroad*, 4 L. D. 215.

The Texas Pacific grant was declared forfeited by the act of February 28, 1885, c. 265, 23 Stat. 337, and this forfeiture enured to the benefit of the United States. *United States* v. *Southern Pacific Railroad*, 146 U. S. 570. It is argued further, however, that if the Southern Pacific did not get the lands in question under its primary grant, it may take a part of them as indemnity lands. It is said that the company has a right to take them for that purpose if the status of the lands at the time of

selection permits it. *Ryan* v. *Railroad Co.*, 99 U. S. 382. That contention seems to be disposed of by *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 47, 66, and the practice of the Land Department for many years has been inconsistent with it. *Southern Pacific Railroad* v. *Moore*, 11 L. D. 534; *Moore* v. *Kellogg*, 17 L. D. 391; *Smead* v. *Southern Pacific Railroad*, 29 L. D. 135. When it is decided that the company got no title to the land within its twenty mile limit, it would be contrary to the intimations of the cases to allow it to take the adjoining strip outside under a claim of indemnity. See *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, 545; *Clark* v. *Herington*, 186 U. S. 206. It is not clear that the language of the statute does not forbid it. The indemnity to the Atlantic and Pacific, by § 3 of its charter adopted for the Southern Pacific by § 18, is to be other lands "in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers." It might be argued that the last quoted words dispose of the matter. Without going into further reasons for our decision, we are of opinion that the decree appealed from was right. We deal only with the questions argued in this court.

Decree affirmed.

MR. JUSTICE BREWER and MR. JUSTICE DAY took no part in the decision of this case.

THE PAQUETE HABANA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

Nos. 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589.* Argued March 19, 1903.—Decided April 6, 1903.

This court having decided in *The Paquete Habana*, 175 U. S. 677, that certain fishing smacks engaged in coast fishing for the daily market were not liable to capture, and ordered that the proceeds of vessels and cargoes be restored to the claimants with compensatory and not punitive damages and costs, and it appearing that the damages allowed were excessive, the cases were remanded to the District Court for further proceedings.

Under the circumstances of this case the decree should be entered against the United States and not against the captors individually.

THE case is stated in the opinion of the court.

Mr. Solicitor General Hoyt for the United States.

The court is free to weigh and settle the facts here uncontrolled by subordinate findings. The inquiry is whether the court is satisfied by the whole evidence. *The Vigilantia*, 1 Rob. 1; *The Soglasie*, Spinks, 104; *The Carlos F. Roses*, 177 U. S. 655. *The Vigilantia* and *The Soglasie* exhibit the reasonable doubt of courts respecting the certificates of national magistrates presumably complaisant toward their countrymen. Early cases in this court show that the court handles such awards with great freedom, allowing some items and rejecting others, in the exercise of its discretion. *The Apollon*, 9 Wheat. 362; *The Lively*, 1 Gall. 315; *The Charming Betsy*, 2 Cr. 64; *Maley* v. *Shattuck*, 3 Cr. 458; *The Amiable Nancy*, 3 Wheat. 546.

The claims are excessive and unconscionable, and the evidence in support of them unsatisfactory and inconclusive. The

*No. 578. *United States* v. *The Paquete Habana*; No. 579. *Same* v. *The Lola*; No. 580. *Same* v. *The Poder de Dios*; No. 581. *Same* v. *The Antonio y Paco*; No. 582. *Same* v. *The Engracia*; No. 583. *Same* v. *The Severita*; No. 584. *Same* v. *The Antonio Suarez*; No. 585. *Same* v. *The Fernandito*; No. 586. *Same* v. *The Oriente*; No. 587. *Same* v. *The Espana*; No. 588. *Same* v. *The Cuatro de Settembre*; No. 589. *Same* v. *The Santiago Apostol*.

witnesses are in the highest degree interested, and the inference of a combination of interest throughout the cases is irresistible. The reappearance of the same witnesses and claimants in different cases, and the corporate relations shown suggest that the ownership of these boats and the handling of their catch constituted a sort of Havana "fishing trust." The interrogatories called for candid and complete answers. Forgetfulness, failure to keep books, the omission to furnish bills of sale, statements about documents which the documents do not support—these things find no excuse in the form of the interrogatories. It was for the claimants to support their claims absolutely and completely. The harbor master's certificate is given as to all the vessels on the same day, long after the final condemnation below, appraising them as of the same date prior to the war. That officer admittedly acts as an expert appointed by the two firms chiefly interested to appraise the value of their respective fishing smacks. His testimony and certificate should not be accepted as a veritable and reasonable statement of the value of the vessels. Sufficient appears fairly to require the court to reject the exaggerated claims, and, indeed, sufficient appears to enable the court, justly and understandingly to fix the point between the prices realized at the government sale and the amounts claimed, which will give *restitutio in integrum.*

If the court thinks that a satisfactory basis of readjustment and settlement is not yet before it, then we submit that the cases should go back to the court below for further inquiry.

As to the naval captors' liability, *The Ostsee*, Spinks, 174, fully reviews the principles and authorities. The captors seize at their peril; they take the burden and the risk along with the possible benefits. The only question is whether the claimants are in fact entitled to restitution with damages and costs. *The Ostsee* decided that captors are liable; that they may afterwards be indemnified at the expense of the public makes no difference in the rule. They cannot be so indemnified by means of a judgment against the United States. It is for Congress to relieve them. The cases in this court, *Murray* v. *The Charming Betsy*, 2 Cr. 64; *Little* v. *Barreme*, 2 Cr. 170; *Maley* v. *Shattuck*, 3 Cr. 458, show that the seizors have al-

ways been held liable for restitution in value. The distinctions and qualifications as to government exemptions from liability, *The Siren*, 7 Wall. 162, speak for themselves and do not comprehend the present cases. The same remark is true of *The Nuestra Señora de Regla*, 108 U. S. 96, in which the reduction of the claim is significant, and the original hearing is instructive on the general doctrine of the government exemption from liability in the courts.

The Government by its commission and war instructions authorizes capture, but does not thereby adopt the acts of its officers as its own, or condone their errors, or assume the liability arising upon their wrongful acts, however "pure in intention" the wrong may be. Such an idea is flatly contrary to all the principles of government exemption from suit and responsibility for the acts of its officers and agents except so far as it has expressly made itself liable. The Government grants prize rights to captors, and libels on behalf of captors and itself. The Government may restore, even after libel filed, at any time before condemnation; that fact would give disappointed captors no claim against the Government. If the executive should determine to recognize a diplomatic claim (which may be interposed after condemnation) that does not summon the captors to respond. Equally, if there is a judicial decree of restitution with damages and costs, that does not call upon the Government to respond because it files the libel and is the formal party plaintiff. The "captors," that is, the actual commander of the offending vessel representing all of his subordinates, must meet the responsibility of the illegal act of seizure.

Mistaken practice in the lower courts or inferences from particular acts of Congress granting indemnity cannot avail to overturn an established rule. As in England the appeal for relief is to Crown or Parliament, here it is to Congress. The courts cannot recognize that appeal by giving judgment against the United States, even if it should be a nugatory judgment not subject to execution. We urge with conviction that any award to claimants here must rest upon the various naval captors and not upon the United States.

Mr. J. Parker Kirlin for claimants.

I. No sufficient ground for the reversal of the decree is shown, so far as the *quantum* of the damages is concerned.

1. There is no serious dispute as to the principle on which the damages are to be assessed. The claimants are entitled to "fair indemnity for the losses sustained by the seizure." *The Nuestra Señora de Regla*, 17 Wall. 29, 31. The owners of the vessels being Cubans, and the vessels having been seized in Cuban waters when about to enter Cuban ports, the damages are naturally to be measured with reference to the value of the vessels and property in Cuba rather than in the United States. *Bates* v. *Clark*, 95 U. S. 204, 210. The damages to be awarded should be equivalent to the injury sustained. *The Lively*, 1 Gallison, 315; *Hetzel* v. *Baltimore & Ohio Ry.*, 169 U. S. 26. This principle is impliedly recognized in the mandates issued under the previous decision, which provided that the damages should be "compensatory."

The assessment of the damages was referred by consent to the commissioner. His conclusions, therefore, will not be disturbed, unless they are clearly in conflict with the weight of the evidence. *The Elton*, 83 Fed. Rep. 519, 520; *Kimberley* v. *Arms Co.*, 121 U. S. 512, 524; *Davis* v. *Schwartz*, 155 U. S. 631, 636; *Crawford* v. *Neill*, 144 U. S. 585, 596; *Furrer* v. *Ferris*, 145 U. S. 131. Even if the reference had not been made on consent, the conclusions of the commissioner on matters of fact would still be entitled to much weight. *Tilghman* v. *Proctor*, 125 U. S. 136, 149.

The District Judge heard argument on the libellant's exceptions to the report, and, after consideration, overruled them and confirmed the report. The case comes before the court, therefore, with the concurrent finding of the commissioner and the court in favor of the claimants. Under these circumstances the court should decline to interfere with the amount of the decrees, unless manifest error appears. *The Ship Marcellus*, 1 Black, 414; *The Conqueror*, 166 U. S. 110, 136.

2. The evidence produced on the part of the claimants consisted of the depositions of the owners of the vessels and of the harbor master in the port of Havana in relation to the value

of the vessels, and of certain disinterested fish merchants as to the value of the fish. The evidence of the libellant consisted, for the most part, of the depositions of witnesses who did not profess to have any acquaintance with the value of fishing vessel property. The commissioner heard some of the witnesses for the Government, but accepted the evidence of the claimants' witnesses as more accurate and reliable. It is contrary to the practice of the court to reverse a decree where both courts below have concurred in the decision of questions of fact, and the result arrived at depends on the number or credibility of witnesses. *The Richmond*, 103 U. S. 540, 543.

3. The exceptions to the commissioner's report are insufficient to raise any question as to the amount of the damages. The exceptions were:

"First, that the amount allowed as compensatory damages for the following vessels, and each of them, is excessive and not sustained by the evidence;" and,

"Second, that the value of each of said vessels . . . as ascertained by the commissioner is contrary to the evidence."

No suggestion was made as to the amount which the United States attorney thought the evidence would justify as an allowance for compensatory damages. Exceptions expressed in almost identical terms were held to be insufficient in *The Commander-in-Chief*, 1 Wall. 43, 50.

4. The status of the claimants does not affect their right to receive full compensation. Even if the claimants were technically in the position of enemies at the time of the captures, the court has, nevertheless, determined that their property was entitled to exemption from capture. In awarding compensation, therefore, the property is to be dealt with in the same manner as the property of friends. If its value was enhanced by reason of the war, that fact would not be material in measuring the damages except as showing the values current at the time when the right to compensation accrued. The right to compensation has been determined, and the damages are to be measured by the value of the property at the time of the capture, with interest and costs. If that value was enhanced by the military or naval operations of our Government, the claimants are, never-

theless, entitled to be paid at the enhanced amounts; for they represented the value which the property would have possessed, and at which, presumably, it could have been disposed of, but for the unlawful capture and condemnation. These observations apply alike to the valuations of the vessels, and to the current price for the fish, at the time of the capture, as to which there is no dispute.

5. There was no error in the award of interest, or the rate at which it was allowed. No question on that subject, however, is properly before the court. There was no exception to the report of the commissioner as to the rate of interest, or as to the propriety of allowing it. Nor is there any assignment of error to the final decrees on this subject. Without any exception or assignment of error on the subject, no question relating to interest appears to be before the court. *The Commander-in-Chief*, 1 Wall. 43.

Interest has always been allowed in cases of this class, not only against private captors, but against the United States. *The Apollon*, 9 Wheat. 362, 376, 379, 380; *The Charming Betsy*, 2 Cranch, 64, 125; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Wheat. 546, 562, 563; *The Nuestra Señora de Regla*, 108 U. S. 92, 104. The records in the cases of *The Labuan*, Blatchford's Prize Cases, 165; *The Glen*, Blatchford's Prize Cases, 375; *The Sybil*, Blatchford's Prize Cases, 615, show awards of interest against the United States and the captors jointly. The allowance of interest was within the fair scope of the mandates as a part of the "compensatory damages" to be recovered.

In allowing the legal rate of eight per cent, which prevails by statute in the Southern District of Florida, the court followed the practice which is sanctioned by this court. *Texas & Pacific Ry. Co.* v. *Anderson*, 149 U. S. 237, 242; *The Conemaugh*, *ante*, p. 363; *Huey* v. *Macon Co.*, 35 Fed. Rep. 431; 1 Sedgwick on Damages, 8th ed. sec. 339. There can be no presumption that the rate of interest in Cuba, during or immediately following the war, when financial conditions were, notoriously, in an extremely unsettled condition, was less

than the legal rate prevailing in the district in which the final decrees in these cases were entered.

II. The District Judge committed no error in deciding that the compensatory damages awarded to the claimants under the mandate of this court were payable by the United States.

1. It appears to have been determined by the previous decision of the court that the compensatory damages awarded are to be paid by the United States.

It would seem that the only parties to these causes are the United States on the one hand, and the claimants of the vessels on the other.

Section 4618 of the Revised Statutes provides that "upon receiving the report of the prize master directed by the preceding section, the attorney of the United States for the District shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof." Section 4630 provides that "the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors."

In pursuance of these provisions libels were filed by the United States, through its attorney for the Southern District of Florida, in all the cases, and in the original decrees of condemnation it was "ordered, adjudged and decreed that the said sloop . . . and cargo are condemned and forfeited *to the United States* as lawful prize of war." Certain naval officers filed their depositions in the cases, claiming shares of the prize money.

Any intervention of this character, however, is permissible only after final decree of condemnation, and is authorized only for the purpose of enabling the court to make distribution of the proceeds of the prize. Rev. Stat. §§ 4631, 4634. It seems doubtful, to say the least, that claims to distributive shares of that portion of the prize money which, under the statutes, falls to the captors, make the officers who present them parties to the cause.

The parties who were before this court on the previous appeal were, therefore, the claimants of the vessels on one side, and the United States on the other. As between those parties the court decreed in each case that "the decree of the District Court be reversed and the proceeds of the sale of the vessels, together with the proceeds of any sale of her cargo, be restored to the claimants with damages and costs." *The Paquete Habana*, 175 U. S. 677, 714. On a subsequent day the court on motion of the Solicitor General, ordered "that the decree be so modified as to direct that the damages to be allowed shall be compensatory only and not punitive." 175 U. S. 677, 721.

This is the judgment of the court between the only parties who were before it. The plain effect of the decision appears to be that the court determined that the compensatory damages to be recovered by the claimants were to be paid by the United States. This determination must be taken as final and conclusive throughout the subsequent stages of the litigation. *The Nuestra Señora de Regla*, 108 U. S. 92, 100; *Clark* v. *Keith*, 106 U. S. 464; *Supervisors* v. *Kennicott*, 94 U. S. 499; *The Lady Pike*, 96 U. S. 461.

No motion was made to amend the mandate so as to provide, if it had been competent to do so, that the judgment should be against the captors as well as the United States, or that it should be against the captors alone. In the absence of such an amendment the District Court had no power or authority to enter any decree, except against the libellant of record. *In re Potts*, 166 U. S. 263, 265, 267–268.

2. If it be considered that the court below had authority, in executing the mandate, to enter a decree against the captors alone, or against the United States and the captors jointly, it was, nevertheless, justified by the practice and by precedent in entering decrees against the United States alone, as was done.

It is the settled practice in prize cases, where restitution is ordered with damages, to assess and award the damages in the original cause against the libellants therein.

This was done without question in cases that arose prior to 1861. *The Charming Betsy*, 2 Cranch, 64; *The Amiable*

Nancy, 3 Wheat. 354; *The Apollon*, 9 Wheat. 362. The rule was recognized by Congress in the act concerning letters of marque, prizes and prize goods, passed June 26, 1812. 2 Stat. 759, 761.

Since the enactment of the prize acts of August 6, 1861, 12 Stat. 319; March 3, 1863, 12 Stat. 759; and June 23, 1864; Rev. Stat. §§ 4613, 4652, it has been the practice to file all libels in prize causes in the name of the United States. No case has been found in which the United States appears as libellant and damages for unlawful capture have been awarded against the naval captors. On the contrary, the practice, since 1861, has been to award the damages against the United States alone, or, in cases where the captors have intervened before condemnation and asked to be made co-libellants, against the United States and the naval captors jointly.

The records on file in a number of cases in the District Court for the Southern District of New York in which the United States was libellant and the captors intervened and joined in the prayer for condemnation, show that judgment was entered jointly against the United States and the captors in the following form: "It is ordered and adjudged . . . that final judgment be, and the same is hereby, rendered in the above cause in favor of the claimants of said vessels and cargo against the libellants and captors for the sum of $ " *The Glen*, Blatchf. Prize Cases, 375, final decree entered by Betts, J., October 24, 1863; *The Labuan*, Blatchf. Prize Cases, 165, final decree entered by Benedict, J., March 25, 1868; *The Sybil*, Blatchf. Prize Cases, 615, final decree entered by Blatchford, J., March 2, 1868.

In all these cases Congress passed appropriations to pay the decrees. 13 Stat. 575; 16 Stat. 649; 16 Stat. 650. Judgment was directed against the United States alone in *The Nuestra Señora de Regla*, 108 U. S. 92. The liability of the United States in such cases appears to be recognized by implication in Rev. Stat. § 4640.

3. The United States, by entering the forum as an actor, and prosecuting to condemnation, for its own and its agents' joint use, the vessels whose unlawful capture it had ratified and con-

firmed, has submitted itself voluntarily to the jurisdiction of the court, and is bound, under the universal practice in prize causes, to compensate the claimants for their loss.

These are not actions of tort against the United States. They are mere claims for the restitution of property which the Government has unlawfully taken from private individuals. The principle involved is that property which one has wrongfully taken shall be returned, or if, by the procurement of the wrongdoer, it cannot be returned in specie, its value should be returned.

If the Government had taken the vessels and applied them to its own use, instead of procuring them to be condemned and sold, without legal right, there could be no question that it would be bound to return them, or their value. *United States* v. *Russell*, 13 Wall. 623; *Clark* v. *United States*, 95 U. S. 539. It may be that this is the principle which underlies the decision in *The Nuestra Señora de Regla*, 108 U. S. 92. Nor could there be any question of the right of the prize court to order the United States to restore the vessels, if they still remained in specie and were subject to its control.

It would appear to be an extreme refinement of principle which would deprive the court of jurisdiction to determine that the United States should refund the value of the property unlawfully taken, simply because it is now beyond the power of the Government, solely in consequence of its own action, to return the vessels themselves.

No claims are made against the Government, beyond the value of the property against which it proceeded and which it caused to be condemned. They are, in substance, merely claims for restitution. Properly speaking, they are not affirmative demands against the Government for damages arising *ex delicto*. The authorities, in which the immunity of the United States from tort actions is asserted, appear to have no real application to these controversies.

The court, in previous decisions, has recognized the liability of the Government to the extent of the value of the property involved, where it has voluntarily submitted itself to the jurisdiction of the court as a plaintiff against such property. *The*

Siren, 7 Wall. 152, 154, 159; *Carr* v. *The United States*, 98 U. S. 436, 438; *Clark* v. *Barnard*, 108 U. S. 436, 448; *Cunningham* v. *R. R. Co.*, 109 U. S. 446, 452; *The Nuestra Señora de Regla*, 17 Wall. 29; 108 U. S. 92.

The English courts also recognize the principle that a sovereign otherwise exempt from suit, may subject itself to judgment in a cross-suit, if it invokes the jurisdiction of the court as a plaintiff. *The Newbattle*, 10 Prob. Div. 33, 35; *King of Spain* v. *Hallet*, 2 Bligh (N. S.), 31, 57.

4. No error has been assigned to the decision of the court below in awarding the damages against the United States alone, instead of against it and the naval captors jointly. No application was made to the court below for a decree against the libellant and the naval captors jointly. No such application could, properly, have been made, for the reason that the naval captors did not intervene as co-libellants and join in the prayer for condemnation. The Revised Statutes do not contemplate or permit an intervention of that nature. Rev. Stat. §§ 4630, 4631, 4634.

The only contention presented by the United States attorney on this subject, was that the decree should be against the naval captors alone. There can be no question it would seem, that the court below rightly decided, on the record as it stood, against that contention. The naval captors had, it is true, taken and brought in the vessel; but their action had been ratified and confirmed by the United States. Under the prize acts, ratification of the captures by the Government, which founded libels thereon, may well be taken as relieving the naval captors from liability, even if they had been before the court as parties. *Lamar* v. *Brown*, 92 U. S. 187; *Dobree* v. *Napier*, 2 Bing. N. C. 781. Joint decrees against the libellant and the captors would have been of advantage to these claimants, but as the record stood there appeared to be no ground for asking the court to enter them in that form.

Mr. Justice Holmes delivered the opinion of the court.

These are cases of fishing smacks, which were libelled as

prize of war. The proceedings in all the cases are similar and the evidence to a large extent the same. It was decided by this court in two of the cases, *Paquete Habana* and *Lola*, 175 U. S. 677, that smacks of this sort, engaged as these were, in coast-fishing for the daily market, were not liable to capture, and decrees were ordered that the proceeds of the vessels and cargoes be restored to the claimants, with damages and costs. On motion of the United States it was ordered that the decrees be modified so as to direct that the damages should be compensatory only and not punitive. Decrees were entered in each of the above-named cases by the District Court in pursuance of this mandate, and agreements between the United States, the captors and the claimants were filed, that the damages should be charged against the United States or the captors, or apportioned, "as to justice may appertain and as the legal responsibility therefor may appear;" saving the right to review the decrees as to amount and as to where the ultimate responsibility rested. The papers do not disclose such an agreement in the *Cuatro de Settembre*, but as the records so far as similar to the first two cases were not printed, we assume that the omission was only in the index, and that it was understood that this case should stand like the rest. The cases were referred to a commissioner to report the amount of damages. He reported his findings and the evidence. The United States excepted to the findings as excessive. The District Court entered decrees against the United States for the amounts, and the United States appealed on the grounds that the decrees should have gone against the captors and not against the Government, and that the damages were excessive and the exceptions to the commissioner's report should have been sustained.

We do not see how it is possible that a decree should be entered against the captors. There was no formal intervention by them, and whether a decree can be made against the United States or not, it has so far adopted the acts of capture that it would be hard to say that under the circumstances of these cases it has not made those acts its own. It is not disputed that the United States might have ordered the vessels to be released. It did not do so. The libels were filed by the United

States on its own behalf, praying a forfeiture to the United States. The statutes in force seemed to contemplate that form of procedure, Rev. Stat. § 4618, and such has been the practice under them. The libels alleged a capture pursuant to instructions from the President. The captures were by superior force, so that that there was no question that the United States was interested in the proceeds. Rev. Stat. § 4630. The modification of the decrees in regard to damages, on motion by the United States, imported a recognition of the interest of the United States in that matter, and its submission to the entry of decrees against it. The agreements to which we have referred had a similar import, although they indicated an awakening to a determination to argue the form of the decree. In the case of *Little* v. *Barreme*, 2 Cr. 170, conversely to this, the United States was not a party and the captor was. All that was decided bearing upon the present point was that instructions from the President did not exonerate the captor from liability to a neutral vessel. As to even that the Chief Justice hesitated. But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued. *Lamar* v. *Browne*, 92 U. S. 187, 199; and as to ratification, *Buron* v. *Denman*, 2 Exch. 167, 187, 189; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Moo. P. C. 22, 86. See *Dempsey* v. *Chambers*, 154 Massachusetts, 330, 332. The principle and authority of *Buron* v. *Denman* was recognized and followed by the Court of Claims in *Wiggins* v. *United States*, 3 C. Cl. 412, 423.

If we are right so far, we think that under the circumstances of this case a decree properly may be entered against the United States. The former decree of this court remains in force and requires a final decree for damages. *Re Potts*, 166 U. S. 263, 265; *McCormick* v. *Sullivant*, 10 Wheat. 192, 200. The decree must run against the United States if a decree is to be made. In *The Nuestra Señora de Regla*, 108 U. S. 92, 102, the court was of opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in

like cases. It seems to us that the facts here are not less strong. Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment. *Glen*, Blatchf. Prize Cases, 375, act of Feb. 13, 1864, c. 10, 13 Stat. 575; *Labuan*, Blatchf. Prize Cases, 165, act of July 7, 1870, c. 220, 16 Stat. 649; *Sybil*, Blatchf. Prize Cases, 615, act of July 8, 1870, c. 231, 16 Stat. 650; *Flying Scud*, 6 Wall. 263, act of July 7, 1870, c. 219, 16 Stat. 649. See also 16 Stat. 650, c. 232; 651, c. 234.

We pass, then, to the other ground of the appeal. With regard to this it is objected that the exceptions to the master's report are not sufficient to open the question; referring to *Commander-in-Chief*, 1 Wall. 43, 50. But the objection being the general one that the evidence did not warrant the finding and all the evidence being attached to the report nothing more is needed.

On the amount of the damages we are of opinion that further proceedings must be had. We do not forget the weight that is given to the findings of a master or commissioner upon matters of fact. But this weight is largely, although not wholly, due to the opportunity, which we do not share, of seeing the witnesses. So far as the commissioner disregarded the testimony of the witnesses whom he saw we should hesitate to overrule his conclusion, although it seems too absolute on the grounds set forth. But the result reached is based on documentary evidence which is before us, and as to which we have equal opportunities for forming a judgment. It appears to us plain that this evidence was given undue weight. The source from which it comes and the high valuations require that it should be taken with considerable reserve. The commissioner had a right, which he seems to have thought that he did not possess, to chancer the estimates. He adopted the owners' prices without qualification. The certificate of the harbor master of Havana is dated November 23, 1898. It does not purport to be a copy of any earlier record. It is true that he makes his valuation as of March 1, 1898, but he does not say either in the certificate or in his testimony that he made that valuation at that or any other date before November 23. We shall not go over the

other evidence in detail. Some at least of the vessels were old. The Paquete Habana, for instance, at least eighteen or twenty years. One half interest was bought in 1892 for $2400. She is valued in 1898 by owners, harbor master and commissioner at $4500. The Lola was purchased "at a cheap price," according to the owner, in 1887. The valuation of some of the other smacks is above the price said to have been paid for them in earlier years.

In the case of the Espana it appears that she was about fourteen years old, and cost when built ten thousand dollars. She is valued by the owners and harbor master, agreeing as usual, at $9000. The commissioner adopts this valuation. Yet it appears that the vessel was resold to the owners for $2500. Whether this price was a fair value or not, and the owners would not give more, the result of the sale was that they had their boat back again. It is apparent, therefore, that their actual loss was only what they had to pay to get it, the loss from detention of the boat and any wear and tear and changes that it had undergone in the meantime. In a case of the present kind it would be going beyond the requirements of justice into the realm of very doubtful technicalities to disregard the fact that the vessel got back because it was due to a subsequent transaction with a stranger. There is some evidence that the same thing happened in some or all of the other cases. See *The Lively*, 1 Gall. 315, 321.

The fish are allowed for at the highest price in Havana during the blockade, which is too high a rate, and interest was charged at eight per cent, there being no reason apparent for charging more than six if interest was allowed. See *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *The Amalia*, 34 L. J. Adm. 21; *Straker* v. *Hartland*, 2 Hem. & Mil. 570; *Frazer* v. *Bigelow Carpet Co.*, 141 Massachusetts, 126. These are details, but they show what is manifest throughout, that the owners' demands have been accepted without discrimination on evidence which does not justify the result.

We think that we have said enough to show that a revision of the findings is necessary. It seems to us better that this revision should take place in the District Court rather than

be attempted by us. Whether further evidence shall be taken we leave to the parties and to that court.

Decrees reversed and cases remanded for further proceedings in accordance with this opinion.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* BEHYMER.

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

No. 224. Argued March 20, April 6, 1903.—Decided April 20, 1903.

In an action for personal injuries sustained by a brakeman by falling from a car, where the claim was based upon negligence in stopping the car suddenly with knowledge of his position and of the slippery condition of the roof of the car, and also upon the projection of a nail in the roof of the car which increased the danger and contributed to his fall, *held*, there was no error in the court declining to rule that the chance of such an accident was one of the risks assumed by the plaintiff, or that the question whether the defendant was liable depended on whether the freight train was handled in the usual and ordinary way. It was proper for the court to leave it to the jury to say whether the train was handled with due care.

THE case is stated in the opinion of the court.

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

Mr. Cone Johnson for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by an employé against a railroad company. It was tried in the Circuit Court, where the plaintiff had a verdict. It then was taken to the Circuit Court of Appeals on a writ of error and bill of excep-

tions by the company, 112 Fed. Rep. 35, and now is brought here on a further writ of error, the company being a United States corporation. A good deal of the argument for the railroad is devoted to disputing the testimony of the plaintiff below and arguing that the verdict was excessive, but of course we have nothing to do with that. *New York, Lake Erie & Western Railroad* v. *Winter*, 143 U. S. 60, 75; *Lincoln* v. *Power*, 151 U. S. 436. We must assume the most favorable statement of the plaintiff's case to be true, unless some particular request for instructions makes it necessary to deal with conflicting evidence. That statement may be made in a few words.

Behymer had been in the employ of the company as a brakeman about three months. On February 7, 1899, at Big Sandy, in Texas, he was ordered by the conductor of a local freight train to get up on some cars standing on a siding and let off the brakes, so that the engine might move them to the main track and add them to the train. The tops of the cars were covered with ice, as all concerned knew. He obeyed orders; the engine picked up the cars, moved to the main track and stopped suddenly. The cars ran forward to the extent of the slack and back again, as they were moving up hill. The jerk upset Behymer's balance, the bottom of his trousers caught in a projecting nail in the running board and he was thrown between the cars. It is true that the jury might have drawn a different conclusion from his evidence or have disbelieved it in essential points, but they also were at liberty to find, as they must be taken to have found, that the foregoing statement is true. The car belonged to another road but was in the charge of the defendant company, and, according to the statement of the counsel for the plaintiff in error, had been inspected before the accident, although we should have doubted whether the testimony meant to go so far. Behymer based his claim upon negligence in stopping the cars so suddenly with knowledge of his position and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall. It should be added that by a statute of Texas if there was negligence the fact that it was the

negligence of a fellow servant was not a defence. General Laws, Texas, 1897, Special Session, c. 6, § 1; 2 Sayles, Texas Civil Stat. 1897, art. 4560 *f*.

The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care, that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash Railway Co.* v. *McDaniels*, 107 U. S. 454. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet it can be avoided if necessary, and when the particular and known condition of the train makes a sudden bump obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff. *Texas & Pacific Ry.* v. *Archibald*, 170 U. S. 665, 672.

However, the plaintiff did not rely on the management of the train alone. The projecting nail was another element in his case. The jury were instructed with regard to that, that the railroad company was not liable unless there was a nail there improperly projecting, and a reasonable inspection would have discovered and remedied the defect. The car was in the custody of the company. There is no suggestion that the company had not had an opportunity to inspect, and the contrary was assumed by a request for instructions on the part of the company. Indeed, as we have said, its counsel interprets the evidence as meaning that the car had been inspected before

the accident. It is not pressed that there was error on this point. See *Mackin* v. *Boston & Albany Railroad*, 135 Massachusetts, 201; *Glynn* v. *Central Railroad*, 175 Massachusetts, 510, 512. The jury were instructed properly on the subject of assumption of risks and contributory negligence, and we think it unnecessary to deal more specifically with this part of the case.

It was argued that Behymer had aggravated the injury by refusing proper surgical treatment. With regard to this the jury were instructed in substance, but at more length, that it was his duty to submit to all treatment that a reasonably prudent person would have submitted to in order to improve his condition, and that no damages could be allowed which might have been prevented by reasonable care. It is suggested that, as a prudent man, he might have postponed recovery from his injury to recovery of damages. The instructions plainly excluded such a view. The argument hardly is serious. We have examined all the minute criticisms on the rulings and refusals to rule, and discover no error. We deem it unnecessary to answer them in greater detail.

Judgment affirmed.

UNITED STATES *v.* SWEET.

APPEAL FROM THE COURT OF CLAIMS.

No. 236. Argued and submitted April 15, 1903.—Decided April 27, 1903.

An officer of volunteers in the United States Army who tenders his resignation and is honorably discharged is not entitled to travel pay and commutation of subsistence, under Rev. Stat. § 1289, as amended by the act of February 27, 1877, c. 69, 19 Stat. 243, from the place of his discharge to where he was mustered in.

This decision is in accord with the settled practice of the War Department and the Treasury which has been to deny these allowances when the officer or soldier is discharged at his own request, for his own pleasure or convenience. The weight of a contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt.

THE case is stated in the opinion of the court.

Submitted by *Mr. Assistant Attorney General Pradt* and *Mr. Franklin W. Collins* for appellant.

Argued by *Mr. George A. King* for appellee. *Mr. William B. King* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here by appeal from a judgment of the Court of Claims in favor of the petitioner, Sweet. The petitioner was a second lieutenant of volunteers in the United States Army, tendered his resignation, and was honorably discharged on October 15, 1898. He was mustered into the service at St. Paul, Minnesota, his residence being Minneapolis. The place of his discharge was Camp Meade, Pennsylvania. He was not furnished transportation or subsistence, but returned to his residence at his own expense, and later brought this petition to recover travel pay and commutation of subsistence under Rev. Stat. § 1289, as amended by the act of February 27, 1877, c. 69, 19 Stat. 243, 244. That section allows the items demanded "when an officer is discharged from the service, except by way of punishment for an offence." The question whether the statute extends to cases like the present has been before this court twice, but has not been decided authoritatively. In one case the court was equally divided, *United States* v. *Price*, No. 60, December Term, 1870; *S. C.*, 4 C. Cl. 164. In the other the decision went off upon another point. *United States* v. *Thornton*, 160 U. S. 654; *S. C.*, 27 C. Cl. 342.

It is admitted that the settled practice of the War Department and of the Treasury has been to deny the allowances claimed when an officer or soldier is discharged at his own request, for his own pleasure or convenience. *Whitmeyer*, 3 Dec. of the Comptroller of the Treasury, 397, 398; *Weber*, 3 Dec. Comp. Treas. 640; 5 Dec. Comp. Treas. 113, 117; 5 Dec. Comp. Treas. 939, 941; *Bridges*, Second Comptroller's Letter

Book, vol. 18, p. 184; *Weevil*, Second Comptroller's Letter Book, vol. 26, p. 296. The weight of a contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. *United States* v. *Johnston*, 124 U. S. 236, 253; *United States* v. *Finnell*, 185 U. S. 236, 244. But it is said that in this case the language of the statute admits of no doubt. It is argued that the words "except by way of punishment for an offence" exclude the implication of other exceptions to the rule. Some force was attributed also to the amendment to the Revised Statutes, which substituted for "honorably discharged from the service" the present words "discharged from the service, except by way of punishment for an offence." The change, however, is merely a recurrence to the language of the earlier statutes under which the practice of the War Department grew up, so that no particular weight can be given to that.

The words "discharged from the service, except by way of punishment for an offence," are found in the acts of March 3, 1799, c. 48, § 25, 1 Stat. 755; March 16, 1802, c. 9, § 24, 2 Stat. 137; January 11, 1812, c. 14, § 22, 2 Stat. 674; and January 29, 1813, c. 16, § 15, 2 Stat. 796. See further the acts of April 12, 1808, c. 43, § 5, 2 Stat. 483; March 3, 1815, c. 79, § 4, 3 Stat. 225; July 22, 1861, c. 9, § 5, 12 Stat. 269; July 29, 1861, c. 24, § 4, 12 Stat. 280; June 20, 1864, c. 145, § 8, 13 Stat. 145; March 16, 1896, c. 59, 29 Stat. 63; June 7, 1900, c. 860, 31 Stat. 708; February 8, 1901, c. 342, 31 Stat. 762. The phrase, "honorably discharged," seems first to have appeared in the Revised Statutes, and to have been amended back to the ancient form in three years. Except for that short intervening time, the allowance of travel pay and commutation of subsistence has gone on under the early words and the practical construction of them to which we have referred.

It follows that the only question is whether the meaning of the long used phrase is too clear for almost equally long established practice to control. It seems to us not to be so. It is quite true that in the military service the word "discharge" is the word applied to an order ending the service of an officer at

his own request. But in other connections it conveys the notion of a movement beginning with the superior and more or less adverse to the object, as, for instance, when we speak of discharging a servant. Usually it is a slightly discrediting verb. If it is taken in its ordinary meaning here, the exception in case of a discharge by way of punishment raises no difficulty, because a discharge on resignation is not within the meaning of the principal clause. The course of the departments has amounted to no more than interpreting the word in this exact sense.

Enlisted men are given similar allowances by § 1290 and the earlier statutes cited. By the act of June 7, 1900, c. 860, 31 Stat. 708, when the Secretary of War, in the exercise of his discretion, has directed the discharge "of any enlisted men . . . and the orders . . . stated that such enlisted men were entitled to travel pay," such order is to be sufficient authority for payment of the allowances under § 1290. This recognizes that it is usual to state in the order whether the soldier is entitled to travel pay or not, and seems to accept existing practices as they are. It has no effect upon the cases before us further than as another slight indication of the understanding in the service. But taking everything into account we are not prepared to overturn the long established understanding of the departments charged with the execution of the law.

Judgment reversed.

UNITED STATES *v.* BARNETT.

No. 235. Argued with No. 236, *ante*, p. 471, and by the same counsel.

MR. JUSTICE HOLMES: This is the case of an enlisted man who makes a claim similar to the above, under Rev. Stat. § 1290, as amended. He was discharged on his own application, and the order of discharge stated that he was not entitled to travel pay. The foregoing reasoning also governs this case.

Judgment reversed.

GILES *v.* HARRIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 493. Submitted February, 24, 1903.—Decided April 27, 1903.

A Circuit Court of the United States in Alabama has not jurisdiction of an action in equity brought by a colored man, resident in Alabama, on behalf of himself and other negroes to compel the board of registrars to enroll their names upon the voting lists of the county in which they reside under a constitution alleged to be contrary to the Constitution of the United States.

THE case is stated in the opinion of the court.

Mr. Wilford H. Smith for appellant.

As the facts alleged in the bill of complaint have been admitted by the demurrer, the only question presented for the court's consideration is, does the bill contain sufficient allegations of matters of fact to raise a Federal question, and, if so, whether the trial court under the law had the power and authority to grant the relief prayed for. The suffrage provisions of the constitution of Alabama are not only unconstitutional and void, but a more high-handed and flagrant case of the nullification of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and repudiation of their solemn guarantees to the negroes of America can never be presented to the courts of the country.

If the suffrage provisions of the constitution of Alabama bore equally upon the whites and blacks alike, no matter what the standard of property or education required might be, no cause of complaint would be urged here against them; but they sought to restrict the suffrage of the blacks without depriving a single white man of his right to vote.

While the Fourteenth and Fifteenth Amendments do not confer the right of suffrage upon the negro, they contain a solemn guarantee of this nation that no State shall give any

preference in this particular to the white citizens over the blacks, or deny the negroes the right to vote, or hinder them in the exercise of the same, because of their race and color and previous condition of servitude, and it is clearly within the equity jurisdiction of the courts of the United States to enforce this solemn guarantee.

I. Sec. 1979, Rev. Stat., brought forward from the act of April 20, 1871, provides "that every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or the immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress," and manifestly confers jurisdiction upon courts of equity to grant relief against the threatened deprivation of rights guaranteed under the Fourteenth and Fifteenth Amendments. Sec. 629, Rev. Stat. cl. 16. *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68.

II. This is not a suit brought to enforce a political right, but a civil right guaranteed by the Constitution of the United States. Nor is it sought in this action to control the exercise of any political functions of the State of Alabama, since no State has the right, nor have its officers the right, to deprive any person of the equal protection of the law, or of his right to vote, on account of his race and color or previous condition of servitude. *United States* v. *Reese*, 92 U. S. 214; *Mills* v. *Green*, 69 Fed. Rep. 852; *United States* v. *Cruikshank*, 92 U. S. 542.

III. The courts of law are without power to give that efficacious and specific redress in the matter of the enforcement and protection of the rights guaranteed under the Fifteenth Amendment, because it would be absurd to argue that any money damage, however large, could in the least degree compensate a negro in Alabama for the deprivation of his right to vote on account of his race and color. A court of equity, exercising its remedial principles of specific redress, with its ability to look through forms at the substance and its power to detect and

expose fraud and conspiracy and cunning and chicanery, can alone grant that relief without which there would be no relief in a case like this. Equity alone has the power to anticipate and prevent a threatened injury where the damage would be insufficient or the wrong irreparable. *Ex parte Lennon*, 166 U. S. 548; *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65.

IV. The Circuit Courts of the United States, sitting in equity, have jurisdiction to enforce and protect the civil rights of a citizen guaranteed by the Fourteenth and Fifteenth Amendments, and this court is not confined to the decision of the question of jurisdiction alone, but should also decide the further question of whether or not the suffrage provisions of the constitution of Alabama are in contravention of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The act of March 3, 1891, section 5, while it gives the Circuit Court the right to certify the jurisdiction alone to the Supreme Court, does not give the Circuit Court the right by such certification to cut the Supreme Court off from considering other questions which could properly come up on appeal from the Circuit Court. *McLish* v. *Roff*, 141 U. S. 661; *Horner* v. *United States*, 143 U. S. 578; *Holder* v. *Aultman, Miller & Co.*, 169 U. S. 81; *Scott* v. *Donald*, 165 U. S. 58; *Penn. Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Whitten* v. *Tomlinson*, 160 U. S. 231.

V. Conceding that this court is confined to the question of jurisdiction alone, and is without the power, on this appeal, of considering any other questions involved in the record, it is wholly impossible for the court to separate the question of jurisdiction in this case from the question of whether or not the suffrage provisions of the constitution of Alabama are in contravention of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Indeed, the two questions are one and inseparable.

VI. Sec. 180 of art. 8 of the constitution of Alabama, known and administered as the temporary plan, contravenes the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in its purpose, in its language and meaning, and

in the way and manner in which it has been carried out and administered by the authorities in the State of Alabama.

The speeches in the convention cited in the record show that the purpose the convention had in view in framing the provisions on suffrage and elections was to invent a scheme by which to disfranchise the negroes without disfranchising a single white man in Alabama.

Subdivisions 1 and 2 of section 180, fixing qualifications upon persons who served in the war of 1812, and in the war with Mexico and with the Indians, and in the land or naval forces of the Confederate States, and their descendants, discriminate against the negroes of Alabama, for the reason that it was impossible, owing to their previous condition of servitude, for them to attain to such qualifications.

Subdivision 3 is too general, and really describes no qualifications, but simply invests the registrars with unlimited and arbitrary power.

If our contention is wrong as to the language and meaning of these subdivisions, still we insist that the administration of said section by all the boards of registrars in the State of Alabama, as shown in the bill and admitted by the demurrer, makes this section unconstitutional and void, because the registrars refused to register qualified negroes for no other reason than their race and color, and required the negroes to produce the testimony of white men as to their qualifications and character, and refused to accept the testimony of colored men, while all white men were registered upon their application without further proof of qualifications than the oath of the applicant. *Ah Kow* v. *Neunan*, 5 Sawyer, 560; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Davies* v. *McKeeby*, 5 Nevada, 369.

VII. Section 181 of the constitution of Alabama, known as the permanent plan, contravenes the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in its purpose and object and in its language and meaning, and therefore should be declared null and void and should not be allowed to be enforced.

But, conceding that the foregoing argument is untenable as to the section, it is clearly made unconstitutional and void in

the manner of the administration of the temporary plan by the registrars in allowing all white men in the State of Alabama to qualify under the temporary plan, and at the same time refusing to allow nearly all negroes to qualify under the same for no other reason than their race and color, and telling them to come back after the 1st of January, 1903, which is admitted by the demurrer. The State of Alabama, through the registrars, has thus compelled the negroes to look to the permanent plan alone for their qualifications to become electors, which makes the law special class legislation from its inception intended to operate against the negroes of Alabama alone. *Jew Ho* v. *Williamson*, 103 Fed. Rep. 10; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

VIII. Section 186 of the suffrage article of the new constitution of Alabama is obnoxious and repugnant to the Fourteenth and Fifteenth Amendments in that the boards of registrars are given absolute and unlimited power and are clothed with the discretion of judicial officers solely for the purpose of placing the said boards beyond the process of the courts, and of more effectually denying, abridging, and hindering the orator in his right to qualify as an elector, and to vote in the State of Alabama, on the ground of his race and color and previous condition of servitude, and said section is also a part of the scheme to deny and abridge his right to vote in the State of Alabama and the right of his race to vote on account of their race and color and previous condition of servitude. *Carter* v. *Texas*, 177 U. S. 442; *Ah Kow* v. *Neunan*, 5 Sawyer, 560; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Mr. William A. Gunter for appellees.

Besides the motion to dismiss, argued below, two questions arise in this appeal, both involving the jurisdiction of the court: (1) Whether the constitution of the court admits of the cognizance of cases of this class, involving "the assertion and protection of political rights;" (2) whether, conceding the first question, such a case is made out as authorizes the exercise of equitable jurisdiction. It is important, for obvious reasons,

that the latter question, if possible, be authoritatively settled, and therefore, we discuss it in the first instance.

I. The duty and responsibility of prescribing the qualification of state electors, who must select the incumbents of political offices, rests entirely with the state government, with the exception of the restraints imposed by the Fifteenth Amendment of the Constitution of the United States. That provision does not pretend to extend any right, or give any privilege, but by negation provides that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." *United States* v. *Reese*, 92 U. S. 214. It is thus plain that the State is at perfect liberty to deny or abridge the right to vote *ad libitum*, provided it touches no question of race, color or previous condition of servitude. Looking at the provisions of the constitution of Alabama brought into question on this appeal, they can and do challenge the closest scrutiny.

It is thus seen that the State gave the right to register as an elector prior to January, 1903, to three classes of male citizens of the State and United States having a certain age and qualification as to residence, viz.: First, soldiers and sailors; second, their descendants; third, all citizens of good character understanding the duties and obligations of citizenship. It cannot be said, that giving the privilege to soldiers and sailors and their descendants was a *denial* or *abridgment* of the right to vote on account of color, race or previous condition of servitude.

These provisions might, and did, in fact, include many citizens of dark color, many of the negro race, and many who had been slaves. The objection, then, if any can be made, must rest on the third provision extending the privilege to all persons of good character understanding the duties and obligations of citizenship. It is evident that there can be no valid objection to the terms of this clause. It is clear that persons of the negro race may have in the highest degree good characters, and understand the duties and obligations of citizenship under a republican government, and thus that they are not excluded. On the other hand, it is equally obvious that white persons are liable to be excluded as not possessing these qualifications.

Therefore, the clause is unobjectionable in its terms. *Williams* v. *Mississippi*, 170 U. S. 213; *Ratcliffe* v. *Beal*, 20 So. Rep. 865.

The constitution of Alabama applies, it is admitted, a test which will exclude with many whites, the mass of the negro population from the privilege of voting. Certainly the Constitution of the United States cannot be construed into denying the right of a State to prohibit criminals and ignorant persons of bad character from electing its officers and legislators.

It is insisted, however, that this law was passed with the intent to exclude the negro only, and the speeches of members of the Convention are referred to, to give color to the act.

The intent of a legislative act can only be gathered from its language. The Convention is responsible only for its collective acts embodied in laws, and not at all for the views of individual members. *Fletcher* v. *Peck*, 6 Cranch, 87; *Dodge* v. *Woolsey*, 18 How. 371; *United States* v. *Des Moines*, 142 U. S. 545; 1 Notes to U. S. Rep. 305.

II. A court of equity has no jurisdiction of the subject matter involved in this case. The object of this suit is to restrain the operations of the state government for the assertion and vindication of a political right to be an elector. This is not within the province of equity jurisprudence. *Green* v. *Mills*, 69 Fed. Rep. 852; *Mississippi* v. *Johnson*, 4 Wall. 475; *In re Sawyer*, 124 U. S. 200; *Fletcher* v. *Tuttle*, 151 Illinois, 41.

It is plain that the right to be admitted to registration as an elector, which is sought to be enforced in this case, is purely political and therefore beyond the jurisdiction of a court of equity.

If there is such a right in any particular case which is denied, it is supposed that the remedies at law are ample for redress, and, certainly, it is wholly beyond the province of a court of equity by its decrees to interfere with the ordinary operations of government as is here proposed.

III. The appeal should be dismissed because it is impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief. *Mills* v. *Green*, 159 U. S. 651.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by a colored man, on behalf of himself "and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated and circumstanced as himself," against the board of registrars of that county. The prayer of the bill is in substance that the defendants may be required to enroll upon the voting lists the name of the plaintiff and of all other qualified members of his race who applied for registration before August 1, 1902, and were refused, and that certain sections of the constitution of Alabama, viz., sections 180, 181, 183, 184, 185, 186, 187 and 188 of article 8, may be declared contrary to the Fourteenth and Fifteenth Amendments of the Constitution of the United States, and void.

The allegations of the bill may be summed up as follows. The plaintiff is subject to none of the disqualifications set forth in the constitution of Alabama and is entitled to vote—entitled, as the bill plainly means, under the constitution as it is. He applied in March, 1902, for registration as a voter, and was refused arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered. The same thing was done all over the State. Under section 187 of article 8 of the Alabama constitution persons registered before January 1, 1903, remain electors for life unless they become disqualified by certain crimes, etc., while after that date severer tests come into play which would exclude, perhaps, a large part of the black race. Therefore, by the refusal, the plaintiff and the other negroes excluded were deprived not only of their vote at an election which has taken place since the bill was filed, but of the permanent advantage incident to registration before 1903. The white men generally are registered for good under the easy test and the black men are likely to be kept out in the future as in the past. This refusal to register the blacks was part of a general scheme to disfranchise them, to which the defendants and the State itself, according to the bill, were parties. The defendants accepted their office for the purpose of carrying out the scheme. The

part taken by the State, that is, by the white population which framed the constitution, consisted in shaping that instrument so as to give opportunity and effect to the wholesale fraud which has been practised.

The bill sets forth the material sections of the state constitution, the general plan of which, leaving out details, is as follows: By § 178 of article 8, to entitle a person to vote he must have resided in the State at least two years, in the county one year and in the precinct or ward three months, immediately preceding the election, have paid his poll taxes and have been duly registered as an elector. By § 182, idiots, insane persons and those convicted of certain crimes are disqualified. Subject to the foregoing, by § 180, before 1903 the following male citizens of the State, who are citizens of the United States, were entitled to register, viz.: First. All who had served honorably in the enumerated wars of the United States, including those on either side in the "war between the States." Second. All lawful descendants of persons who served honorably in the enumerated wars or in the war of the Revolution. Third. "All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government." As we have said, according to the allegations of the bill this part of the constitution, as practically administered and as intended to be administered, let in all whites and kept out a large part, if not all, of the blacks, and those who were let in retained their right to vote after 1903, when tests which might be too severe for many of the whites as well as the blacks went into effect. By § 181, after January 1, 1903, only the following persons are entitled to register: First. Those who can read and write any article of the Constitution of the United States in the English language, and who either are physically unable to work or have been regularly engaged in some lawful business for the greater part of the last twelve months, and those who are unable to read and write solely because physically disabled. Second. Owners or husbands of owners of forty acres of land in the State, upon which they reside, and owners or husbands of owners of real or personal estate in the State assessed for taxation at three

hundred dollars or more, if the taxes have been paid unless under contest. By § 183, only persons qualified as electors can take part in any method of party action. By § 184, persons not registered are disqualified from voting. By § 185, an elector whose vote is challenged shall be required to swear that the matter of the challenge is untrue before his vote shall be received. By § 186, the legislature is to provide for registration after January 1, 1903, the qualifications and oath of the registrars are prescribed, the duties of registrars before that date are laid down, and an appeal is given to the county court and Supreme Court if registration is denied. There are further executive details in § 187, together with the above mentioned continuance of the effect of registration before January 1, 1903. By § 188, after the last mentioned date applicants for registration may be examined under oath as to where they have lived for the last five years, the names by which they have been known, and the names of their employers. This, in brief, is the system which the plaintiff asks to have declared void.

Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in *Mills* v. *Green*, 159 U. S. 651, 657, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903.

The certificate of the circuit judge raises the single question of the jurisdiction of the court. The plaintiff contends that this jurisdiction is given expressly by Rev. Stat. § 629, cl. 16, coupled with Rev. Stat. § 1979, which provides that every person who, under color of a state "statute, ordinance, regulation, custom, or usage," "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

We assume, as was assumed in *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68, 72, that § 1979 has not been repealed, and that jurisdiction to enforce its provisions has not been taken away by any later act. But it is suggested that the Circuit Court was right in its ruling that it had no jurisdiction as a court of the United States, because the bill did not aver threatened damage to an amount exceeding two thousand dollars. It is true that by the act of August 13, 1888, c. 866, § 1, 25 Stat. 433, 434, the Circuit Courts are given cognizance of suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, in which the matter in dispute exceeds the sum or value of two thousand dollars. We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money. *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 487. But, assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio intuitu*. There is no pecuniary limit on appeals to this court under section 5 of the act of 1891, c. 517, 26 Stat. 826, 828, *The Paquete Habana*, 175 U. S. 677, 683, and we do not feel called upon to send the case back to the Circuit Court in order that it might permit the amendment. In *Mills* v. *Green*, 159 U. S. 651; *S. C.*, 69 Fed. Rep. 852, no notice was taken of the absence of an allegation of value in a case like this.

We assume further, for the purposes of decision, that § 1979 extends to a deprivation of rights under color of a state constitution, although it might be argued with some force that the enumeration of " statute, ordinance, regulation, custom, or usage," purposely is confined to inferior sources of law. On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore we are not prepared to say that the decree should be affirmed

on the ground that the subject matter is wholly beyond the jurisdiction of the Circuit Court. *Smith* v. *McKay*, 161 U. S. 355, 358, 359.

Although the certificate relates only to the jurisdiction of that court as a court of the United States, yet, as the ground of the bill is that the constitution of Alabama is in contravention of the Constitution of the United States, the appeal opens the whole case under the act of 1891, c. 517, § 5, 26 Stat. 827. The plaintiff had the right to appeal directly to this court. The certificate was unnecessary to found the jurisdiction of this court, and could not narrow it. As the case properly is here we proceed to consider the substance of the complaint.

It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of § 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. *Green* v. *Mills*, 69 Fed. Rep. 852. But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seems to us to dispose of the case.

The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? If a white man came here on the same gen-

eral allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. If we accept the plaintiff's allegations for the purposes of his case, he cannot complain. We must accept or reject them. It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question for the future. If we have an opinion that the bill is right on its face, or if we are undecided, we are not at liberty to assume it to be wrong for the purposes of decision. It seems to us that unless we are prepared to say that it is wrong, that all its principal allegations are immaterial and that the registration plan of the Alabama constitution is valid, we cannot order the plaintiff's name to be registered. It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered, but if all could be the difficulty would not be overcome. If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured.

The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in § 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is al-

leged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. *Hans* v. *Louisiana*, 134 U. S. 1. The Circuit Court has no constitutional power to control its action by any direct means. And if we leave the State out of consideration, the court has as little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.

Decree affirmed.

MR. JUSTICE BREWER dissenting.

I am unable to concur in either the opinion or judgment in this case. The single question is whether the Circuit Court of the United States had jurisdiction. Accepting the statement of facts in the opinion of the majority as sufficiently full, it appears that the plaintiff was entitled to a place on the permanent registry and was denied it by the defendants, the board of registrars in the county in which he lived. No one was allowed to vote who was not registered. He desired to vote at the coming election for representative in Congress. He was deprived of that right by the action of the defendants. Has the Circuit Court jurisdiction to redress such wrong? It is conceded that because of the permanence of the registry the appeal cannot be dismissed under *Mills* v. *Green*, 159 U. S. 651, for if registered on the permanent registry the plaintiff can vote at all future elections.

Whether the plaintiff's remedy was at law or in equity, can-

not be considered on this appeal. It was so decided in *Smith* v. *McKay*, 161 U. S. 355, the authority of which is not in terms denied in the opinion of the majority, although by the decision it is practically disregarded. The certificate of the trial judge stated that "the only question considered and decided by the court in dismissing the bill of complaint was, whether upon the bill and demurrer thereto a case is presented of which this court has jurisdiction under the Constitution or laws of the United States."

The act of Congress authorizing appeals directly from the Circuit Courts to this court, 26 Stat. 827, provides that:

"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."

In *Smith* v. *McKay*, we said (p. 358):

"When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals."

See also *Tucker* v. *McKay*, 164 U. S. 701; *Murphy* v. *Colorado Paving Company*, 166 U. S. 719; *Shepard* v. *Adams*, 168 U. S. 618, 622; *Building & Loan Association* v. *Price*, 169 U. S. 45, in which we said:

"The complainant appealed to this court, which appeal was allowed and granted solely upon the question of the jurisdiction of the Circuit Court, and that question alone has been certified. Whether the bill shows facts sufficient to invoke the consideration of a court of equity is not such a question of jurisdiction as is referred to in the Judiciary Act of March 3, 1891, c. 517, and we have therefore no concern with that question." *Blythe Company* v. *Blythe*, 172 U. S. 644; *Blythe* v. *Hinckley*, 173 U. S. 501, 506, from which I quote: "Appeals or writs of error may be taken directly from the Circuit Courts to this court in

cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States."

A still more significant case is *Huntington* v. *Laidley*, 176 U. S. 668. In that case proceedings had been had in the courts of the State resulting in a final determination of the controversy. Subsequently this action was commenced in the Federal court, and the final decision of the state courts was pleaded as *res judicata*. The Circuit Court dismissed the suit for want of jurisdiction, and certified the question to this court. I thought it was sacrificing substance to form to reverse the judgment of dismissal when it was apparent that the controversy had been settled by the decisions in the state court, and, therefore, could not rightfully be relitigated in the Federal court. But this court held that the only question to be considered was that of jurisdiction, saying (p. 679):

"Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defence—either by way of *res adjudicata*, or because of any control acquired by the state court over the subject matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The Circuit Court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case. In any aspect of the case, the decree of the Circuit Court of the United States, dismissing the suit for want of jurisdiction, must be reversed, and the cause remanded to that court for further proceedings therein."

Although the statute and these decisions thus expressly limit the range of inquiry on a certificate of jurisdiction to the ques-

tion of jurisdiction, is is held that because there is a constitutional question shown in the pleadings, the certificate may be ignored and the entire case presented to this court for consideration. In other words, although the plaintiff, by his method of appeal, following the provisions of the statute, limited the inquiry to the matter of jurisdiction, this court will ignore such limit and treat the case as coming here on a general appeal, which he did not take. This conclusion seems to me to practically destroy the statute and overrule the prior decisions, for the jurisdiction of Federal courts primarily rests on the Constitution of the United States and the extent of their jurisdiction is determined by its provisions. Hence every case coming up on a certificate of jurisdiction may be held to present a constitutional question and be open for full inquiry in respect to all matters involved.

Neither can I assent to the proposition that the case presented by the plaintiff's bill is not strictly a legal one and entitling a party to a judicial hearing and decision. He alleges that he is a citizen of Alabama, entitled to vote; that he desired to vote at an election for representative in Congress; that without registration he could not vote, and that registration was wrongfully denied him by the defendants. That many others were similarly treated does not destroy his rights or deprive him of relief in the courts. That such relief will be given has been again and again affirmed in both National and state courts.

That the United States Circuit Court has jurisdiction of an action like this seems to me to result inevitably from prior decisions of this court. Without stopping to notice in detail the cases of *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651, and *In re Coy*, 127 U. S. 731, in which the general jurisdiction of Federal courts over matters involved in the election of national officers is affirmed, I refer to two recent cases which bear directly upon the present question. *Wiley* v. *Sinkler*, 179 U. S. 58, was an action brought in the Circuit Court of the United States by the plaintiff to recover damages of an election board for wilfully rejecting his vote for a member of the House of Representatives. We held that the court had jurisdiction, and said (p. 64):

"This action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States. The complaint, by alleging that the plaintiff was at the time, under the constitution and laws of the State of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the State, shows that the action is brought under the Constitution and laws of the United States. The damages are laid at the sum of $2500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court. *Barry* v. *Edmunds*, 116 U. S. 550; *Scott* v. *Donald*, 165 U. S. 58, 89; *Vance* v. *W. A. Vandercook Co.*, 170 U. 468, 472; *North American Co.* v. *Morrison*, 178 U. S. 262, 267. The Circuit Court therefore clearly had jurisdiction of this action, and we are brought to the consideration of the other objections presented by the demurrer to the complaint."

Again, in *Swafford* v. *Templeton*, 185 U. S. 487, which, like the former case, was one brought in the Circuit Court of the United States to recover damages for the alleged wrongful refusal by the defendants as election officers to permit the plaintiff to vote at a national election for a member of the House of Representatives, it was held that the court had jurisdiction. Here, too, we said, after referring to *Wiley* v. *Sinkler* (p. 492):

"It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in *Ex parte Yarbrough*, 110 U. S. 655, 664, 'fundamentally based upon the Constitution of the United States, which created the office of member of Congress, and declared that it should be elective, and pointed out the means of ascertaining who should be electors.' That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained

of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the State for electors of the most numerous branch of the legislature of the State. It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an inspection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States."

It seems to me nothing need be added to these decisions, and unless they are to be considered as overruled they are decisive of this case.

MR. JUSTICE BROWN also dissents.

MR. JUSTICE HARLAN dissenting.

By the final judgment in the Circuit Court the bill in this case was dismissed for want of jurisdiction to entertain it and for want of equity; and from that judgment the plaintiffs prayed and were allowed an appeal.

Subsequently an order was made by the Circuit Court certifying that the only question considered and decided was whether upon the bill and demurrer a case was presented of

which it had jurisdiction under the Constitution and laws of the United States.

Although the case involves questions of considerable importance, it was submitted here without oral argument.

Could the Circuit Court take cognizance of this cause consistently with the act of Congress regulating its jurisdiction? This is naturally the fundamental, if not the only, question in the case. An answer to the question requires a reference to several acts of Congress, including the Judiciary Act of August 13, 1888, correcting that of March 3, 1887. 25 Stat. 433.

Section 629 of the Revised Statutes enumerates in subdivisions the cases of which the Circuit Courts of the United States may take original cognizance.

In subdivision one of that section the Circuit Courts are given original cognizance "of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State;" and in subdivision two, "of all suits in equity, where the matter, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners." Rev. Stat. § 629, subdiv. 1 and 2.

By the sixteenth subdivision of that section it is declared that the Circuit Courts shall have original cognizance "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The matter in dispute in such suits was not expressly required by the Revised Statutes to have any money value.

By section 1979 of the Revised Statutes, Title 24, "Civil Rights," it is provided that "every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citi-

zen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." It has been said that this section as well as subdivision 16 of section 629 were based upon the first section of the act of April 20, 1871, 17 Stat. 13, c. 22, entitled "An act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." *Holt* v. *Indiana Manuf. Co.*, 176 U. S. 68, 70.

Next came the act of March 3, 1875, which provided that "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *and* arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein." 18 Stat. 470, c. 137. That act expressly repealed previous statutes in conflict with its provisions.

Then came the act of 1888, correcting that of 1887, and which provides "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and* arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their author-

ity, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." By that act the conflicting provisions of previous acts were repealed, except in certain particulars, among which were the provisions relating to "any jurisdiction or right mentioned . . . in Title twenty-four of the Revised Statutes," Civil Rights, under which Title § 1979 is found.

It is clear that under the act of 1888 a Circuit Court could not take original cognizance of a suit simply because it was one arising under the Constitution or laws of the United States. The value of the matter in dispute in such a case must exceed $2000, exclusive of interest and costs.

The bill makes no allegation whatever as to the value of the matter in dispute, although this court, speaking by the Chief Justice, in *Holt* v. *Indiana Manufacturing Company*, above cited, after referring to the first section of the Judiciary Act of 1888, said: "This" [the question of the value in dispute in cases arising under the Constitution or laws of the United States] " was carefully considered in *United States* v. *Sayward*, 160 U. S. 493, and it was held that the sum or value named was *jurisdictional*, and that the Circuit Court could not, under the statute, take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded two thousand dollars. That decision was reaffirmed in *Fishback* v. *Western Union Telegraph Company*, 161 U. S. 96, 99." It was added—contrary to the intimation given in the opinion in the present case—that "the conclusion reached is not affected by the fact that the operation of the act of March 3, 1891, was to do away with any pecuniary limitation on appeals directly from the Circuit Courts to this court. *The Paquete*

Habana, 175 U. S. 677." Of course, it was not meant by that language that the jurisdiction of the Circuit Courts, so far as the value of the matter in dispute is concerned, was changed as to the cases embraced by the fifth section of the act of 1891. The act of 1891 left the original jurisdiction of the Circuit Courts as established by the act of 1888.

1. It cannot be disputed that the present suit is one arising under the Constitution and laws of the United States, and it is clear that the value of the matter in dispute is made by the statute an essential element in the jurisdiction of the Circuit Court in such a case. But it has been suggested that this suit is also embraced by subdivision 16 of § 629 and § 1979 of the Revised Statutes—which provisions this court assumed, in *Holt* v. *Manufacturing Co.*, and now assumes, were not repealed by any subsequent statute, and, therefore, that the value of the matter in dispute is of no consequence. But this suggestion overlooks the declaration of the court in that case to the effect that although the above provisions must be assumed to be still (1899) in force, they refer "to civil rights only." 176 U. S. 72. In this view, subdivision 16 of § 629 and § 1979 of the Revised Statutes have no bearing upon the present case, if the rights for the protection of which the present suit was brought are political rights, and not civil rights within the meaning of the statutes relating to "Civil Rights." Consequently the saving clause in the act of 1888 in respect of any jurisdiction or right mentioned in Title 24 of the Revised Statutes, Civil Rights, becomes immaterial in the present case. Whether this be so or not, the court refrains from declaring that the plaintiff could proceed under subdivision 16 of section 629 or section 1979 of the Revised Statutes, without regard to the value of the matter in dispute. If this court thinks that this suit could be maintained under subdivision 16 of § 629 or under § 1979, or under both, without regard to the value of the matter in dispute, I submit that it should have been so adjudged.

2. Referring to the suggestion that the act of 1888 gives the Circuit Court jurisdiction in all suits at law or equity, in which the matter in dispute is the sum or value of $2000 and arising under the Constitution or laws of the United States, and con-

ceding that this court in *Wiley* v. *Sinkler*, 179 U. S. 57, and *Swafford* v. *Templeton*, 185 U. S. 487, recognized that the deprivation of a man's political rights (those cases had reference to the elective franchise) may properly be alleged to have the required value in money, the court says: "Assuming that the allegation [of value] should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio intuitu*. There is no pecuniary limit on appeals in this court under section 5 of the act of 1891, c. 517, 26 Stat. 826, 828; *The Paquete Habana*, 175 U. S. 677, 683, and we do not feel called upon to send the case back to the Circuit Court that it might permit the amendment."

It seems to me that this question as to the value of the matter in dispute was sufficiently raised in the Circuit Court; for the demurrer to the bill was, in part, on the ground that the facts stated did not make a case "within the jurisdiction of the court." But, passing that view, I come to a more serious matter. In cases of which a Circuit Court may take original cognizance, the value of the matter in dispute—which is mentioned in the statute in advance of any reference to the nature of the subject of the action—is as essential to jurisdiction as is the nature of the subject of such dispute. And yet the court says that an objection that the record from the Circuit Court does not show an allegation as to value is unavailing here, even if such allegation ought to have been made. That is a new, and I take leave to say a startling, doctrine. Must not this court upon its own motion decline to pass upon, indeed, has this court, strictly speaking, jurisdiction to consider and determine, the merits of a case coming from the Circuit Court, unless it *affirmatively* appears *from the record* that the case is one of which that court could take cognizance? Is not a suit presumably without the jurisdiction of a Circuit Court, unless the record shows it to be one of which that court may take cognizance? Is it of any consequence that the parties did not raise the question of jurisdiction in the Circuit Court? If the record shows nothing more than that the case

arises under the Constitution and laws of the United States, and if it does not affirmatively appear, in some appropriate way, that the value of the matter in dispute is up to the required amount, has this court jurisdiction to consider and determine the merits of the case?

Let us look at some of the adjudged cases upon the general subject of the jurisdiction of the Federal courts, and see what the duty of this court is when its own jurisdiction does not affirmatively appear from the record, or when it does not appear that the Circuit Court had jurisdiction.

In *Sizer* v. *Many*, 16 How. 97, 103, which was an action for the infringement of letters patent: "The sum taxed being less than $2000 no writ of error will lie under the act of 1789. This act *gives no jurisdiction to this court* over the judgment of a Circuit Court, where the judgment is for less than that sum. . . . The writ of error must therefore be dismissed for want of jurisdiction." In *Brown* v. *Shannon*, 20 How. 55, 58, which was an action to enforce the specific execution of a contract in relation to the use of a patent right: "The sum mentioned in the bill . . . being less than $2000, whatever errors may be apparent in the proceedings and decree of the court below, we have yet *no power* under the act of Congress to revise and correct them, and the appeal *must* be dismissed." In *Richmond* v. *City of Milwaukee*, 21 How. 80, 82, which was an action to prohibit the conveyance of certain lots: "There is nothing in the allegations of the parties or in the evidence to show that the value of the lots in question exceeded $2000, nor anything from which it can be inferred. The appeal must therefore be dismissed *for want of jurisdiction in this court.*" In *Pratt* v. *Fitzhugh*, 1 Black, 271, 273, which was a cause in admiralty: "Without the fact of value being shown on the record, or by evidence *aliunde*, the court *has no jurisdiction.*" In *Walker* v. *United States*, 4 Wall. 163, 165, which was an action on a judgment for money: "*This court has no appellate jurisdiction*, except such as is defined by Congress. The act of Congress limits this jurisdiction to cases where the matter in dispute exceeds $2000. We can no more take jurisdiction where the matter does not exceed than we can where it is less

than that sum. The amount in controversy in the case before us, ascertained in conformity with the settled principles of the court, does not exceed two thousand dollars. We have, therefore, *no jurisdiction* of the writ of error, and it *must* be dismissed." In *The Grace Girdler*, 6 Wall. 441, which was an appeal in admiralty: "While it is true that the greater part of the loss fell upon Lockwood as owner of the Ariel, and her belongings, there is nothing in the record which shows that the damage sustained exceeded $2000. And *this is essential to jurisdiction.*" In *Ayers* v. *Watson*, 113 U. S. 595, 598, which was an action of trespass to try title to land: "Diverse state citizenship of the parties, *or some other jurisdictional fact prescribed by the second section*, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed."

These cases relate to the jurisdiction of this court under statutes prescribing a certain amount as essential, upon writ of error or appeal, for the review of judgments rendered in the Circuit Court.

Looking now at cases in which the want of jurisdiction in the Circuit Court has been held to preclude this court from going into the merits of the case adjudged, we find in *King Bridge Co.* v. *Otoe County*, 120 U. S. 226, which was an action upon county warrants, this language: "It does not appear that the Circuit Court had jurisdiction of the action. Unless the contrary appears affirmatively from the record, the presumption, upon writ of error or appeal, is that the court below was without jurisdiction." In *Metcalf* v. *Watertown*, 128 U. S. 587, which was an action upon a judgment, and in which case the question was whether an action upon a certain judgment was barred by limitation, this court said: "We are not, however, at liberty to express any opinion upon the question of limitation, if the court, whose judgment has been brought here for review, *does not appear, from the record*, to have had jurisdiction of the case. And whether that court had or had not jurisdiction, is a question which we must examine and determine, *even if the parties forbear to make it, or consent that the case be*

considered upon its merits." In *Chapman* v. *Barney*, 129 U. S. 677, 681, which was an action for trover: "We are confronted with the question of jurisdiction, which, *although not raised by either party in the court below or in this court*, is presented by the record, and under repeated decisions of this court must be considered." In *Parker* v. *Ormsby*, 141 U. S. 83: "Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear, upon the record, it was error to have rendered a decree, *whether the question of jurisdiction was raised or not in the court below.* In the exercise of its power, this court, *of its own motion*, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act." In *Mattingly* v. *Northwestern Virginia Railroad*, 158 U. S. 53, 57, which was an action to set aside certain conveyances and to foreclose a mortgage: "Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet as the record failed to affirmatively show jurisdiction, this court must take notice of the defect."

According to the adjudged cases, the first inquiry which this court should make as to any case before it from an inferior Federal court is as to its own jurisdiction. If jurisdiction does not appear from the record then the writ of error or appeal should be dismissed. If it is found to have jurisdiction for any purpose, then its next duty is to inquire as to the jurisdiction of the court below. When the latter court does not appear upon the record to have jurisdiction, then the duty of this court is to reverse the judgment and remand the case to be dismissed for want of jurisdiction. I say "appear upon the record to have jurisdiction," because, as we have seen, the presumption is that a cause is without the jurisdiction of a Federal court, unless the contrary affirmatively appears. *Turner* v. *Bank of North America*, 4 Dall. 8; *Brown* v. *Keene*, 8 Pet. 115; *Ex parte Smith*, 94 U. S. 455; *Robertson* v. *Cease*, 97 U. S. 646. In *Brown* v. *Keene*, Chief Justice Marshall said: "The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdic-

tion depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

To these cases I will add that of *M. C. & L. M. Railway* v. *Swan*, 111 U. S. 379, 382, in which this court said: "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

In the above case of *Holt* v. *Manufacturing Co.*, 176 U. S. 68, which involved a question of the jurisdiction of the Circuit Court, this court said: "In this, as in all cases, if it appears that the Circuit Court had no jurisdiction, *it is the duty of this court to so declare, and enter judgment accordingly.*"

These principles have been expressly affirmed by this court in many other cases. And yet, according to the opinion in this case, if objection is not made in the Circuit Court to its jurisdiction, it will be unavailing to raise that question in this court, and we may proceed to determine the merits of the case. Such a doctrine, I repeat, is a new departure. The court, in effect says, that although it may know that the record fails to show a case within the original cognizance of the Circuit Court, it may close its eyes to that fact, and review the case on its merits. In view of the adjudged cases, I cannot agree that the failure of parties to raise a question of jurisdiction will relieve this court of its duty to raise it upon its own motion. The con-

trary view cannot be justified. This court may not assume jurisdiction to do that which it has no authority to do.

It will be appropriate to observe that the Circuit Court in effect propounds the question whether it had jurisdiction of this case upon the record before it. That question necessarily involves the inquiry whether subdivision 16 of § 629 and § 1979 of the Revised Statutes were repealed by later acts. But that point is left undecided, the court only assuming that those statutory provisions are still in force, but it does not say whether the suit could be maintained under those sections or under either of them without allegation or proof as to the value of the matter in dispute. Nor does the court distinctly adjudge whether the case is embraced by the act of 1887–8; but simply *assuming* that the allegation of value should have been made in the bill, it proceeds to consider the case upon its merits. The question of the jurisdiction of the Circuit Court under the acts of Congress, the one certified, is thus left in the air, and the case is examined and disposed of upon its merits just as if jurisdiction of the Circuit Court appeared upon the record. There is no claim that the essential fact of value appears anywhere in the record, either in the bill or otherwise. Consequently, as already said, this court is without power to consider the merits.

The court says that the plaintiff had the right to appeal directly to this court under section 5 of the act of 1891, and that the certificate was unnecessary to found the jurisdiction of this court and could not narrow it. But it does not follow that this court can review the merits of the case, if the Circuit Court does not appear to have had jurisdiction to determine the rights of the parties.

My views may be summed up as follows: 1. This case is embraced by that clause of the act of 1887–8, which provides that the Circuit Court shall have original cognizance "of all suits of a civil nature, . . . where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States." 2. That the sum or value of the matter in dispute in such cases is jurisdictional under the statute. 3. That as it did not appear from the record, in any way, that the matter

in dispute exceeded in value the jurisdictional amount, the Circuit Court could not take cognizance of the case or dispose of it upon its merits. 4. That least of all does this court have jurisdiction to determine the merits of this case. 5. That when a case comes here upon a certificate as to the jurisdiction of a Circuit Court, this court may not forbear to decide that question, and determine the merits of the case upon a record which does not show jurisdiction in the Circuit Court.

As these are my views as to the jurisdiction of this court, upon this record, I will not formulate and discuss my views upon the merits of this case. But to avoid misapprehension, I may add that my conviction is that upon the facts alleged in the bill (if the record showed a sufficient value of the matter in dispute) the plaintiff is entitled to relief in respect of his right to be registered as a voter. I agree with MR. JUSTICE BREWER that it is competent for the courts to give relief in such cases as this.

SENA *v.* UNITED STATES.

No. 40. Petition for modification of judgment and for rehearing. June 1, 1903.

The opinion of the court in this case is reported *ante*, p. 233.

MR. JUSTICE BROWN: *It is ordered by the court* that the decree of affirmance in this case be amended by adding the following words: "so far as such decree orders that the petition be dismissed, but without prejudice to such further proceedings as petitioner may be advised to take."

OPINIONS PER CURIAM, ETC., FROM MARCH 2, TO MAY 3, 1903.

No. 169. FRED T. HEGEMAN ET AL., ETC., PLAINTIFFS IN ERROR, *v.* JOHN H. SPRINGER, AS RECEIVER, ETC. Error to the United States Circuit Court of Appeals for the Second Circuit. Submitted February 24, 1903. Decided March 2, 1903. *Per Curiam.* Judgment affirmed with costs, on the authority of *Bleistein* v. *Donaldson Company*, 188 U. S. 239, decided at this term; *Robinson* v. *Belt*, 187 U. S. 50, and the case remanded to the Circuit Court of the United States for the Southern District of New York. *Mr. Edward Jacobs* for plaintiffs in error. *Mr. Chauncey S. Truax* for defendant in error.

No. 179. GEORGE NESTER ET AL., PLAINTIFFS IN ERROR, *v.* FRANK E. CHURCH. Error to the Supreme Court of the State of Michigan. Argued February 27, 1903. Decided March 2, 1903. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Castillo* v. *McConnico*, 168 U. S. 674. *Mr. Timothy E. Tarsney* for plaintiffs in error. *Mr. Frank E. Robson* for defendant in error.

No. 402. AMADA C. DE BACA ET AL., ADMINISTRATORS, ETC., APPELLANTS, *v.* UNITED STATES ET AL. Appeal from the Court of Claims. Submitted February 24, 1903. Decided March 2, 1903. Error being confessed by the appellees, judgment reversed, and cause remanded with directions to proceed therein according to law. *Mr. H. C. Burnett* for appellants. *The Attorney General* and *Mr. Assistant Attorney General Thompson* for appellees.

No. 196. BANK OF COMMERCE, PLAINTIFF IN ERROR, *v.* CHARLES S. WILTSIE, PROSECUTING ATTORNEY. Error to the Supreme

Court of the State of Indiana. Argued March 10, 11, 1903. Decided March 16, 1903. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Erie Railroad Company* v. *Purdy*, 185 U. S. 148; *Mallett* v. *North Carolina*, 181 U. S. 592; *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291; and cases cited. See 153 Indiana, 460–474. *Mr. Augustin Boice* for plaintiff in error. *Mr. Merrill Moores*, *Mr. W. L. Taylor* and *Mr. C. C. Hadley* for defendant in error.

No. 197. HUNTER H. MOSS, JR., PROSECUTING ATTORNEY, ETC., ET AL., APPELLANTS, *v.* ELLIS GLENN. Appeal from the Circuit Court of the United States for the Northern District of West Virginia. Argued and submitted March 11, 1903. Decided March 16, 1903. *Per Curiam.* Final order reversed with costs, and cause remanded with directions to quash the writ of *habeas corpus* and dismiss the petition. *Baker* v. *Grice*, 169 U. S. 284; *Markuson* v. *Boucher*, 175 U. S. 184; *Minnesota* v. *Brundage*, 180 U. S. 499; *Dreyer* v. *Illinois*, 187 U. S. 71. *Mr. William N. Miller* and *Mr. Hunter H. Moss, Jr.*, for appellants. *Mr. C. C. Cole* for appellees.

No. 208. PEOPLE OF THE STATE OF ILLINOIS ON THE RELATION OF GEORGE F. RAYBURN ET AL., PLAINTIFFS IN ERROR, *v.* HUGH A. BINNS ET AL. Error to the Supreme Court of the State of Illinois. Submitted March 12, 1903. Decided March 16, 1903. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Castillo* v. *McConnico*, 168 U. S. 674; *Butler* v. *Gage*, 138 U. S. 52; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148. See 192 Illinois, 68. *Mr. Edward D. Blinn* for plaintiffs in error. No appearance for defendants in error.

No. 227. LILLIE WINSTON, PLAINTIFF IN ERROR, *v.* WALKER WINSTON. Error to the Supreme Court of the State of New York. Argued April 7, 1903. Decided April 13, 1903. *Per*

Curiam. Judgment affirmed with costs, on the authority of *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Andrews* v. *Andrews*, 188 U. S. 14. *Mr. Eugene Sweeney* for plaintiff in error. *Mr. Daniel E. Lynch* for defendant in error.

No. 535. Almond A. White, Plaintiff in Error, *v.* Sidney L. Wright et al. Error to the Supreme Court of the State of Minnesota. Motion to dismiss submitted April 6, 1903. Decided April 13, 1903. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Haseltine* v. *Bank*, 183 U. S. 130; *Insurance Company* v. *Kirchoff*, 160 U. S. 374; *Meagher* v. *Manufacturing Company*, 145 U. S. 611. *Mr. Orville Rinehart* for plaintiff in error. *Mr. Leon E. Lum* and *Mr. Jed L. Washburn* for defendants in error.

No. 242. Frederick D. Schulte et al., Plaintiffs in Error, *v.* August Heman. Error to the Supreme Court of the State of Missouri. Argued and submitted April 16, 1903. Decided April 20, 1903. *Per Curiam.* Judgment affirmed with costs, on the authority of *Shumate* v. *Heman*, 181 U. S. 402; *French* v. *Barber Asphalt Paving Company*, 181 U. S. 324; *Chadwick* v. *Kelly*, 187 U. S. 540; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112. See *Heman* v. *Schulte*, 166 Missouri, 409. *Mr. William B. Thompson* for plaintiffs in error. *Mr. Hickman P. Rodgers* for defendant in error.

Nos. 249 and 250. United States ex rel. Henry D. Phillips, Plaintiff in Error, *v.* Eugene F. Ware, Commissioner of Pensions; and Nos. 251 and 322. United States ex rel. Henry D. Phillips, Plaintiff in Error, *v.* Ethan Allen Hitchcock, Secretary of the Interior et al. Error to the Court of Appeals of the District of Columbia. Submitted April 16, 1903. Decided April 20, 1903. *Per Curiam.* Writs of error dis-

missed for the want of jurisdiction. Act of March 3, 1901, sec. 233, 31 Stat. 1189, c. 854; act of February 9, 1893, sec. 8, 27 Stat. 434, c. 74; act of March 3, 1885, 23 Stat. 443, c. 355; *Baltimore and Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210; *United States* v. *Lynch*, 137 U. S. 280; *Cameron* v. *United States*, 146 U. S. 533; *South Carolina* v. *Seymour*, 153 U. S. 353. *Mr. Henry D. Phillips* and *Mr. E. R. Walker* for plaintiff in error. *Mr. Assistant Attorney General Campbell* and *Mr. F. L. Campbell* for defendants in error.

No. 357. Mary J. Lyon et al., Plaintiffs in Error, *v.* Margaret Gombret et al. Error to the Supreme Court of the State of Nebraska. Motions to dismiss or affirm submitted April 6, 1903. Decided April 20, 1903. *Per Curiam.* Writ of error dismissed for the want of jurisdiction, on the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Pierce* v. *Somerset Railway*, 171 U. S. 648; *Gillis* v. *Stinchfield*, 159 U. S. 658; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556. See *Lyon* v. *Gombert*, 63 Nebreska, 630. *Mr. Lionel C. Burr* and *Mr. Charles L. Burr* for plaintiffs in error. *Mr. J. H. Broady* for defendants in error.

No. 237. Second National Bank of Richmond, Kentucky, Plaintiff in Error, *v.* C. N. Fitzpatrick et al. Error to the Court of Appeals of the State of Kentucky. Argued April 15, 1903. Decided April 27, 1903. *Per Curiam.* Writ of error dismissed for the want of jurisdiction, on the authority of *Haseltine* v. *Central Bank*, 183 U. S. 130. *Mr. J. A. Sullivan* for plaintiff in error. No appearance for defendants in error.

No. 611. New York, New Haven and Hartford Railroad Company, Plaintiff in Error, *v.* Patrick McKeon. Error to the Court of Common Pleas of Fairfield County, Connecticut. Motions to dismiss or affirm, submitted April 20, 1903. Decided April 27, 1903. *Per Curiam.* Judgment affirmed with

costs and interest, on the authority of *Wheeler* v. *New York etc. Railroad Company*, 178 U. S. 321; *New York and New England Railroad Company* v. *Bristol*, 151 U. S. 556; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Little Rock etc. Railway Company* v. *Worthen*, 120 U. S. 97–102; *Davidson* v. *New Orleans*, 96 U. S. 97, 105. See 53 Atl. Rep. 656. *Mr. Arthur M. Marsh* for plaintiff in error. *Mr. Stiles Judson, Jr.*, for defendant in error.

Decisions on Petitions for Writs of Certiorari.

From March 2 to May 3, 1903.

No. 512. Joseph H. Ching, Petitioner, *v.* United States. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George E. Hamilton* and *Mr. Adrian Posey* for petitioner. *Mr. Solicitor General Richards* for respondent.

No. 573. Eufaula Cotton Oil Company et al., Petitioners, *v.* Stillwell & Bierce and Smith-Vaile Company. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Edgar Simonds* for petitioners. *Mr. E. E. Wood* for respondent.

No. 577. Philip S. Witherspoon, Petitioner, *v.* Frederick P. Olcott. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. O. Davis* for petitioner. No appearance for respondent.

No. 592. Walter N. Dimmick, Petitioner, *v.* United States.

March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George D. Collins* for petitioner. *Mr. Solicitor General Richards* for respondent.

No. 599. WILLIAM E. FERGUSON ET AL., ETC., PETITIONERS, *v.* ENOCH HELLIESEN ET AL. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin* and *Mr. Le Roy S. Gove* for petitioners. *Mr. Wilhelmus Mynderse* for respondents.

No. 608. WILLIAM J. HUME, PETITIONER, *v.* UNITED STATES. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. H. M. Jordan* for petitioner. *Mr. Solicitor General Richards* for respondent.

No. 613. STEAMSHIP EAGLE POINT, ETC., PETITIONER, *v.* LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LIMITED. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Wilhelmus Mynderse* for petitioner. *Mr. Charles C. Burlingham* and *Mr. Harrington Putnam* for respondent.

No. 617. PAUL CAPDEVIELLE, MAYOR, ETC., ET AL., PETITIONERS, *v.* UNITED STATES EX REL. D. M. KILPATRICK ET AL. March 2, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank B. Thomas* for petitioners. *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. H. M. Jordan* for respondents.

No. 247. BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., PETITIONERS, *v.* W. N. COLER & CO. March 9, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. A. C. Avery* for petitioners. *Mr. John F. Dillon*, *Mr. Charles Price*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* for respondents.

No. 457. DAVID R. JULIAN, SHERIFF, ETC., ET AL., PETITIONERS, *v.* CENTRAL TRUST COMPANY ET AL. March 9, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. A. C. Avery*, *Mr. Lee S. Overman* and *Mr. C. A. Mountjoy* for petitioners. *Mr. Charles Price* for respondents.

No. 612. ALPHONSE EMSHEIMER, PETITIONER, *v.* CITY OF NEW ORLEANS. March 9, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. H. M. Jordan* for petitioner. No appearance for respondent.

No. 625. ARTHUR JOHN BUSTON, PETITIONER, *v.* PENNSYLVANIA RAILROAD COMPANY. March 9, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Richard C. Dale*, *Mr. George W. Pepper* and *Mr. Samuel Dickson* for petitioner. *Mr. John G. Johnson* and *Mr. Frank P. Prichard* for respondent.

No. 609. CREED AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER, *v.* UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY. March 16, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Charles S. Thomas*, *Mr. Wm. H. Bryant* and *Mr. H. H. Lee* for petitioner. *Mr. Charles J. Hughes, Jr.*, for respondent.

No. 623. CHARLES B. KIMBELL ET AL., PETITIONERS, *v.* CHICAGO HYDRAULIC PRESS BRICK COMPANY ET AL. March 16, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edmund H. Smalley* for petitioners. *Mr. Edward Cunningham, Jr.*, and *Mr. Edward C. Eliot* for respondents.

No. 628. HENRY C. PAYNE, POSTMASTER GENERAL, PLAINTIFF IN ERROR AND PETITIONER, *v.* UNITED STATES EX REL. NATIONAL RAILWAY PUBLICATION COMPANY. March 16, 1903. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Solicitor General Richards* for petitioner. No appearance for respondent.

No. 629. HENRY C. PAYNE, POSTMASTER GENERAL, PLAINTIFF IN ERROR AND PETITIONER, *v.* UNITED STATES EX REL. RAILWAY LIST COMPANY. March 16, 1903. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Solicitor General Richards* for petitioner. No appearance for respondent.

No. 636. WILLIAM A. WRIGHT, COMPTROLLER GENERAL, PETITIONER, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL. March 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Boykin Wright* and *Mr. John C. Hart* for petitioner. *Mr. Alex. C. King* for respondents.

No. 638. MEXICAN NATIONAL RAILROAD COMPANY, PETITIONER, *v.* NIEL JACKSON. March 23, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas W. Dodd* for petitioner. No appearance for respondent.

No. 619. ROBERT H. DOWNMAN ET AL., PETITIONERS, *v.* GERMAN INSURANCE COMPANY OF FREEPORT, ILL. April 6, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. N. Atkinson* for petitioners. No appearance for respondent.

No. 630. UNITED STATES, PETITIONER, *v.* ALFRED R. MULLINS. April 6, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Solicitor General Richards* for petitioner. *Mr. Alexander Pope Humphrey* for respondent.

No. 633. WEEKER GIVEN, PETITIONER, *v.* TIMES-REPUBLICAN PRINTING COMPANY ET AL. April 6, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. A. Lipscomb* for petitioner. *Mr. A. B. Cummins*, *Mr. Wm. W. Dudley* and *Mr. Louis T. Michener* for respondents.

No. 631. JOHN R. CLARKE, PETITIONER, *v.* TOWN OF NORTHAMPTON. April 20, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Fayette B. Tiffany*, *Mr. Henry J. Cookinham* and *Mr. John M. Thurston* for petitioner. *Mr. Fred. Linus Carroll* and *Mr. Andrew J. Nellis* for respondent.

No. 663. RALPH MOORE, ETC., PETITIONER, *v.* SOUTHERN RAILWAY COMPANY. April 20, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry H. Ingersoll* for petitioner. *Mr. W. A. Henderson* and *Mr. Leon Jourolmon* for respondent.

No. 652. H. BAUENDAHL & CO., PETITIONERS, *v.* JACOB S.

BERNHEIMER & BRO. April 27, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Adolph G. Wolf* for petitioners. *Mr. Max J. Kohler* for respondents.

No. 669. S. WARREN LAMSON ET AL., PETITIONERS, *v.* CHARLES F. HUTCHINS, EXECUTOR, ETC. April 27, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. H. Barnum* for petitioners. No appearance for respondent.

No. 672. THE STEAMSHIP ELY, ETC., PETITIONER, *v.* WILLIAM B. BOWRING ET AL. April 27, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioner. *Mr. Wilhelmus Mynderse* for respondents.

Cases Disposed of Without Consideration by the Court.

From March 2 to May 3, 1903.

No. 233. CHARLES DOHERTY, PLAINTIFF IN ERROR, *v.* STATE OF VERMONT. Error to the Supreme Court of the State of Vermont. March 2, 1903. Dismissed, on authority of counsel for plaintiff in error. *Mr. Tracy L. Jeffords* for plaintiff in error. *Mr. C. A. Prouty* for defendant in error.

No. 184. CONTRACTING AND BUILDING COMPANY OF KENTUCKY, PETITIONER, *v.* CONTINENTAL TRUST COMPANY. March 4, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit dismissed for the want of prosecution. *Mr. Thomas Emery* and *Mr. John Ford* for petitioner. No appearance for respondent.

No. 606. ROBERT H. BILLINGSLEA, PETITIONER, *v.* KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL. March 9, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit dismissed, per stipulation. *Mr. Presley K. Ewing* and *Mr. Henry F. Ring* for petitioners. *Mr. Gardiner Lathrop*, *Mr. Thomas R. Morrow* and *Mr. S. W. Moore* for respondents.

No. 388. JEREMIAH F. MCCARTHY ET AL., PLAINTIFFS IN ERROR AND APPELLANTS, *v.* JAMES F. MCCARTHY. Error to and appeal from the Court of Appeals of the District of Columbia. March 11, 1903. Dismissed, each party to pay its own costs in this court, per stipulation of counsel. *Mr. Chapin Brown* for plaintiffs in error and appellants. *Mr. C. C. Cole* and *Mr. Vincent A. Sheehy* for defendant in error and appellee.

No. 283. JOSHUA M. SEARS, PLAINTIFF IN ERROR, *v.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON. Error to the Supreme Judicial Court of the State of Massachusetts. April 6, 1903. Dismissed with costs, per stipulation. *Mr. Edward W. Hutchins* and *Mr. Henry Wheeler* for plaintiff in error. *Mr. Thomas M. Babson* for defendant in error.

No. 239. SCHOONER GIBARA HABANA, ETC., APPELLANT, *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of Florida, April 8, 1903. Dismissed, pursuant to the tenth rule. *Mr. H. A. Herbert* and *Mr. Benjamin Micou* for appellant. *The Attorney General* for appellee.

No. 240. SCHOONER EXPRESSO, ETC., APPELLANT, *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of Florida. April 8, 1903. Dismissed, pursuant to the tenth rule. *Mr. H. A. Herbert* and *Mr.*

Benjamin Micou for appellant. *The Attorney General* for appellee.

No. 274. JOHN LAWRENCE ET AL., TRUSTEES, ETC., PLAINTIFFS IN ERROR, *v.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON. Error to the Supreme Judicial Court of the State of Massachusetts. April 13, 1903. Dismissed with costs, per stipulation. *Mr. J. H. Benton, Jr.*, for plaintiffs in error. *Mr. Thomas M. Babson* for defendant in error.

No. 531. JOHN LAWRENCE O'BRIEN, APPELLANT, *v.* JOHN H. SHINE, UNITED STATES MARSHAL, ETC. Appeal from the Circuit Court of the United States for the Northern District of California. April 17, 1903. Dismissed with costs, on motion of *Mr. John M. Thurston* for the appellant. *Mr. John M. Thurston* for appellant. *Mr. Solicitor General Richards* and *Mr. Morgan H. Beach* for appellee.

No. 260. V. VAN BUREN, PLAINTIFF IN ERROR, *v.* MARGARET U. MCKINLEY. Error to the Supreme Court of the State of Idaho. April 17, 1903. Dismissed with costs, pursuant to the tenth rule. *Mr. James H. Hawley* for plaintiff in error. *Mr. Edgar Wilson* for defendant in error.

No. 270. JAMES P. WITHEROW, APPELLANT, *v.* CARNEGIE STEEL COMPANY, LIMITED. Appeal from the Circuit Court of the United States for the Southern District of New York. April 23, 1903. Dismissed with costs, pursuant to the tenth rule. *Mr. Hector M. Hitchings* for appellant. *Mr. John R. Bennett* for appellee.

No. 262. CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS

RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* VILLAGE OF CLYDE, OHIO. Error to the Supreme Court of the State of Ohio. April 24, 1903. Dismissed with costs, on authority of counsel for plaintiff in error. *Mr. John T. Dye* for plaintiff in error. *Mr. Homer Metzgar* and *Mr. S. S. Richards* for defendant in error.

No. 284. EMERSON CHAMBERLAIN, APPELLANT, *v.* PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY ET AL. Appeal from the Circuit Court of the United States for the District of Indiana. April 27, 1903. Dismissed per stipulation. *Mr. Edward B. Whitney* for appellant. *Mr. J. M. Dickinson* for appellees.

No. 281. VIRGINIA-CAROLINA CHEMICAL COMPANY, PETITIONER, *v.* HOME INSURANCE COMPANY OF NEW YORK ET AL. April 27, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. Dismissed for the want of prosecution. *Mr. Henry A. M. Smith* for petitioner. *Mr. Augustin T. Smythe* and *Mr. Alex. C. King* for respondents.

ALLOTMENT OF JUSTICES.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1902.

MARCH 9, 1903.

ORDER: There having been an associate justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and associate justices, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First circuit, OLIVER WENDELL HOLMES, associate justice.
For the Second circuit, RUFUS W. PECKHAM, associate justice.
For the Third circuit, HENRY B. BROWN, associate justice.
For the Fourth circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth circuit, EDWARD D. WHITE, associate justice.
For the Sixth circuit, JOHN M. HARLAN, associate justice.
For the Seventh circuit, WILLIAM R. DAY, associate justice.
For the Eighth circuit, DAVID J. BREWER, associate justice.
For the Ninth circuit, JOSEPH MCKENNA, associate justice.

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ACTION.

1. Where it appears by the articles of association of a corporation that the remedy by forfeiture and sale for non-payment of assessments on stock is cumulative, such remedy is not a bar to an action at law for the debt, and such sale or forfeiture is not a condition precedent to the right to recover the assessments. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.
2. Prior to the passage of the act of Congress "to further regulate commerce with foreign nations and among the States" approved February 19, 1903, a District Attorney of the United States under the direction of the Attorney General of the United States given in pursuance of a request made by the Interstate Commerce Commission was without power to commence a proceeding in equity against a railroad corporation to restrain it from discriminating in its rates between different localities. *Held*, therefore, that there was error committed below in refusing to sustain a demurrer of a defendant railroad company to a bill filed by a District Attorney of the United States under the circumstances stated. As, however, the act of February 19, 1903, expressly conferred the power which did not theretofore exist and as that act specifically provided that the new remedies which it created should be applicable to all causes then pending, *Held*, that although the action of the lower court in refusing to sustain the demurrer would be overruled, the case would not be finally disposed of but would be remanded for further proceedings in consonance with the provisions of the act of February 19, 1903. *Missouri Pacific Ry. Co.* v. *United States*, 274.
3. A suit to foreclose a mortgage is not a proceeding *in rem* which will bind persons who are not parties thereto, and the fact that the decree covered the property in question does not conclude strangers to the suit. *Pardee* v. *Aldridge*, 429.

See CONSTITUTIONAL LAW, 4; COURTS, 8; MARITIME LAW, 1, 2; PUBLIC LANDS, 1; STATUTES, 9.

ACTS OF CONGRESS.

See ACTION, 2; APPEAL AND WRIT OF ERROR, 1; ARMY OFFICERS; BANKRUPTCY; EXECUTIVE POWERS; JURISDICTION, 1, D; PRACTICE, 1, 4; PUBLIC LANDS, 1, 2, 8; PUBLIC OFFICERS, 1, 3; PUBLIC RECORDS; RAILROAD LAND GRANTS; STATUTES, 3, 4; STOCKHOLDERS, 4; TAXATION, 2.

ADMIRALTY.

See MARITIME LAW;
STATES, 2;
STATUTES, 8.

ALIENS.

As the existing treaty with Japan expressly excepts from its operation any regulation relating to police and public security, and as the various acts of Congress forbidding aliens of whatever country to enter the United States who are paupers or persons likely to become a public charge, are regulations for police and public security, aliens from Japan of the prohibited class have no right to enter or reside in the United States. *Quære*, Whether, even in the absence of such a provision in the treaty, the "full liberty to enter, reside," etc., clause refers to that class in either country who from habits or conditions are the object of police regulations designed to protect the general public against contact with dangerous or improper persons. *The Japanese Immigrant Case*, 86.

See CONGRESS;
EXECUTIVE OFFICERS.

APPEAL AND WRIT OF ERROR.

1. Where diversity of citizenship does not exist and the jurisdiction of the Circuit Court rests solely on the ground that the cause of action arose under the Constitution of the United States, an appeal lies directly to this court, under section 5 of the Judiciary Act of 1891, and if an appeal should be presented to the Circuit Court of Appeals and there go to decree, this court will reverse the decree, not on the merits, but by reason of want of jurisdiction in that court. It is not the intention of the Judiciary Act of 1891 to allow two appeals in cases of that description. *Union & Planters' Bank* v. *Memphis*, 71.
2. Where a bill is based not only upon diversity of citizenship, but also upon the alleged unconstitutionality of municipal ordinances as impairing the obligation of a contract, an appeal lies to this court and the whole case is opened for consideration. *Davis & Farnum Manuf. Co.* v. *Los Angeles*, 207.
3. The sufficiency of evidence cannot be reviewed by this court on writ of error. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.
4. Where the allowance of an attorney's fee under the provisions of a state statute is the basis of the Federal right asserted, and it appears that one of the assignments of error relied upon before, and considered and expressly decided by, the highest court of the State was that the statute was unconstitutional and void and in conflict with the Fourteenth Amendment for the want of mutuality and deprived the plaintiff in error of the equal protection of the law, the motion to dismiss will be denied. *Farmers' and Merchants' Insurance Co.* v. *Dobney*, 301.

See JURISDICTION.

ARMY OFFICERS.

An officer of volunteers in the United States Army who tenders his resignation and is honorably discharged is not entitled to travel pay and commutation of subsistence, under Rev. Stat. § 1289, as amended by the act of February 27, 1877, c. 69, 19 Stat. 243, from the place of his discharge to where he was mustered in. This decision is in accord with the settled practice of the War Department and the Treasury which has been to deny these allowances when the officer or soldier is discharged at his own request, for his own pleasure or convenience. The weight of a contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. *United States* v. *Sweet*, 471.

ASSUMPSIT.

See EVIDENCE, 2.

ATTORNEY'S FEE.

See CONSTITUTIONAL LAW, 3;
LOCAL LAW (FLORIDA).

ATTORNEY GENERAL.

See ACTION.

BANKRUPTCY.

Payments on a running account, in the usual course of business, by a person whose property had actually become insufficient to pay his debts, where new sales succeeded payments and the net result was to increase his estate, and the seller had no knowledge or notice of the insolvency and no reason to believe an intention to prefer, are not preferences, which must be surrendered as a condition to the allowance of proof of claim, under the bankruptcy act of 1898. *Pirie* v. *Chicago Title and Trust Company*, 182 U. S. 438, in which the decision proceeded on the finding of facts made pursuant to clause 3 of General Orders in Bankruptcy, XXXVI, distinguished. *Jaquith* v. *Alden*, 78.

BILL OF PEACE.

See EQUITY, 1.

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See CONTRACTS, 1;
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1. *Crutcher* v. *Kentucky*, 141 U. S. 47, distinguished from *Pullman Company* v. *Adams*, 420.
2. *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, distinguished from *Jaquith* v. *Alden*, 78.

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1. *Calhoun* v. *Violet*, 173 U. S. 60, explained in *Potter* v. *Hall*, 292.
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3. *Smith* v. *Townsend*, 148 U. S. 490, explained in *Potter* v. *Hall*, 292.

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1. *Eastern Building & Loan Association* v. *Williamson*, 189 U. S. 122, followed in *Finney* v. *Guy*, 335.
2. *Hale* v. *Allison*, 188 U. S. 56, followed in *Finney* v. *Guy*, 335.
3. *Hamblin* v. *Western Land Co.*, 147 U. S. 531, followed in *Sawyer* v. *Piper*, 154.
4. *In re Sawyer*, 124 U. S. 200, followed in *Davis & Farnum Manuf. Co.* v. *Los Angeles*, 207.
5. *Mills* v. *Green*, 159 U. S. 651, followed in *Tennessee* v. *Condon*, 64.
6. *Oregon & California R. R. Co.* v. *United States* (*No. 1*), 189 U. S. 103, followed in *Oregon & California R. R. Co.* v. *United States* (*No. 2*), 116.
7. *Osborne* v. *Florida*, 164 U. S. 650, followed in *Pullman Company* v. *Adams*, 420.
8. *Shively* v. *Bowlby*, 152 U. S. 1, followed in *United States* v. *Mission Rock Company*, 391.

CLERKS OF UNITED STATES COURTS.
See PUBLIC RECORDS.

CIVIL RIGHTS.
See JURISDICTION, A, 7, B 2.

COMITY.
See COURTS, 8.

COMMERCE.
See INTERSTATE COMMERCE.

CONGRESS, POWERS OF.

It has been firmly established by numerous decisions of this court that

it is within the constitutional power of Congress to exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations to executive officers, without judicial intervention. *The Japanese Immigrant Case*, 86.

See STATES, 2.

CONGRESS, ACTS OF.

See ACTION 2;
APPEAL AND WRIT OF ERROR, 1;
ARMY OFFICERS;
BANKRUPTCY;
EXECUTIVE POWERS;
JURISDICTION, A, 1, D;
PRACTICE 1, 4;
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PUBLIC OFFICERS, 1, 3;
PUBLIC RECORDS;
RAILROAD LAND GRANTS;
STATUTES, 3, 4;
STOCKHOLDERS, 4;
TAXATION, 2.

CONSTITUTIONAL LAW.

1. Although this court has never had occasion to determine exactly what the Fourteenth Amendment required in the assessment of ordinary annual taxes upon personal property, such proceedings should be construed with the utmost liberality and while notice may be required at some stage of the proceedings such notice need not be personal, but may be given by publication or by posting notices in public places. Such notices must be suitable and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law. *Glidden* v. *Harrington*, 255.
2. The statute of Massachusetts which requires that all personal estate within or without the Commonwealth shall be assessed to the owner; that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth, shall be assessed in the place where the trustee resides; that the assessors before making the assessment shall give notice by posting in some public place or places; that in case the taxpayer shall fail to make returns they shall ascertain as nearly as possible the particulars of the estate and estimated value, which shall be conclusive upon the owner unless he can show a reasonable excuse for omitting to make the return; also making provision for an application to the assessors for an abatement of taxes and for an appeal to the county commissioners, does not deprive taxpayers of their property without due process of law. *Ib.*
3. Sections 43, 44, 45 of chapter 48 of the laws of Nebraska of 1899, by which the court upon rendering judgment for a total loss sued for against an insurance company upon any policy of insurance against loss on real property by fire, tornado or lightning shall allow the plaintiff a reasonable attorney's fee to be taxed as costs is not repugnant to

the equality clause of the Fourteenth Amendment either because it arbitrarily subjects insurance companies to a liability for such fees when other defendants in other cases are not subjected to such burden, or because the fee is to be imposed on the insurance companies but not on the insured when the suit is successfully defended, or because the statute arbitrarily distinguishes between different classes of policies allowing the fee in certain cases and not in others. *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 301.

4. As decided in *Hale* v. *Allinson*, 188 U. S. 56, a receiver of an insolvent corporation appointed by the courts of Minnesota under the statutes of that State then existing cannot maintain an action outside of that State to enforce the statutory double liability of the stockholders; in refusing to allow such a receiver to maintain such an action, the courts of Wisconsin did not fail to give full faith and credit to the laws and judgments of Minnesota, under the Federal Constitution. *Finney* v. *Guy*, 335.

See CONGRESS;
POLICE POWER;
STATUTES, 8.

CONSTRUCTION.

1. *Of Executive Order.*

In 1899 the President made an order reserving two rocks or islands in San Francisco Bay for naval purposes, and described them as of their actual fractional acreage. *Held*, that in the absence of explicit directions such order could not be construed as appropriating valuable property adjacent to the rocks and islands as being appurtenant thereto. *United States* v. *Mission Rock Company*, 391.

2. *Of Executive Proclamation.*

Where there is a seeming contradiction between two clauses in a proclamation opening lands for settlement, the first clause being a special description of a strip of land, and the second being found in a portion of the proclamation defining the purposes for which the strip is made, the first clause is entitled to preference. *Winebrenner* v. *Forney*, 148.

See PUBLIC LANDS, 4.

3. *Of Spanish Grants.*

See SPANISH LAND GRANTS.

4. *Of Statutes.*

See COURTS, 3;
PUBLIC LANDS, 1;
STATUTES.

5. *Of Written Instruments.*

See COURT AND JURY, 1.

CONTRACTS.

1. Where the highest court of a State has decided that the act of the legislature under which bonds were issued by a county is unconstitutional

and such decision is in conformity with the prior decisions of that court, the bonds, having been illegally issued, do not constitute a contract which is protected by the Constitution of the United States. *Zane* v. *Hamilton*, 370.

2. The Knoxville Water Company was incorporated to construct waterworks near Knoxville with power to contract with the city and inhabitants for a supply of water and "to charge such price for the same as may be agreed upon between said company and said parties;" the general act under which the company was incorporated provided that it should not interfere with or impair the police or general powers of the municipal authorities, and they should have power by ordinance to regulate the price of water supplied by such company. The company in 1882 contracted for an exclusive privilege for thirty years to construct works, and after fifteen years to convey to the city at a price to be agreed upon or fixed by appraisal, and to "supply private consumers at not exceeding five cents per hundred gallons." Subsequently the city passed an ordinance reducing the price of water to private consumers below that rate. In an action to enforce penalties for overcharging the later rate, *Held*, that there was no contract on the part of the city to permit the charge named therein; and that the charter having been accepted subject to the provision of the general act reserving the power in the municipal authorities to regulate the price of water, the subsequent ordinance was not void either as impairing the obligation of a contract, or as depriving the company of its property without due process of law. *Knoxville Water Company* v. *Knoxville*, 434.

See APPEAL AND WRIT OF ERROR, 2;
EQUITY, 3.

CORPORATIONS.

See CONSTITUTIONAL LAW, 4; LOCAL LAW (ALABAMA);
EVIDENCE, 2; PRESUMPTION, 2;
STOCKHOLDERS.

COURT AND JURY.

1. Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character taken in connection with other facts and circumstances, it is a question which is properly referred to a jury. *Rankin* v. *Fidelity Insurance, etc., Co.*, 242.
2. Where a workman was injured by being hit by a spike maul which had been left on the tracks and which was struck and thrown by an engine, the fact that the foreman himself, whose special duty it was to see that the track was unobstructed on the passage of a train, and who is to some extent an interested witness, testifies that he had looked along the track and had seen no obstruction, is not sufficient to take the question of his negligence away from the jury. *Texas & Pacific Railway Co.* v. *Carlin*, 354.
3. In an action for personal injuries sustained by a brakeman by falling

from a car, where the claim was based upon negligence in stopping the car suddenly with knowledge of his position and of the slippery condition of the roof of the car, and also upon the projection of a nail in the roof of the car which increased the danger and contributed to his fall, *held*, there was no error in the court declining to rule that the chance of such an accident was one of the risks assumed by the plaintiff, or that the question whether the defendant was liable depended on whether the freight train was handled in the usual and ordinary way. It was proper for the court to leave it to the jury to say whether the train was handled with due care. *Texas & Pacific Railway Co.* v. *Behymer*, 468.

COURTS.

1. Where a former judgment pleaded has no force or effect in the state courts of Tennessee as exempting a corporation from certain taxes, other than as a bar to the *identical* taxes litigated in that suit, the courts of the United States can accord it no greater efficacy. *Union & Planters' Bank* v. *Memphis*, 71.
2. While this court does not take judicial notice of the decisions of the courts of one State in a case coming from the courts of another State, it may properly refer to the opinion of the highest court of a State as to the construction of a statute of that State when such statute is involved in a case before this court and this applies to a decision rendered after the judgment appealed from was rendered. *Eastern Building & Loan Association* v. *Williamson*, 122.
3. Courts of one State do not take judicial notice of the laws of another State, whether written or unwritten. Statutes and decisions must be proved as facts, but when proved their construction and meaning are for the consideration and judgment of the court, and the fact that an attorney of the enacting State has testified without contradiction as to the construction of a law of that State does not conclude the court and make it its duty to find as a fact that such was the true construction. *Ib.*
4. A postponement or continuance is largely within the discretion of the court, and unless such discretion is shown to have been abused there is no ground for reversal in a refusal to postpone. *Fidelity and Deposit Co.* v. *L. Bucki Lumber Co.*, 135.
5. Where it has been declared by the highest court of a State that liability for counsel fees is a part of the obligation assumed by the obligor in attachment bond, such liability should be enforced in every court in which an action on such bond is brought. Where a liability can be enforced in the state court in which an action is originally brought that liability cannot be taken away by removing the case to a Federal court. *Ib.*
6. The ruling of the Land Department that an entry into prohibited territory of the public domain prior to the time fixed for its opening, by an entryman who had subsequently retired and taken part in the race on an equality with others, did not disqualify him, because such prior entry had given him no particular advantage which he would not

otherwise have possessed, *Held* to be a finding of fact not reviewable by the courts. *Potter* v. *Hall*, 292.

7. Where the law of a foreign jurisdiction has been proved as a fact, the evidence of a witness, stating such law and decisions as to its meaning and effect, does not preclude the court from itself consulting and construing such statute and decisions, and deducing its own opinion in regard thereto, *Eastern Building & Loan Assn.* v. *Williamson*, *ante*, p. 122; nor is the right and duty of the courts to themselves construe statutes and decisions of a foreign jurisdiction altered because such law and decisions are set forth in a pleading which is demurred to instead of being proved as facts on a trial. *Finney* v. *Guy*, 335.
8. Whether, apart from Federal questions the courts of one State should permit an action of this nature to be maintained on the principle of comity is a question exclusively for the state court to decide. *Ib.*

See APPEAL AND WRIT OF ERROR, 1;
EQUITY, 4;
EVIDENCE, 1;
EXECUTIVE OFFICERS, 2;
JURISDICTION;
LAND DEPARTMENT;
PRACTICE, 4;
SPANISH LAND GRANTS;
STATES, 2;
STATUTES, 5, 8;
TERMS OF COURT.

CUMULATIVE REMEDIES.

See ACTIONS, 1.

DAMAGES.

Where as the result of an attachment against a lumber company there was an interruption of business for a certain time, and the plaintiff in the action thereafter refused to deliver materials to the lumber company, the sureties on the attachment bond are liable for the damages directly attributable to attachment, but not for any of the damages caused by the plaintiff's failure to deliver materials or for the reflection on the credit of the lumber company by the bringing of the action in which the attached bond was given. *Fidelity and Deposit Co.* v. *L. Bucki Lumber Co.*, 135.

See MARITIME LAW, 1;
PRIZE;
STATUTES, 9.

DELEGATED POWERS.

See STATUTES, 3.

DISTRICT OF COLUMBIA.

See PRACTICE, 5;
TERMS OF COURT.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 1, 2;
CONTRACTS, 2;
EXECUTIVE OFFICERS, 1;
FEDERAL QUESTION, 1.

EQUAL PROTECTION OF LAWS.

See APPEAL AND WRIT OF ERROR, 4; JURISDICTION, A, 7, B, 2; FEDERAL QUESTION, 1; POLICE POWER.

EQUITY.

1. Even if the making of a government survey, which could be made without any material injury to soil or timber, involved a trespass, it would be of so fugitive and temporary a character as to lack such elements of irreparable injury as would furnish the basis for equity interposition. Nor will a bill of peace lie where the legal remedy is adequate, and where the persons directly interested are not made parties, are not numerous, and assert separate rights. *Kirwan* v. *Murphy*, 35.
2. A bill in equity cannot be maintained to enjoin the officers of the Land Department from surveying land which years before had been omitted from an alleged survey, the complainants having purchased lands under such alleged survey, which did not include that in question. The remedy for any infringement of complainant's rights is at law after the administrative action of the government has been concluded. *Ib.*
3. One who has contracted to deliver gas machinery to a gas and fuel company has no standing in a court of equity to restrain a city from enforcing an ordinance prohibiting the erection of gas works within a portion of the city in which the erection of gas works was not prohibited when the contract was made, on the ground that such ordinances are repugnant to the Federal Constitution as impairing the obligation of a contract, it not appearing that the plaintiff has any contract with the city or that the gas and fuel company would not, or could not, by reason of insolvency, respond to its claim under the contract. *Davis & Farnum Manuf. Co.* v. *Los Angeles*, 207.
4. A court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property or the enforcement of an unconstitutional law. (*In re Sawyer*, 124 U. S. 200.) *Ib.*

See ACTION, 2.

ESTOPPEL.

To constitute an estoppel by silence there must not only be an opportunity but an obligation to speak. *Wiser* v. *Lawler*, 260.

See MINES;
PRACTICE, 10.

EVIDENCE.

1. The Circuit Court of the United States, sitting in New Hampshire, may receive as evidence, when attached to the deposition of the manager of a corporation, who is an attorney and solicitor of the Supreme Court of Judicature in England of thirty years' standing, intimately acquainted with the English Corporation Laws, what purport to be the

copies of the laws under which such corporation was organized, and which he testifies were issued by authority, being printed by Her Majesty's printer, and as such are by law receivable in evidence without further proof, in the domestic courts of Great Britain. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.

2. Where the statute under which a corporation is organizes provides that moneys payable in pursuance of the articles of the company shall be deemed a debt due by such member, it is not necessary to prove an express promise to pay an assessment. *Ib.*

3. The valuation of property for the purposes of taxation may be considered in determining the reasonableness of water rates fixed by a board of supervisors, especially if such valuation was under oath. *San Diego Land & Town Co.* v. *Jasper*, 439.

See APPEAL AND WRIT OF ERROR, 3; JURISDICTION, 6; PRACTICE, 9; PRESUMPTION, 1.

EXECUTIVE OFFICERS.

1. An administrative officer, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles of due process of law as understood at the time of the adoption of the Constitution. Nor is it competent for any executive officer, at any time within the year limited by the statute, to arbitrarily cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although illegally here, to be arrested and deported without giving such alien an opportunity, appropriate to the case, to be heard upon the questions involving his right to be and remain in the United States. *The Japanese Immigrant Case*, 86.

2. Where, however, the alien had notice, although not a formal one, the courts cannot interfere with the executive officers conducting it. The objections of the alien to the form of the investigation could have been presented to the officer having primary control of the case, or by an appeal to the Secretary of the Treasury, and the action of the executive officers is not subject to judicial review. *Ib.*

EXECUTIVE ORDER.

See CONSTRUCTION, 1.

EXECUTIVE POWERS.

1. Where Congress creates an office and provides for the removal of the incumbent at any time for inefficiency, neglect of duty, or malfeasance in office, if the removal of the officer is sought to be made for any of those causes he is entitled to 'notice and a hearing'; but if the President removes him without giving him notice and an opportunity to defend himself, it must be presumed that the removal was not made for any of the causes assigned in the statute. *Shurtleff* v. *United States*, 311.

2. In the absence of constitutional or statutory provision the President can,

by virtue of his general power of appointment, remove an officer, even though he were appointed by and with the advice and consent of the Senate. This power (assuming, but not deciding, that Congress could deprive the President of the right to exercise it in such a case as this) cannot be taken away by mere inference or implication, and in the absence of plain language in the statute Congress will not be presumed to have taken it away. Under section 12 of the Customs Administrative Act of June 10, 1890, providing for the appointment of general appraisers and their removal by the President for inefficiency, neglect or malfeasance in office, the President may also remove such officers without any of the causes specified, under his general power of removal. *Ib.*

EXECUTIVE PROCLAMATION.

See CONSTRUCTION, 2;
PUBLIC LANDS, 4.

FEDERAL QUESTION.

1. The mere averment of the existence of a Federal question is not sufficient to give this court jurisdiction, but as held in *Hamblin* v. *Western Land Company*, 147 U. S. 531, a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Where the only Federal question alleged is that the refusal of the state court to allow the plaintiff in error to file a supplementary answer in an action in which foreclosure and sale had been decreed and sustained by the highest court of the State, on the ground that it was a taking of property without due process of law, and a denial of equal protection of the laws, and the trial court does not appear to have abused its discretion, there is no real Federal question involved and the writ of error will be dismissed. *Sawyer* v. *Piper*, 154.
2. Where a case turns upon the construction by a state court of a statute of another State, and not upon the validity of such statute, a decision on that question is not necessarily of a Federal character. It depends upon the particular facts of each case and the manner in which they are presented, how far such questions can be regarded as coming under the full faith and credit clause of the Constitution. *Finney* v. *Guy*, 335.
3. Where the plaintiff in error claimed and set up a right under the Constitution of the United States, and the decision of the Supreme Court of the State was tantamount to the denial of that right, there is a Federal question and a motion to dismiss will be denied. *Detroit, Fort Wayne & Belle Isle Ry.* v. *Osborn*, 383.

See JURISDICTION;
PRACTICE, 6, 7.

FELLOW-SERVANT.

1. All the members of the crew of a vessel, except perhaps the master, are, as between themselves, fellow-servants, and hence seamen cannot recover for injuries sustained through the negligence of another member

of the crew beyond the expense of their maintenance and cure. *The Osceola*, 158.

2. Where it is the special duty of the foreman of a gang repairing a bridge to see that the track is unobstructed when a train is about to cross, although it may be the duty of the men to keep their tools off the track, it is the foreman's duty to supervise them, and if, through his negligence, the track is not left unobstructed and one of the gang is injured, such negligence under the statutes of Texas in that regard is that of a vice principal and not of a fellow-servant. *Texas & Pacific Railway Co.* v. *Carlin*, 354.

FOREIGN CORPORATIONS.

See LOCAL LAW (ALABAMA); PRESUMPTION, 2; PLEADING, 1; STOCKHOLDERS.

FOREIGN STATUTES.

See EVIDENCE, 1.

FRAUD.

1. Promoters of mining enterprises, in the preparation of prospectuses, are bound to consider the effect that would be produced upon an ordinary mind by the statements contained in them, and in estimating the probability of persons being misled by them, the court may take into consideration not only the facts stated, but the facts suppressed. Vendors of mining properties are not responsible for false statements made in prospectuses issued by a mining company to whom the properties had been sold, unless they knew or connived in such statements, or were active in putting them in circulation. While they may have known that prospectuses were being issued, they were under no obligation to read them, or contradict their statements or promises, or interfere with their circulation or distribution. If their title be of record, they are not bound to give notice of their rights in the property to the purchasers of stock, or to refuse the money due upon their contract of sale when it is tendered them. To constitute an estoppel by silence there must not only be an opportunity but an obligation to speak, and the purchase must have been in reliance upon the conduct of the party sought to be estopped. A person holding a deed of property which he has placed upon record, is not ordinarily bound to disclose his title to persons contemplating purchasing, or making improvements upon the land, unless his silence be deceptive, or accompanied by an intention to defraud. *Wiser* v. *Lawler*, 260.

2. Where a national bank has sold certain bonds and the vendee has obtained a judgment for the purchase money in a state court on the ground that the sale was induced by false representations of the president of the bank the judgment will not be reversed on the ground that the sale of the bonds was without the authority of the bank and was illegal and void. The fraud is prior to the sale and authorizes a rescission, nor can the bank claim that the fraud was perpetrated by an agent who did not represent it for illegal purposes. The bank must

adopt the whole transaction or no part of it. *National Bank & Loan Co. v. Petrie*, 423.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 4;
FEDERAL QUESTION, 2.

GRANTS.

See PUBLIC LANDS;
RAILROAD LAND GRANTS;
SPANISH LAND GRANTS.

HOMESTEADS.

See PUBLIC LANDS.

IMMIGRATION.

See ALIENS;
CONGRESS, 2;
EXECUTIVE OFFICERS.

INFRINGEMENT OF PATENT.

See PATENT FOR INVENTION.
PRACTICE, 2.

INJUNCTION.

See EQUITY, 2, 4.

INSPECTION OF PUBLIC RECORDS.

See PUBLIC RECORDS.

INSURANCE.

See CONSTITUTIONAL LAW, 3.

INTEREST.

See JUDGMENTS.

INTERSTATE COMMERCE.

By sections 3317, 3387, of the Mississippi Code of 1892, a tax is imposed "on each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad track [in the State] over which the company runs its cars." Section 195 of the state constitution declares sleeping car companies to be common carriers. On the assumption that such companies would be held free to abandon the business taxed if they see fit, the tax is not void as an interference with commerce between the States. *Crutcher* v. *Kentucky*, 141 U. S. 47, distinguished; *Osborne* v. *Florida*, 164 U. S. 650, followed. *Pullman Company* v. *Adams*, 420.

See ACTION, 2.

INVENTION.

See PATENT FOR INVENTION;
PRACTICE, 2;
PRESUMPTION, 1.

JUDGMENTS.

1. In 175 U. S. 187, and 178 U. S. 317, this court held that the collision between the Conemaugh and the New York in the Detroit River was the fault of both vessels and judgment was given in favor of the Conemaugh for one half of her damages less one half of the damages of the New York. In this proceeding, *held*, that the New York against which judgments had been entered for damages to the cargo on the Conemaugh could not in this action recoup or set off any part of such damages against, or shift any part of such judgment upon the owners of the Conemaugh, even though it should result in the New York paying more than fifty per cent of the total loss. *The Conemaugh*, 363.
2. The mandate having provided for interest at the same rate that decrees bear in the courts of the State of Michigan, there was no error in view of the statutory provisions as to interest in Michigan, in computing the interest at seven per cent per annum. *Ib.*

See CONSTITUTIONAL LAW, 4;
PRACTICE, 3;
RES JUDICATA.

JUDICIAL NOTICE.

See COURTS, 2, 3.

JURISDICTION.

A. OF THE SUPREME COURT.

1. Where the contention is that the title to ore taken from a mine depends upon whether the mine was patented under the act of July 26, 1866, or the act of May 10, 1872, and involves the effect of the want of parallelism of the end lines of the location, a Federal question is so presented that this court has jurisdiction. *Kennedy Co.* v. *Argonaut Co.*, 1.
2. Where it appears that the matter in dispute is only the possession of certain public land for which a contested entry has been made and it is clear from the facts that such possession is worth much less than $5000, the judgment of the territorial court will not be reviewed. *McClung* v. *Penny*, 143.
3. It must appear that this court has jurisdiction of the case before it can inquire whether the territorial court has committed any error in its decision or in permitting the action to be maintained, and such jurisdiction does not exist if the value of that which is in controversy does not exceed $5000. *Ib.*
4. A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of state courts, and a mere aver-

ment of the existence of a Federal question is not sufficient. *Sawyer* v. *Piper*, 154.

5. Where no claim of Federal right was specially set up or called to the attention of the state court in any way and that court did not pass upon or necessarily determine any Federal question, this court is without jurisdiction and the writ of error will be dismissed. *Onondaga Nation* v. *Thacher*, 306.
6. Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence. *Thayer* v. *Spratt*, 346.
7. Where a negro moves to quash an indictment on the ground that he is denied the equal protection of the laws and his civil rights under the Constitution and the laws of the United States by the exclusion of negroes from the grand jury, but the record does not show that he proved or offered to prove the truth of the allegations on which the motion was based, this court cannot interfere with the judgment. *Brownfield* v. *South Carolina*, 426.

See PRACTICE.

B. OF CIRCUIT COURTS.

1. An averment in a bill that the complainants are "all of Cognac in France, and citizens of the Republic of France," is sufficient to give the Circuit Court of the United States for Nebraska jurisdiction in a controversy where the defendants are citizens of Nebraska. No averment of alienage is necessary. *Hennessy* v. *Richardson Drug Co.*, 25.
2. A Circuit Court of the United States in Alabama has not jurisdiction of an action in equity brought by a colored man, resident in Alabama, on behalf of himself and other negroes to compel the board of registrars to enroll their names upon the voting lists of the county in which they reside under a constitution alleged to be contrary to the Constitution of the United States. *Giles* v. *Harris*, 475.

C. OF COURT OF PRIVATE LAND CLAIMS.

Where the last known occupant of a Spanish grant made in 1728 had been killed by the Indians in 1839, and when the land passed to the United States under the treaty of 1848 with Mexico possession had been abandoned by his descendants for at least nine years and no action was taken by any one in regard to the grant until 1899, and meanwhile the public land surveys were extended over the tract in 1861, homestead and other entries were made, improvements established, patents secured and mines opened and developed, the doctrine of laches is peculiarly applicable, and under the provisions of the statute establishing it, the Court of Private Land Claims could not be called upon to confirm such a grant. *Sena* v. *United States*, 233.

D. OF STATE COURTS.

Under sec. 5328, Rev. Stat., and the provisions of the Criminal Code of California, the state courts of that State have concurrent jurisdiction with the courts of the United States to try a person for extortion where

the basis of the extortion was a threat to accuse a person of having committed an act which is a crime exclusively against the United States and made so by a Federal statute. *Sexton* v. *California*, 319.

E. ADMIRALTY.

See STATUTES, 8.

JURY.

See COURT AND JURY;
MORTGAGE.

LACHES.

See JURISDICTION, C;
SPANISH LAND GRANTS.

LAND DEPARTMENT.

1. The administration of public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer outside of his authority and in violation of the statute. The courts can neither correct nor make surveys. The power to do so is in the political department of the government, and the Land Department must primarily determine what are public lands subject to survey and to disposal, and as it is possessed of this power in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. *Kirwan* v. *Murphy*, 35.
2. In an ordinary contest between two applicants for preëmption, in which the officers of the Land Department have decided upon the testimony in favor of one and against the other, the decision of the Land Department on questions of fact is conclusive upon the courts. When the Secretary of the Interior has made a decision in such a contest the courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination. *De Cambra* v. *Rogers*, 119.

See COURTS, 6; PUBLIC LANDS, 8;
EQUITY, 2; STATUTES, 5.

LAND GRANTS.

See JURISDICTION, C;
PUBLIC LANDS;
RAILROAD LAND GRANTS.

LAND PATENTS.

See JURISDICTION, 1.

LIEN ON VESSELS.

See MARITIME LAW, 2.

LOCAL LAW.

Alabama.

The highest court of Alabama has held that under the constitutional and statutory provisions of that State any act in the exercise of its corporate functions is forbidden to a foreign corporation which has not complied with the constitution and the statute in regard to filing instrument designating agent and place of business, and that contracts resulting from such acts are illegal and cannot be enforced in the courts. *Held*, that this applied to a building and loan association of Tennessee making a loan in Tennessee secured by certain shares of its own stock and also by mortgage on certain real estate in Alabama, and that although the association had complied with certain provisions of the law, the fact that it had not designated an agent as required by the constitution and statutes was a bar to the foreclosure of the mortgage in the courts of Alabama. *Chattanooga National Building, etc., Association* v. *Denson*, 408.

California. *See* JURISDICTION, D.

Florida.

Counsel fees incurred in securing the dissolution of an attachment are recoverable in actions upon attachment bonds. *Fidelity and Deposit Co.* v. *L. Bucki Lumber Co.*, 135.

Massachusetts. *See* CONSTITUTIONAL LAW, 2.

Michigan.

Under the laws of the State of Michigan the commissioner of railroads has power to compel a street railroad to install safety appliances in accordance with law, the cost to be shared between it and a steam railroad occupying the same street, notwithstanding that the steam road is the junior occupier of the street. *Detroit, Fort Wayne & Belle Isle Railway* v. *Osborn*, 383.

See JUDGMENTS.

Mississippi. *See* INTERSTATE COMMERCE.
Nebraska. *See* CONSTITUTIONAL LAW, 3.
New York. *See* STATUTES, 7.
Tennessee. *See* COURTS, 1;
RES JUDICATA.
Texas. *See* FELLOW-SERVANTS, 2.
Washington. *See* STATUTES, 8.
Wisconsin. *See* STATUTES, 9.

MANDAMUS.

See PRACTICE, 5.

MARITIME LAW.

1. The law both in England and America is settled as to the following propositions: (*a*) That a vessel and her owners are liable, in case a

seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. (*b*) That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to such ship. (*c*) That all the members of the crew, except perhaps the master, are, as between themselves, fellow-servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure. (*d*) That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received from negligence or accident. *The Osceola*, 158.

2. It is settled law in this country and England that a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel. No such lien is given for necessaries furnished in the home port of the vessel, or in the port in which the vessel is owned, registered, enrolled or licensed, and the remedy, in such case, though enforceable in the admiralty, is *in personam* only. In this particular the States of the union are treated as foreign to each other. *The Roanoke*, 185.

See STATES, 1;
STATUTES, 8, 9.

MARSHAL.

See PUBLIC OFFICERS.

MASTER AND SERVANT.

See FELLOW-SERVANT.

MEASURE OF DAMAGES.

See DAMAGES;
MARITIME LAW, 1.

MINES.

Where, as the result of an adverse proceeding in the land office and a compromise agreement entered into by applicants for patents for mining claims on the same lode, a common end line crossing the lode at right angles was established and patents were issued according to the adjustment, this fixed the rights of the parties in length on the lode and the extralateral right as between them; and estopped each and its successors from asserting the right to ore body extracted from the vein within the end line of the other. *Kennedy Company* v. *Argonaut Company*, 1.

See JURISDICTION, 1.

MINING COMPANIES.

See FRAUD, 1.

MINING PATENTS.

See MINES.

MORTGAGE.

Where a railroad company mortgages its road including all appurtenances and appendages of said railroad, and the property of said company now acquired, or which may be acquired, used for and pertaining to the operation of said railroad, a sale under such mortgage does not include property acquired by the company after the mortgage for the purpose of subdivision and sale; and it is a question for a jury to determine, whether the land so purchased was to be used for and pertaining to the operation of the railroad or not. *Pardee* v. *Aldridge*, 429.

See ACTION, 3.

NATIONAL BANKS.

See FRAUD, 2; ....
STOCKHOLDERS, 4.

NEGLIGENCE.

See COURT AND JURY, 2, 3;
FELLOW-SERVANT, 2.

OKLAHOMA.

See COURTS, 6;
STATUTES, 5;
TAXATION.

PARTIES.

In a suit against a board of supervisors to have water rates fixed by such board declared void for unreasonableness, the body making the regulation is the usual, proper and sufficient party respondent, and the default of those who set the original proceedings in motion and who were also made parties respondent, is immaterial, so long as the remaining parties defend the suit. *San Diego Land & Town Co.* v. *Jasper*, 439.

See PRACTICE, 5.

PATENT FOR INVENTION

Where the patents sued on are not pioneer patents and do not embody a primary invention, but are only improvements on the prior art and defendants' machines can be differentiated the charge of infringement cannot be maintained. In view of the state of the art, and what passed in the Patent Office, this court cannot regard the Kitselman patent of January 18, 1887, for wire fabric machines, as a pioneer patent, but its claims must be limited in their scope to the actual combination of essential parts as shown and cannot be construed to cover other combinations of elements of different construction and arrangement. *Kokomo Fence Machine Co.* v. *Kitselman*, 8.

See PRACTICE, 2;
PRESUMPTION, 1.

PATENT FOR LANDS.

See PUBLIC LANDS, 1.

PATENTS, MINING.

See MINES.

PLEADING.

1. By subscribing to the stock in a foreign corporation, the subscriber subjects itself to the laws of such foreign country in respect to the powers and obligations of such corporation, and if the statute under which the corporation is organized and the by-laws of the corporation provide that the directors may from time to time make such calls as they think fit upon members for all moneys unpaid on shares of stock, it is not necessary for the declaration to contain averments either as to the conditions upon which the corporation can make assessments or that the assessments sued for were necessary. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.
2. A demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon statutes or decisions is the right conclusion to be drawn from them. *Finney* v. *Guy*, 335.

See JURISDICTION, B;
PRACTICE, 4, 8.

PLEDGEE OF STOCK.

See STOCKHOLDERS, 2, 3.

POLICE POWER.

There is a difference between ordinary vehicles and electric cars which the State may, in the exercise of its police power, recognize without denying the company operating the electric cars the equal protection of the laws. *Detroit, Fort Wayne & Belle Isle Ry.* v. *Osborn*, 383.

See ALIENS.

PRACTICE.

1. Where the Circuit Court dismisses a bill on the ground that it has no jurisdiction because diversity of citizenship did not appear, and certifies this question of jurisdiction, that is the only question for the consideration of this court on an appeal under the first subdivision of section 5 of the Judiciary Act of March 3, 1891, and if jurisdiction is found to exist the case will be remanded to be heard on the merits, notwithstanding the Circuit Court also expressed the opinion that the bill was without equity. *Hennessy* v. *Richardson Drug Co.*, 25.
2. Where in a patent case a preliminary injunction has been granted by a Circuit Court on the strength of a previous adjudication by the same court over the same patent, the case involving questions of fact in respect of

anticipation and infringement, and not being ripe for final hearing, it is error for the Circuit Court of Appeals on an appeal from the interlocutory order to direct a dismissal of the bill. *Mast Foos Company* v. *Stover Manufacturiny Company*, 177 U. S. 485, applied. *Brill* v. *Peckham Motor Truck Co.*, 57.

3. It is the duty of this court to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to delare principles or rules of law which cannot affect the matter in issue in the case before it. When, pending an appeal, it becomes, without any fault on the part of the defendant, impossible for this court to grant any effectual relief to the plaintiff in error even if it should decide the case in his favor, the appeal will be dismissed. *Mills* v. *Green*, 159 U. S. 651, followed. *Tennessee* v. *Condon*, 64.

4. Under section 954, Rev. Stat., the Circuit Court has power in its discretion to allow plaintiff to amend his petition after judgment has been entered in his favor, but while the court still has control of the record, and it is not an abuse of such discretion to permit an amendment setting up plaintiff's citizenship, the fact being established and residence only having been pleaded, and where it appears that had the amendment not been made as it was the Circuit Court of Appeals would have been constrained to reverse and remand with leave to make the amendment. *Mexican Central Railway Co.* v. *Duthie*, 76.

5. Judgment before a justice of the peace of the District of Columbia against Key and Scott, and appeal to the Supreme Court of the District with a Guaranty Company as surety on the undertaking on appeal. Judgment in the latter court in favor of Scott, and against Key and the Guaranty Company. Appeal to the Court of Appeals by Key alone without summons and severance or any equivalent, and motion to dismiss for want of parties, and want of jurisdiction of such an appeal. Dismissed on the latter ground in accordance with previous ruling. *Held:* That an application to this court for a writ of mandamus to the Court of Appeals to reinstate the appeal and decide the case on the merits must be denied. *In re Key*, 84.

6. Under the rule of this court requiring opinions to be sent up with the record, it is a sufficient compliance with the words "specially set up and claimed" that the Federal question was fully considered in the opinion of the court, and ruled against the plaintiff in error. *San José Land & Water Co.* v. *San José Ranch Co.*, 177.

7. Although no Federal right, title or immunity was specially set up or claimed in the complaint, it is sufficient if it appears in the motion for new trial and in the assignment of error in the state supreme court. In this case it also appears from the opinion of the court that the question was whether the plaintiff in error had brought itself within the scope of an act of Congress upon which it relied. *Ib.*

8. Variances between the allegation and proof must be taken when the evidence is offered, and if such evidence be sufficient to support the verdict the defect in the declaration is cured. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.

9. Where the bill of exceptions contains nothing to indicate that the call for assessments was not properly made and does not show that it contains *all* the evidence, this court is at liberty, if the circumstances of the case require it, to infer that there was other evidence to support the verdict. The sufficiency of evidence cannot be reviewed on writ of error. *Ib.*

10. Where the objection that a statute does not provide for notice is taken for the first time in this court, and the record shows that there actually was notice given, it is not open to the plaintiff in error to complain that the statute did not provide for such notice. *Detroit, Fort Wayne & Belle Isle Railway* v. *Osborn*, 383.

See COURTS, 2, 4;
SPANISH LAND GRANTS;
TERMS OF COURT.

PREFERENCES.

See BANKRUPTCY.

PRESIDENT.

See CONSTRUCTION, 1, 2;
EXECUTIVE POWERS.

PRESUMPTION.

1. The presumption from the grant of separate letters patent for improvements on the prior art, is, that there was a substantial difference between the inventions. *Kokomo Fence Machine Co.* v. *Kitselman*, 8.

2. There is a presumption of good faith attaching to foreign as well as to domestic corporations. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.

See EXECUTIVE POWERS, 1;
PUBLIC OFFICERS, 4.

PRIZE.

Where libels were filed by the United States in its own behalf against certain fishing smacks which were taken as prize of war but which were not liable to capture, and the proceeds thereof the prize courts have decreed should be returned to the claimants of such vessels, a decree for damages should be entered against the United States and not against the captors individually. *The Paquete Habana*, 453.

PROCLAMATION.

See CONSTRUCTION, 2;
PUBLIC LANDS, 4.

PUBLIC LANDS.

1. In a suit brought under the act of Congress of March 3, 1887, c. 376, to compel the reconveyance of lands covered by patent issued February 20,

1893, on the ground that it included land to which there were adverse claims of settlers to the land on which they respectively resided and which the United States now claimed for them, *Held:* (1) That under the land grant acts the railroad company did not acquire and could not have acquired an interest in specific sections of land within the indemnity limits specified in the grant before their actual and approved selection under the direction of the Secretary of the Interior, prior to the date of occupancy by the respective settlers. (2) No right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary of the Interior. (3) The rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the land by the railroad company—the settler having, after the lands were surveyed, promptly taken the necessary steps to protect his rights under the homestead law. In such case, the entry made under these laws relates back to the date of the settlement of the lands. (4) It cannot be claimed that *all* the lands within the indemnity limits were required to supply deficits, when there had been no adjustment and determination of the amount of lieu lands required prior to his *bona fide* occupancy of the land. *Oregon & California R. R. Co.* v. *United States*, 103.

2. On the authority of the preceding case, *Held*, that where a duly qualified entryman made a *bona fide* settlement upon lands within the indemnity limit of the grant made by act of Congress of May 4, 1870, with the intention, whenever the way was opened by a survey, to enter the lands under the homestead laws, his rights were superior to those acquired, or that could have been acquired, by the railroad company under any selection by it of indemnity lands made after the date of such settlement. *Oregon & California R. R. Co.* v. *United States*, 116.
3. The relinquishment of rights under a homestead or preëmption entry opens the land to entry by another; and a second entryman may, if there has been no contest, perfect a title, but if the records show that there has been a contest and the successful contestant relinquishes, a party subsequently entering the land is charged with notice of the equitable rights of the unsuccessful contestant which can be enforced whenever the title passes from the government. *McClung* v. *Penny*, 143.
4. The strip of land referred to in the President's proclamation of August 19, 1893, "one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," ran around and immediately within the outer boundaries of the body of lands opened for settlement, and not around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians. *Winebrenner* v. *Forney*, 148.
5. A party who, on complying with the provisions of an act of Congress would have the right to purchase lands, part of the public domain, but who has not complied with the requirements of the act, is not entitled, upon the mere showing of such right to purchase, to demand that its title be adjudged good and valid, and that another party who is in pos-

session be adjudged to have no estate or interest in the land, or that such other person be enjoined from asserting any adverse claim, or that the claimant recover the possession of the land with the right of ousting the defendant from the improvements made thereon by its predecessors. *San José Land & Water Co.* v. *San José Ranch Co.*, 177.

6. An entry into prohibited territory and subsequent retirement therefrom prior to its opening for settlement did not disqualify such entryman from participating in the race for the land when no manifest advantage over his competitors resulted from such prior entry. *Potter* v. *Hall*, 292.
7. On proceedings to cancel an entry which has been transferred, where the Land Department has notice thereof, and the records show the name and address of the transferee, the transferee has a right to notice. *Thayer* v. *Spratt*, 346.
8. It appearing from the facts that at the time of making their entries entrymen were entitled to purchase lands under the act of Congress of June 3, 1878, for the sale of timber lands in Washington Territory and elsewhere, and that in the purchase of the land they fully complied with the laws of the United States and the rules and regulations of the Land Department; that the applications were allowed and certificates duly issued as applied for, and the lands included in the entries were at all times chiefly valuable for timber thereon and at that time unfit for cultivation; and that thereafter based upon a misconstruction of the act of 1878 the land office cancelled the entries on the ground that as the land could be cultivated after the removal of the timber it was not subject to entry as timber land: *Held*, that the original entries were valid and that the conveyances of the original entrymen passed a good title to their grantee for which he was entitled to a patent from the United States. *Ib.*

See CONSTRUCTION, 2;
LAND DEPARTMENT, 1, 2;
RAILROAD LAND GRANTS.

PUBLIC OFFICERS.

1. Under sec. 829, Rev. Stat., a United States marshal may elect to be reimbursed his actual travelling expenses incurred in serving writs, but there is no authority in law for allowing him mileage in excess of the distance from the place of arrest to the place of receiving the writs, even if the travel is in a new and unsettled Indian country and there are exceptional difficulties to overcome. *United States* v. *Nix*, 199.
2. Where a United States court is opened for business by order of the judge, it is the duty of the marshal to attend and he is entitled to his per diem fee therefor whether the judge be present or not. *Ib.*
3. A general act is not to be construed as applying to cases covered by a prior special act on the same subject. The marshal for the District of Oklahoma is entitled to fees for transportation of prisoners arrested under warrants issued by United States commissioners as fixed by the statute providing a temporary government for the Territory of Oklahoma, notwithstanding the provisions of the act of Congress of Au-

gust 19, 1894, applicable to marshals generally throughout the country. The fact that a marshal's accounts have been approved by a district judge is sufficient to cast upon the government the burden of showing any error of fact in his account. *Ib.*

4. Where the marshal charged for travel in transporting a prisoner who escaped from his custody, and there was no finding, either by the district judge in approving his accounts, or by the Court of Claims, of due diligence on the part of the officer to prevent the escape, the item was held to be properly disallowed, the presumption being that the prisoner escaped by negligence. *Ib.*

See EXECUTIVE POWERS.

PUBLIC RECORDS.

Under section 828, Rev. Stat., and section 2 of the act of August 1, 1888, a corporation engaged in the business of insuring titles to real estate has the right, during office hours, to inspect and examine the indices and cross indices of the judgment records kept by the clerks of the Circuit and District Courts when such inspection and examination relate to current and depending transactions and are made at such times and under such circumstances that they do not interfere with the clerk or his assistant in the discharge of their duties or with the exercise of the right of other persons to have access to such indices and cross indices. *Bell* v. *Commonwealth Title Insurance Co.*, 131.

RAILROADS.

See LOCAL LAW (MICHIGAN).
MORTGAGE.

RAILROAD LAND GRANTS.

Under the act of March 3, 1871, c. 122, 16 Stat. 573, the rights of the Southern Pacific Railroad Company were subordinate to those of the Texas Pacific Railroad Company. When the Texas Pacific grant was declared forfeited by the act of February 28, 1885, the forfeiture did not vest the Southern Pacific with the lands forfeited but the forfeiture enured to the benefit of the United States. *Southern Pacific R. R. Co.* v. *United States*, 447.

See PUBLIC LANDS, 1.

RECEIVER.

See CONSTITUTIONAL LAW, 4.

RECORDS.

See PUBLIC RECORDS.

REMOVAL OF CAUSES.

See COURTS, 5.

REMOVAL FROM OFFICE.

See EXECUTIVE POWERS.

REPRESENTATIONS.

See FRAUD, 1, 2.

RES JUDICATA.

The doctrine of *res judicata* under the decisions of the highest court of Tennessee is not applicable to taxes for years other than those under consideration in the particular case. The effect of a prior judgment of a state court as *res judicata* is a question of state, and not of Federal, law. *Union & Planters' Bank* v. *Memphis*, 71.

See LAND DEPARTMENT, 2.

RIPARIAN RIGHTS.

1. The State of California upon its admission into the Union acquired absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject to the paramount right of navigation over the waters, so far as such navigation might be required for the necessities of commerce with foreign nations or among the several States, the regulation of which is vested in the general government. (*Shively* v. *Bowlby*, 152 U. S. 1.) The State of California pursuant to an act of legislature issued its patent in 1872 for certain submerged lands in San Francisco Bay, about fourteen acres and upwards, which the patentee's grantees improved by filling in and building docks and warehouses. Within the boundaries were two small rocks or islands one fourteen one hundredths of an acre, and the other one one hundredth of an acre in area. In 1899 the President made an order reserving the two rocks and describing them as of the above mentioned fractional acreage for naval purposes. The United States demanded possession of the original islands and of the adjacent property appurtenant thereto. *Held*, That as to all the premises except the two rocks or islands, which were awarded to the United States, the grantee under the state patent had good title and could not be ejected. *Held*, that in the absence of explicit directions the President's order could not be construed as appropriating such valuable property as that adjacent to the rocks and islands as being appurtenant thereto. *United States* v. *Mission Rock Company*, 391.

SEAMEN.

See FELLOW-SERVANT, 1;
MARITIME LAW;
STATUTES, 9.

SPANISH LAND GRANTS.

Where the boundaries of a Spanish grant made in 1728, are defined with accuracy they will not be controlled by vague and practically unintelligible terms as to quantity. While, owing to the loose manner in

which they were made and the boundaries described, this court has been extremely liberal in construing Spanish grants, such grants must still be construed favorably to the government, and the grantee is bound to show not only the grant itself, but that its boundaries were fixed with reasonable certainty; and where the Court of Private Land Claims has held that the evidence of settlement, occupation, continuity of possession, cultivation, etc., is so vague, contradictory and uncertain as to be almost wanting, this court in the absence of clear evidence to the contrary will adopt the opinion of the court below in that particular. Where the last known occupant of a Spanish grant made in 1728 had been killed by the Indians in 1839, and when the land passed to the United States under the treaty of 1848 with Mexico possession had been abandoned by his descendants for at least nine years and no action was taken by any one in regard to the grant until 1899, and meanwhile the public land surveys were extended over the tract in 1861, homestead and other entries were made, improvements established, patents secured and mines opened and developed, the doctrine of laches is peculiarly applicable, and under the provisions of the statute establishing it, the Court of Private Land Claims could not be called upon to confirm such a grant. *Sena* v. *United States*, 233.

See JURISDICTION, C.

STATES.

1. By the maritime law, as administered in England and in this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel; and in this particular the several States of the Union are treated as foreign to each other. *The Roanoke*, 185.
2. It is competent for the States to create liens for necessaries furnished to domestic vessels, and such liens will be enforced by the courts of admiralty under their general jurisdiction on the subject of necessaries; but where Congress has dealt with a subject within its exclusive power, or where such exclusive power is given to the Federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for the States to invade the domain of such jurisdiction and enact laws which in any way trench upon the power of the Federal courts. *Ib.*

See MARITIME LAW, 2;
POLICE POWER;
RIPARIAN RIGHTS.

STATUTES.

A. CONSTRUCTION OF.

1. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. *The Japanese Immigrant Case*, 86.
2. A general act is not to be construed as applying to cases covered by a prior special act on the same subject. *United States* v. *Nix*, 199.
3. Where the statute of a State delegates powers to a city, the ordinances

of the municipality are the acts of the State, and their unconstitutionality is the unconstitutionality of a state law within the meaning of section 5 of the Circuit Court of Appeals Act. *Davis & Farnum Manuf. Co.* v. *Los Angeles*, 207.

4. The expression in section 721, Rev. Stat. (the "laws of the several States") in regard to the authentication of foreign statutes applies not only to statutes of the States but to the decisions of their highest courts. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.
5. The Land Department charged with the execution of the act of March 2, 1889, opening for settlement the territory of Oklahoma having in many rulings held that prior entry did not disqualify provided the one who had so entered had returned and taken part in the race with the others, unless the prior entry conferred some manifest advantage, which would not otherwise have been possessed, *Held*, that as this construction of the statute was in accord with the spirit and intent of the act it should not be disregarded by the courts upon the ground that it was in conflict with the mere letter of the statute. *Potter* v. *Hall*, 292.
6. The weight of a contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. *United States* v. *Sweet*, 471.
7. The construction given by the Supreme Court of South Carolina and by the Court of Appeals of New York to the building and loan law of New York to the effect that it does not relieve a building and loan association from an obligation to pay the full par value of certificates at a date stated therein whether earned or not commends itself to this court as a correct construction thereof. *Eastern Building & Loan Association* v. *Williamson*, 122.
8. The statutes of the State of Washington, sections 5953, 5954, 2 Ballinger's Code, giving an absolute lien upon foreign vessels for work done or material furnished at the request of a contractor or sub-contractor, and making no provision for the protection of the owner in case the contractor has been paid the full amount of his bill before notice of the claim of the sub-contractor is received, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defences to which they would otherwise have been entitled, is an unlawful interference with the exclusive jurisdiction of all admiralty and maritime cases which is vested by the Constitution in the Federal courts, and to that extent such statute is unconstitutional and void. *The Roanoke*, 185.
9. Section 3348, Rev. Stat. of 1898 of Wisconsin, providing that every ship, boat or vessel used in navigating the waters of that State shall be liable for all damages arising from injuries done to persons or property thereby, and that the claim therefor shall constitute a lien upon such ship, boat or vessel, is confined to cases where the damage is done by those in charge of a ship, with the ship as the "offending thing." Cases of damages done *on board* the ship are not, within the meaning of the act, damages done *by the ship*. Such statute does not create a lien which can be enforced *in rem* for injuries received by a seaman by

the falling of a gangway, resulting as alleged from the master negligently ordering the same to be hoisted while a head wind was blowing. *The Osceola*, 158.

See COURTS, 7;
PUBLIC LANDS, 1.

B. JUDICIAL NOTICE OF.

See COURTS, 3.

C. PROOF OF.

See EVIDENCE, 1.

D. OF UNITED STATES.

See ACTION, 2;
APPEAL AND WRIT OF ERROR, 1;
ARMY OFFICERS;
BANKRUPTCY;
EXECUTIVE POWERS;
JURISDICTION, 1, D;
PRACTICE, 1, 4;
PUBLIC LANDS, 1, 2, 8;
PUBLIC OFFICERS, 1, 3;
PUBLIC RECORDS; .....
RAILROAD LAND GRANTS;
STATUTES, 3, 4; ...
STOCKHOLDERS, 4;
TAXATION, 2.

E. OF STATES AND TERRITORIES.

Alabama. *See* LOCAL LAW.
California. *See* JURISDICTION, D.
Florida. *See* LOCAL LAW.
Massachusetts. *See* CONSTITUTIONAL LAW, 2.
Michigan. *See* LOCAL LAW;
JUDGMENTS.
Mississippi. *See* INTERSTATE COMMERCE.
Nebraska. *See* CONSTITUTIONAL LAW, 3.
New York. *See* STATUTES, 7.
Oklahoma. *See* TAXATION, 2.
Tennessee. *See* COURTS, 1;
RES JUDICATA.
Texas. *See* FELLOW-SERVANT, 2.
Washington. *See* STATUTES, 8.
Wisconsin. *See* STATUTES, 9.

STOCKHOLDERS.

1. By subscribing to stock in a foreign corporation the subscriber subjects itself to the laws of such foreign country in respect to the powers and obligations of such corporation. *Nashua Savings Bank* v. *Anglo-American Co.*, 221.
2. Where it was shown that a trust company loaned on shares of a then solvent and dividend paying national bank, and accepted its stock as collateral, and subsequently the pledgor failed, and the trust company caused the stock to be transferred to one of its employés, paid an assess-

ment subsequently levied upon the stock, and charged it to the pledgor, and frequently wrote to ascertain if there was any market for the stock, stating that it was held as collateral, *Held*, that the pledgee is not bound by statements made without its knowledge by the assignees of the pledgors upon the schedules of liability to the effect that the pledgee had converted the stock. *Rankin* v. *Fidelity Insurance, etc.*, 242.

3. Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock, or held it for others. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder. But it is otherwise, if he allow his name to appear on the book as owner, or being the owner, makes a colorable transfer of the stock. *Ib.*
4. Liability of shareholders of national banks under section 5151, Rev. Stat., may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. Nor can the real owner exonerate himself from responsibility by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred. *Ib.*

See ACTION, 1;
CONSTITUTIONAL LAW, 4;
PLEADING, 1.

SURVEYS.

See EQUITY, 1, 2.
LAND DEPARTMENT, 1.

TAXATION.

1. When the difference is deep and radical between two domains in which the same kind of property may be situated, the law which makes them one district for taxation, so that all the property of the same kind in the same district must be taxed alike, and no reasonable distinction be permitted, must itself be so plain and urgent that no other intention can be suggested. *Foster* v. *Pryor*, 325.
2. There is no provision in the act of Congress of 1890 organizing Oklahoma, or in the territorial act of 1886, which was violated by the act of 1899, p. 216, Session Laws of Oklahoma, which provides that only taxes for territorial and court funds shall be assessed, levied or collected in any unorganized country, district or reservation attached to any county for judicial purposes, and the effect of which is to tax property in an organized county for more purposes, thereby making a different and higher rate than similar property is taxed in the unorganized territory attached to such county. *Ib.*

See CONSTITUTIONAL LAW, 1, 2;
INTERSTATE COMMERCE;
TRUST PROPERTY.

TERMS OF COURT.

Under the rules of the Supreme Court of the District of Columbia, the January terms begin on the first Tuesday of January. The effect of January 1, being a holiday, when it falls on Tuesday, is not to prolong an October term which ends on December 31, and postpone the commencement of the January term until January 8, but only to postpone the exercise by the court of its duties until the following day. It is too late, therefore, after January 1, to make a motion to prolong the October term, which motion under the rules must be made before the end of that term. The rule prolonging the term is to be exercised when invoked; there is no duty imposed upon the court to prolong the term of its own motion. *Gordon* v. *Randle*, 417.

TERRITORIAL COURTS.

See JURISDICTION, 2, 3.

TITLE INSURANCE COMPANIES.

See PUBLIC RECORDS.

TREATIES.

See ALIENS;
JURISDICTION, C.

TRIAL.

See COURT AND JURY;
COURTS, 4.

TRUST PROPERTY.

Under the statute of Massachusetts which requires that all personal estate held in trust shall be assessed for taxation to the trustee, a person residing in Massachusetts and holding property in trust has the same opportunity to show that he held no property in trust as he has in regard to his individual property, and it is as much his duty to disclose it as though it were individual property. *Glidden* v. *Harrington*, 255.

UNITED STATES.

See PRIZE.