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UNITED STATES REPORTS

VOLUME 190

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.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

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SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1902.

In re WATTS AND SACHS, PETITIONERS.

ORIGINAL. HABEAS CORPUS AND CERTIORARI.

Nos. 15, 16. Argued April 20, 1903.—Decided May 18, 1903.

1. The jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive.
2. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent by the receiver of another court appointed in a subsequent suit, and although that rule has only a qualified application when winding up proceedings in a state court are superseded by proceedings in bankruptcy, it obtains as a rule of comity, and its considerate observance is adequate to avert collisions between Federal and state courts.
3. The preservation of the independence of the bar is vital to the due administration of justice, and its members cannot be imprisoned for contempt for error in judgment when advising in good faith and in the honest belief that their advice is well founded.
4. Members of the bar cannot be properly held to have intended to obstruct the administration of justice and to bring the authority of a court of the United States into contempt when it is the orders of a state court appearing to have been entered of record of its own motion that are complained of, and counsel in that court acted in good faith and in the honest discharge of their duty.

M. ZIER & COMPANY, a corporation located at New Albany, Indiana, engaged in the boiler manufacturing business, was

hopelessly insolvent on and prior to December 30, 1902, and some thousands of dollars had been drawn from its treasury by the manager of its affairs for the purpose of making certain payments, of which $3100 had been paid to Ryerson & Son, a corporation of Chicago, Illinois, and a large creditor of the Zier Company, previously to December 30, and $9600 was on that day placed by M. Zier, the manager of the company, in the hands of his attorney to be paid over to Zier's sister-in-law, who was a stockholder and creditor of the Zier corporation. It was arranged by Zier's attorney with the Chicago corporation on December 29 that the latter should apply for the appointment of a receiver of the Zier corporation, and that the New Albany Trust Company should be appointed receiver, and this resulted in a complaint filed by the Ryerson corporation, represented by W. W. Watts, a member of the bar of Kentucky, in the Circuit Court of Floyd County, Indiana, charging that the Zier Company was insolvent and was dissipating its property and assets, and praying for the appointment of a receiver, "and that the court shall make such orders as shall be necessary and proper for the preservation of said property, for the continuance of said business for the purpose of completing unfinished contracts," etc., to which defendant voluntarily appeared and consented to the appointment of the New Albany Trust Company as receiver. The appointment was accordingly made, and the Trust Company immediately qualified and proceeded to administer the estate and wind up its affairs.

On January 16, the Trust Company, as receiver, filed its report and petition, giving an inventory and appraisement of the assets of Zier & Co., the receipts and expenditures of the receiver to that date, the particulars in respect of outstanding contracts; raising the question as to the further operation of the plant, and advising an order for a meeting of the creditors to consider that subject; requiring creditors to prove their claims, and enjoining them from the prosecution of suits except by intervention. A list of the creditors was attached, which included the Inland Steel Company, John C. Thurston, and the Dey Time Register Company.

The court entered an order directing such meeting to be

held January 24, and notice by mail to be given, which was done, and the meeting was held on that day, a large number of creditors being represented, including the Inland Steel Company. An order was thereupon entered for payment of rent, the completion of unfinished contracts, for the continuance of the operation of the plant to a specified extent, for the issue of certificates of indebtedness to a small amount, but that no new contracts should be made. It was further ordered that creditors be notified by mail and by publication to file their claims on or before May 11, and "that all creditors and other persons be and they are hereby enjoined and restrained from prosecuting any claim or suit against this estate except by intervention in this cause or by first obtaining leave of this court."

February 6, 1903, the Inland Steel Company, John C. Thurston, and John Dey, doing business as Dey Time Register Company, creditors of the Zier corporation to the amounts of $935, $15, and $100, respectively, filed their petition in bankruptcy in the United States District Court for the District of Indiana against that corporation to have it declared a bankrupt. The petition alleged that the company was hopelessly insolvent and had committed, within four months next preceding the filing of the petition, acts of bankruptcy, which were specified. It was further alleged that it was necessary, for the preservation of the estate of Zier & Company and for the benefit of its creditors alike, that a receiver in bankruptcy be appointed at once to take charge of the affairs of said company. On February 11 a further petition was filed by the Inland Steel Company, and, on the same day, a supplemental petition, in which the appointment by the Circuit Court of Floyd County of a receiver and his being put in charge of the insolvent's property, were set up as additional acts of bankruptcy.

The District Court thereupon appointed Frederick D. Connor as receiver, and directed that he should take into his possession the plant of Zier & Company and all its other property, and further ordered that the New Albany Trust Company should deliver up to the receiver all the property of Zier & Company and refrain from in any way interfering with him. The re-

ceiver immediately qualified by giving bond as required by the court.

February 13, 1903, and before the receiver of the District Court had made demand for the property, on learning of Mr. Connor's appointment as receiver, Mr. Watts, after consulting with the local attorneys of Zier & Company, communicated with the District Judge and requested that the Federal receiver should not proceed until he, Mr. Watts, could procure an order from the Floyd Circuit Court permitting him to do so, and could come to Indianapolis, and present to the District Judge reasons why the receiver should not have been appointed by that court, and why his order to that effect should be vacated. The District Judge immediately caused the court's receiver and the attorneys interested in the case to be notified to take no further steps until a hearing could be had on the questions suggested by Mr. Watts, on February 16, at Indianapolis. No further action was taken by the receiver of the District Court, but he presented to the Floyd Circuit Court a petition setting forth his appointment and qualification, together with a certified copy of the order appointing him, on the morning of Saturday, February 14, and asked the delivery to him of the property and effects of Zier & Company and the discharge of the Trust Company as receiver. The Floyd Circuit Court entered an order reciting that Connor, as receiver, came by his attorney, "and by leave and order of the court, and upon his own motion, makes himself a party to this proceeding, and thereupon by leave of the court files his verified petition showing his appointment as receiver of said M. Zier & Co. by order of the United States District Court for the District of Indiana," and praying for the surrender of the property, "and the matter of said petition is now continued until the next term of this court." Saturday, February 14, was the last day of the term, and the next term of the court commenced on the ninth day of March.

On the same day, February 14, the Trust Company, by Watts, its attorney, filed its petition, framed by him, which alleged that the Trust Company was carrying out as receiver the terms of the order of January 24; that that order had

been entered without objection from the Inland Steel Company, John C. Thurston or the Dey Register Company, or any creditor; that the three last-mentioned creditors had filed a petition in involuntary bankruptcy against M. Zier & Company, February 6, 1903; that supplemental petitions were filed February 11, 1903, but that the petitions, although setting up the receivership in the state court, had not shown to the United States District Court the participation of the Inland Steel Company in the proceedings of January 24, its appearance, and the restraining order and injunction; that thereupon the order had been obtained in the bankruptcy proceedings appointing Connor receiver, and directing him to take charge of the estate of M. Zier & Company in bankruptcy, and directing the receiver of the state court to deliver up the property. The petition further averred that the creditors whose appearance was noted in the state court on January 24 had claims aggregating $53,279.51; that creditors with claims aggregating $11,622.49 had filed claims with the state court receiver, making a total of $64,902 in amount, so filed or appearing, out of a total liability of $76,463.36; that the total number of creditors was seventy-six; that thirty-seven appeared to the action, and twenty-five, including the Dey Time Register Company, had filed their claims with the state court receiver, making a total of sixty-two creditors who had appeared or filed their claims.

That, with a view to the due observance of the comity existing between the state and the Federal courts, and of avoiding a clash of jurisdiction, petitioner had communicated through its attorneys with the United States District Judge and requested the non-enforcement of his order until after the matters in question had been presented to the state court, with the request that that court direct it and its attorneys to lay said matters before the judge of the District Court, whereupon the District Judge requested counsel to notify the attorneys of the creditors petitioning in bankruptcy that the matter would be heard on Monday, February 16, in Indianapolis, and that in the meantime the order appointing Connor was not to be enforced.

The petition further alleged that the court was about to ad-

journ over to the first day of its next term, March 9; that the order of January 24, directed petitioner as receiver to go on and complete various contracts; that it had entered upon the work; that the operation of the plant was for the beneficial purposes of the estate; and that the stoppage of the plant would involve loss to the creditors and many complicated questions of damage; that it would work great hardship to leave the estate with the court adjourned and without instructions as to what to do; and that the petitioner was this court's officer, and must be ordered and directed by this court only, with respect to the property in its hands.

Petitioner averred that the injunction and restraining order of the state court had been knowingly violated by the Inland Steel Company and the Dey Time Register Company; that these two creditors and all other creditors were estopped from prosecuting the petition in bankruptcy, and from seeking to take from petitioner the assets in its hands as receiver; and that all the creditors were enjoined from prosecuting any attempt to take from the receiver any of the assets in its hands except by leave. And, further, that the record in the District Court of the United States for the District of Indiana did not disclose all the facts regarding the matters herein; that that court had no information as to the restraining orders and estoppels, by entry of appearance, participation, and otherwise. That the assets of the Zier Company were *in custodia legis;* that the parties had submitted themselves to this forum; that the court came into lawful custody of the property, and the orders and proceedings were entered and had before the institution of the bankruptcy proceedings, and the attempt to oust this court and receiver therefrom. Petitioner, therefore, asserted its belief that the District Court, under the peculiar circumstances of the case, would coincide with the state court, if it should deem wise to enter orders specifically restraining the Inland Steel Company, John L. Thurston and the Dey Time Register Company and their attorneys; Connor; and the United States marshal from further prosecuting any matters in relation to the estate or of the taking of the assets in any manner, except by intervention in this action.

Petitioner prayed for instructions; that it should present the facts to the District Court of the United States, either by limited or general appearance in the bankruptcy proceedings, and ask such relief, if any, as this court might direct; and that an injunction be granted.

An order was then entered, prepared by Mr. Watts, embodying matters set up in the petition, granting an injunction, ordering the operation of the plant to continue, and directing the receiver, through its attorneys, to proceed to Indianapolis and there by a limited appearance to lay before the District Court the facts with regard to the matters herein, and to suggest to that court the orders of this court, and its belief that with full information of the facts the order of that court would at most have been a direction for application to be made to this court for the delivery of the assets to the receiver or trustee of the District Court. It was further ordered that the Inland Steel Company, John L. Thurston, and the Dey Time Register Company show cause why they should not be punished for contempt in disobeying the orders of this court by taking action without obtaining leave.

On Monday, February 16, Mr. Watts, with the vice president of the New Albany Trust Company, receiver, appeared in the District Court at Indianapolis, and the proceedings in the state court, including the petition and order of February 14, were laid before that court, and hearing was had that day and on February 17. At the conclusion of the argument the District Judge announced his ruling that the court in bankruptcy had supreme and exclusive jurisdiction in the matter; and asked Mr. Watts and the representative of the Trust Company if it were not better to avoid the clash of jurisdiction by voluntarily turning the property over to the Federal receiver, indicating at the same time that otherwise it would be his duty to exert the power of the court in vindication of its jurisdiction. Mr. Watts and his colleague thereupon announced that the property would be turned over to the Federal receiver. Mr. Watts at the same time stated to the court that he would do all in his power to see that the proceedings in the state court of February 14 were

stricken out, and that he would endeavor to have the state court make an order directing the surrender of the property.

The District Court, on February 17, made the following order:

"This cause coming on now to be heard upon the petition of Frederick D. Connor, filed herein on the 16th day of February, A. D. 1903, for the instruction of the court concerning the property and assets of said M. Zier & Company, which are now in the possession of the New Albany Trust Company, as receiver of the Floyd Circuit Court, in a suit therein pending against said M. Zier & Company, because of their insolvency; and the petitioning creditors in this cause and said Connor, receiver as aforesaid, being now present and represented by George H. Hester and William Wilhartz, their solicitors, and said New Albany Trust Company, receiver as aforesaid, being now present and represented by Henry E. Jewett, its vice president, and by William W. Watts, its solicitor, and after argument by counsel, the said New Albany Trust Company, as receiver of the Floyd Circuit Court, by its said vice president, having voluntarily offered and agreed, by and with the consent and approval of said William W. Watts, its solicitor, in open court, to surrender full and immediate possession and control of the property and assets of said M. Zier & Company, in its possession or under its control, as receiver of the Floyd Circuit Court, to said Connor, as receiver of this court, upon the presentation by him to said New Albany Trust Company of a certified copy of the order for his appointment as such receiver heretofore made by this court. It is now hereby ordered by the court that said Connor, receiver as aforesaid, forthwith present a certified copy of the order for his appointment as such receiver to the said New Albany Trust Company, and immediately thereupon take full possession and control of the property and assets of said M. Zier & Company that are now in the possession or under the control of said New Albany Trust Company, as receiver of the Floyd Circuit Court."

On February 19 the Trust Company by its vice president filed a report in the Floyd Circuit Court, in which it stated that, in pursuance of the order of the court, it had appeared before the

District Judge in Indianapolis on Monday, February 16, and, upon the hearing in that court, the receiver had stated that it was ready and willing to deliver to the receiver appointed by the Federal court all the property and assets of Zier & Company in its hands; that it had not yet been able to make up its accounts as receiver, but was preparing the same to submit to the court, and was willing to turn over all the property to the Federal receiver; and prayed leave from the court to do so. The company further asked that upon the presentation and approval of its accounts as receiver, its resignation be accepted, and that it be fully and finally discharged.

On the same day Connor demanded of the Trust Company the property of Zier & Company in its possession, to which that company at once replied that it had that morning filed before the judge of the Floyd Circuit Court, in chambers, a report, a copy of which was attached; that the judge had stated orally that he wished the property held until the accounts of the Trust Company as receiver were rendered and passed on; that the company thought this might be done the next day, and desired, if Connor was willing, to defer action until then, because it would "relieve us of embarrassment in the premises. On the other hand, if you insist on immediate surrender of the property to you, we are bound to say that we believe that to carry out in good faith the understanding with the Honorable Judge of the United States Court of Indianapolis and our vice president, H. E. Jewett, we ought to surrender the property to you at once." Connor declined to grant further time, and the Trust Company turned over to him the plant of Zier & Company, which constituted all the property of that company except certain books and cash. Connor immediately took possession of the property and put watchmen in charge to hold the same for him.

On February 20 the United States Tube Company presented to the Floyd Circuit Court, "in vacation, at chambers," a petition signed and verified by D. A. Sachs, in which it was set forth that the Trust Company, as receiver, had wrongfully turned over and surrendered the possession of the boiler plant of Zier & Company to Connor, the receiver in bankruptcy, and was

threatening to turn over to Connor all the other assets of Zier & Company in its hands. Petitioner therefore prayed that the Trust Company be cited to appear before the court, in chambers, on the afternoon of that day, and show cause why it should not be punished for contempt, and that if the court found that the Trust Company had violated its orders as represented that it be removed from its office as such receiver and a successor be appointed; and that the Trust Company be required to account immediately and turn over to its successor the property of Zier & Company. On this petition the judge of the Floyd Circuit Court on the same day entered an order removing the Trust Company from the receivership and directing it to account for the assets of Zier & Company. The order further provided for the appointment of Charles D. Kelso as receiver and directed him, on qualification, to demand of the Trust Company and Connor the immediate possession of the property of Zier & Company which came into the hands of the Trust Company as receiver, and should Connor fail or refuse to surrender the possession of the assets, that he at once report to the judge for further instructions.

Kelso, having qualified, on the same day reported to the judge at chambers that he had demanded of the Trust Company the possession of the assets of Zier & Company, and that the Trust Company had refused to surrender the possession for the reason that it had turned over the possession of the plant to Connor, and that as to the other assets it intended to account forthwith to the judge of the Floyd Circuit Court; and that he then demanded the property of Connor, who refused to surrender the same. The state court then entered an order that a writ be issued, directed to the sheriff of the county, requiring him immediately to seize and deliver to Kelso all the property which Connor had in his possession, and forthwith to make a return to the court.

February 21, Connor filed a petition in the District Court, in which, after setting forth the facts as to the delivery of the possession of the plant of Zier & Company to him, February 19, he stated that he retained possession of the same until February 20, when possession was demanded of him by Kelso, as

receiver appointed by the Floyd Circuit Court, which demand he refused; that he was served with a certified copy of the order of the Floyd Circuit Court, and with a writ issued by that court February 20, to the sheriff, requiring him forthwith to take possession of the plant and the assets; and that the sheriff forcibly took possession thereof, and delivered the same over to Kelso, who was then in possession.

The petition of Connor further stated:

"That this petitioner believes the above-stated proceedings were procured to be had by William W. Watts, Esq., of Louisville, Ky., who during the continuation of the New Albany Trust Company, as receiver of M. Zier & Company, represented said Trust Company as such; that said Charles D. Kelso is now represented by one D. A. Sachs, Esq., of Louisville, Ky., an attorney-at-law, and that the petitioner believes that said Sachs also assisted in procuring the orders of the said Floyd Circuit Court above set out, and the petitioner further says that he verily believes the forcible removal of said property from his possession and control as receiver appointed by this court as aforesaid, was brought about by the joint action and efforts of said Charles D. Kelso, as receiver, and Charles D. Kelso, individually, and William W. Watts, as attorney for said New Albany Trust Company, and D. A. Sachs, attorney for said Charles D. Kelso, receiver."

The petitioner further prayed that Kelso, as receiver and individually; the sheriff, the deputy sheriff, and the custodian of the plant; and William W. Watts, as attorney for the Trust Company, and D. A. Sachs, as attorney for Kelso, be required and directed to redeliver the property to petitioner, and be cited to appear and show cause why they should not be punished for contempt.

On this petition the District Court, February 21, made an order requiring the parties therein named to appear before it at Indianapolis on February 25 to show cause why they should not redeliver the property, and restraining them from in any way interfering therewith; and further ordering that the parties show cause why they should not be punished for contempt. On the same day, the United States District Attorney

for the District of Indiana filed informations in the District Court against Kelso, Watts, Sachs, and others, for contempt of the District Court in disobeying and disregarding its orders. Watts and Sachs filed separate answers and pleas to the rule to show cause and to the information against them, which were traversed by the United States District Attorney.

William W. Watts, by way of response to the rule, and plea to the information, pleaded that he was not guilty of the alleged contempts stated in the rule and information, or either of them. He denied that he had committed or advised any act of contempt of the orders of the District Court, or that he had in any way, directly or indirectly, or by aiding or advising, forcibly, or in any other way, taken from the receiver in the bankruptcy proceedings the property of Zier & Company, or any part of it, or in any way, by aiding, abetting or advising, had withheld the custody of said property or any part of it. But he said that the orders of the District Court directing its receiver to take the property of Zier & Company into its custody were void because of want of jurisdiction, and that the possession of the property by Connor, receiver, was wrongfully and unlawfully obtained, and the retaking under the orders and writ of the Floyd Circuit Court was a lawful and proper taking.

He then set up the various proceedings hereinbefore enumerated, and the part he took therein; adding: "All this was done solely for the purpose of preventing any possible conflict between the two jurisdictions, and it was believed by this defendant and respondent, and by the said New Albany Trust Company, and by the judge of the Floyd Circuit Court, that upon such presentation, the United States District Court would rescind its said order appointing said Frederick D. Connor, as receiver, and directing him to take possession of said property of M. Zier & Company." Under this authorization he and the Trust Company appeared at Indianapolis on Monday, February 16, and exhibited to the District Court the order of the Floyd Circuit Court authorizing them to appear, and make a full statement of the situation in the state court, after which and extended argument, the District Judge refused in any way to reconsider, modify or set aside his order, and demanded of

the representative of the Trust Company whether or not it would turn over the property, and of defendant and respondent whether or not he, as counsel for the Trust Company, would advise it to turn the property over, to Connor, as receiver. "Under these circumstances and not otherwise, and believing that the said demand of said judge of the said United States District Court was peremptory, this defendant and respondent, as counsel for the said New Albany Trust Company, stated that he would advise the said New Albany Trust Company to turn over the said property to the said Frederick D. Connor, receiver." On February 17, defendant and the vice president of the Trust Company left Indianapolis, and defendant supposed that it was not necessary for any order respecting the hearing in the District Court February 16 and 17 to be entered, and that no order would be entered. But an order was entered, a fact which he learned several days thereafter.

Defendant, further answering, alleged that on February 19 defendant and the Trust Company, receiver, appeared before the judge of the Floyd Circuit Court, in chambers, and defendant, as attorney for the Trust Company, then filed before the judge of that court a written petition and motion, setting forth what had passed at Indianapolis, in view of which he moved to strike out and expunge from the files the petition and order of February 14, 1903. This was particularly desired, because the District Judge seemed to regard the petition and order as offensive. That defendant was in every way in good faith endeavoring to carry out the understanding at Indianapolis, and advised, and at no time gave any contrary advice, the Trust Company to turn over to Connor, receiver, all the property of the Zier Company. The response and plea further averred that Watts was much embarrassed by the condition of affairs and felt that the judge of the Floyd Circuit Court might misconstrue his actions in the premises, and before going to New Albany on February 19, 1903, requested his friend, D. A. Sachs, a lawyer residing in Louisville, Kentucky, to accompany him for the purpose of explaining his action to the judge of the Floyd Circuit Court, and this Sachs accordingly did. But the judge of that court was not satisfied, and entered a rule on

Watts to show cause "why he should not be punished for contempt."

On the same day the Trust Company filed its separate petition, praying for leave to turn over the property, and for its discharge in the premises on the approval of its accounts. But the judge cited it also to show cause.

The pleading further set forth the communication of the Trust Company to Connor, receiver, and the delivery of the property to him; and that on February 20 defendant appeared before the judge of the Floyd Circuit Court in obedience to his request. On that day an order was entered removing the Trust Company as receiver, and appointing Charles D. Kelso as receiver in its stead, and authorizing him to demand of Connor the property of Zier & Company. Before that order was entered the Trust Company had, in fact, under the advice of Watts, turned over the property to Connor, and the response and plea asserted that defendant did not advise, aid, connive at, or abet the entry of said order, and had nothing whatsoever to do with it.

The response and plea further set forth the report of Kelso, and the entry of an order directing the issue of a summary writ to the sheriff of Floyd County, and stated: "This defendant and respondent did not procure the entry of said order or connive at its entry or advise its entry, and did not know of its entry until after it had been entered. He had no connection whatever with it."

Defendant and respondent reiterated that all of his acts and doings and advice after his appearance at Indianapolis were with the single purpose of having the Trust Company turn over all the property and effects to the receiver of the District Court, and that he did nothing and said nothing and advised nothing which would in any way delay the execution of that purpose; that he did nothing and said nothing with reference to the removal of the Trust Company or the removal of Kelso, and in no way did he advise anything looking to the retaking of said property from the hands of said Connor, receiver, and with all these matters he had nothing to do. Transcripts of the records were attached as exhibits.

By his separate response and plea, D. A. Sachs denied the commission of any act, or the advising or consenting to the commission of any act, in disobedience of any order of the court in the bankruptcy case, or that he had aided, abetted or advised the taking from the receiver the property of Zier & Company, or in any way disobeyed or disregarded, or aided or abetted the disregarding of, the orders or decrees of the District Court, or been guilty of any contempt in the case. He said that he first heard of the proceedings on February 18 from Mr. Watts, and appeared before the state judge and attempted to explain the matter simply as his friend. He at no time advised disobedience or disregard of the orders of the District Court or the taking of the property from Connor, but on the contrary advised against that course; and "that all he did in this matter was without fee or any consideration whatever except through friendship to said Watts." He then believed and is still of the opinion that the receiver of the Floyd Circuit Court had the rightful possession of the property, and that the District Court did not have the right or authority to interfere therewith in the summary way pursued herein. The response then set forth the various proceedings in both courts, and respondent asserted that on Monday, February 23, 1903, he learned for the first time of the making of the order in the District Court dated February 17. He denied that he had anything to do with the proceedings other than the action he took with a view of extricating Mr. Watts from the complications, and "with a view of avoiding any action that might be justly construed as a violation of the orders of either court." He denied knowledge of a petition or order for the property to be seized, and had nothing whatever to do in any way with the procuring or execution of such an order or with the forcible taking of the property or any part thereof from the receiver.

The responses and pleas having been traversed, evidence, documentary and oral, was adduced at considerable length, and on March 14, 1903, the District Court found Watts and Sachs each guilty of contempt as charged in the information and rules, and sentenced each of them to confinement in the jail of Marion County for sixty days and to pay costs.

In the meantime the property had been restored to Connor, receiver, the $9600 had been paid over to him, and Zier & Company had been adjudicated bankrupt.

Petitions by Watts and Sachs for writs of *habeas corpus* and of certiorari, setting forth the foregoing matters and things, were thereupon presented to this court, leave given to file them, and the writs thereupon issued, and it was directed that each of the petitioners be admitted to bail on his personal recognizance in the sum of $500, to be entered into before the judge of the United States court for the District of Indiana.

Mr. David Fairleigh, with whom *Mr. Bernard Flexner* was on the brief, for the petitioner Watts.

I. When a person is imprisoned by a United States court for refusing to comply with an order of that court, and such order is beyond the jurisdiction or power of the court to make, the order itself is void, and the order punishing for contempt is likewise void, and this court will, on writ of *habeas corpus*, discharge the person so imprisoned. *Ex parte Lange*, 18 Wall. 163; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 U. S. 713; *In re Ayres*, 123 U. S. 443; *In re Lane*, 135 U. S. 443; *In re Tyler*, 149 U. S. 164; *In re Bonner*, 151 U. S. 242; *In re McKenzie*, 180 U. S. 536.

II. An order of a United States District Court sitting in bankruptcy, commanding its receiver to peremptorily take from the possession of a receiver of a state court property in his hands as such at the time the bankruptcy proceedings were begun, is void. *Peck* v. *Jenness*, 7 How. 611; *Taylor* v. *Carryl*, 20 How. 583; *Marshall* v. *Knox*, 16 Wall. 551; *Doe* v. *Childress*, 21 Wall. 643; *Covell* v. *Heyman*, 111 U. S. 182; *Shields* v. *Coleman*, 157 U. S. 168; *Johnson, Assignee*, v. *Bishop, Sheriff*, Woolworth, 324; *Metcalf* v. *Barker*, 187 U. S. 165; *Pickens* v. *Roy*, 187 U. S. 177; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Bardes* v. *Hawarden Bank*, 178 U. S. 524.

III. A receiver appointed by a court has no authority to surrender the possession of the property in his hands without authority from the court which appointed him, and the person who so acquires the possession of the property from him is in

wrongful possession, and the court may issue an appropriate writ to restore the possession of the property to a custodian of the court. *Davis* v. *Gray*, 16 Wall. 217; *Shields* v. *Coleman*, 157 U. S. 168; *White* v. *Schloerb*, 178 U. S. 542; *Metcalf* v. *Barker*, 187 U. S. 165.

Mr. W. H. H. Miller, with whom *Mr. W. M. Smith* was on the brief, for the petitioner Sachs.

1. The Floyd Circuit Court was in the lawful, actual possession of the property in controversy when the bankruptcy proceeding commenced. *First National Bank* v. *U. S. Encaustic, etc.*, 105 Indiana, 227; *Pressley* v. *Lamb*, 105 Indiana, 171. The fact of actual possession is undisputed.

This proceeding in the state court is not subject to collateral attack. *Phelps* v. *Mutual Reserve, etc.*, 112 Fed. Rep. 453; *Weiss* v. *Guerineau*, 109 Indiana, 438; *Hollinger* v. *Reeme*, 138 Indiana, 363.

The suit in the state court was not under an "insolvency law." *Mayer* v. *Hellman*, 91 U. S. 496; *Carling* v. *Seymour*, 113 Fed. Rep. 483.

It is idle to say that the filing of the bill and procurement of the appointment of a receiver was a fraud on the state court because preferences had been given; since, in the absence of bankruptcy proceedings, the preferences were lawful. *Sandford Fork, etc.*, v. *Howe*, 157 U. S. 312, 317; *McCormick* v. *Smith*, 127 Indiana, 230, 235. It was uncertain whether bankruptcy proceedings would ever be commenced.

2. The rules of comity between the state court and the United States District Court sitting in bankruptcy apply in all their breadth and force. *Peck* v. *Jenness*, 7 How. 612 (Bankrupt Act, 1841); *Eyster* v. *Gaff*, 91 U. S. 521 (Bankrupt Act, 1867); *Metcalf* v. *Barker*, 187 U. S. 165 (Bankrupt Act, 1898); *Carling* v. *Seymour*, 113 Fed. Rep. 483.

If the possession of the state court is actual, the fact, (if it be a fact,) that the jurisdiction of the bankruptcy court is exclusive does not warrant the latter court in taking the possession from the state court by summary proceedings. *Moran* v. *Sturges*, 154 U. S. 256; *The Oliver Jordan*, 2 Curtis, 414; *Taylor* v.

Carryl, 20 How. 583; *The E. L. Cain*, 45 Fed. Rep. 367; *The James Roy*, 59 Fed. Rep. 784; *Carling* v. *Seymour Lumber Co.*, (C. C. A. 5th Cir.) 113 Fed. Rep. 483, 490, 491, reversing same case, *In re Macon, etc.*, in 112 Fed. Rep. 323, where the District Court seems to have held opinions similar to those of the District Court in the case at bar. See also, *Temple* v. *Glasgow*, (C. C. A. 4th Cir.) 80 Fed. Rep. 443–446.

3. And the fact that the suit in the state court was not based on a valid lien is immaterial. The power of the bankruptcy court is as plenary when there are liens as when there are not. Rev. Stat. § 4972 (act 1867); sections 2 and 69, act 1898; *Johnson* v. *Bishop*, 1 Wool. 324; *Bradley* v. *Frost*, 3 Dillon, 457; *In re Price*, 92 Fed. Rep. 987; *In re Lingert*, 110 Fed. Rep. 927; *In re Lesser*, 100 Fed. Rep. 433; *In re Wells*, 114 Fed. Rep. 222; *In re Ward*, 104 Fed. Rep. 985; *Smith* v. *Belford*, 106 Fed. Rep. 658; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18.

For discussion of rule of comity, *Covell* v. *Heyman*, 111 U. S. 176.

4. The act of 1898 (as well as that of 1867) provides for intervention by representative of bankruptcy court in a suit in a state court. Section 11, sub. *b* and *c*.

5. This was actually done in case at bar by a general appearance.

6. This being done, the bankruptcy court was bound to await the decision of the state court in the ordinary way. *Peck* v. *Jenness*, 7 How. 612, 625; *Johnson* v. *Bishop*, 1 Wool. 324; *Doe* v. *Childress*, 21 Wall. 643; *Scott* v. *Kelly*, 22 Wall. 57; *Mays* v. *Fritton*, 20 Wall. 414; *Davis* v. *Friedlander*, 104 U. S. 570; *Winchester* v. *Heiskell*, 119 U. S. 450; *Adams* v. *Crittenden*, 133 U. S. 296; *Ludeling* v. *Chaffe*, 143 U. S. 301.

The bankruptcy court never got lawful possession of the property. *a.* Because such possession as it got from the state court's receiver was the result of a threat to take it with "a club." *b.* Because the state court receiver could not deliver lawful possession without the consent of his court. This is elementary. *Shields* v. *Coleman*, 157 U. S. 168; *White* v. *Schloerb*, 178 U. S. 542; *Metcalf* v. *Barker*, 187 U. S. 165; *The*

E. L. Cain, 45 Fed. Rep. 367–370; *The James Roy*, 59 Fed. Rep. 784; *Moran* v. *Sturges*, 154 U. S. 256.

7. The amendment to the bankrupt act of February 5, 1903, making a receivership an act of bankruptcy, is not retroactive so as to apply to this case. All bankrupt acts have been prospective as to acts of bankruptcy. Act 1841, 5 Stat. 442; Act 1867, 14 Stat. 536; Act 1898, sec. 71; *Chew Hong* v. *United States*, 112 U. S. 536, 559; Endlich on Statutes, 276; *McEwan* v. *Den*, 24 How. 245. If the amendment is not retroactive, this receivership was not an act of bankruptcy. *In re Wilmington Hosiery Co.*, 120 Fed. Rep. 180; also 179.

Mr. George H. Hester (by special leave), with whom *Mr. William Wilhartz* was on the brief, for the receiver in bankruptcy of M. Zier & Co.

All state laws for the administration of insolvents' estates and all actions and proceedings thereunder are suspended by the enactment of the general bankruptcy law. *In re Smith*, 92 Fed. Rep. 135; *Tua* v. *Carriere*, 117 U. S. 201–209; *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *Lea* v. *George M. West Co.*, 91 Fed. Rep. 237; *In re Rouse, Hazard & Co.*, 91 Fed. Rep. 96; *Lothrop* v. *Highland Foundry Co.*, 128 Massachusetts, 120; *Parmenter Mfg. Co.* v. *Hamilton*, 172 Massachusetts, 178; *Harbaugh* v. *Costello*, 184 Illinois, 110; *In re Gutwillig*, 90 Fed. Rep. 475.

The jurisdiction of the Federal courts over the administration of insolvent estates is exclusive and supreme. *In re Merchants Insurance Co.*, 6 N. B. R. 43; *In re Smith*, 92 Fed. Rep. 135; *Harbaugh* v. *Costello*, 184 Illinois, 110; *Watson* v. *Bank*, 11 N. B. R. 161.

The Bankruptcy Act of 1898 authorizes the District Court "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of this act."

The jurisdiction of the bankruptcy court being supreme, it may properly, by summary process, obtain possession of property in the hands of an assignee or other officer of a state court. *In re John A. Etheridge Furniture Co.*, 92 Fed. Rep. 329;

White v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, 184 U. S. 1; *In re Tune*, 115 Fed. Rep. 906; *In re Green Pond R. Co.*, 13 N. B. R. 118; Fed. Cas. No. 5786; *In re Safe Deposit and Sav. Inst.*, 7 N. B. R. 392; Fed. Cas. No. 12,211; *In re Washington Marine Ins. Co.*, 2 Ben. 292; Fed. Cas. No. 17,246; *In re Merchants Ins. Co.*, 3 Biss. 162; Fed. Cas. No. 9441; *In re National Life Ins. Co.*, 6 Biss. 25; Fed. Cas. No. 10,046; *In re Whipple*, 6 Biss. 516; Fed. Cas. No. 17,512; *In re Smith*, 92 Fed. Rep. 135; *Clarke* v. *Larremore*, 188 U. S. 486.

Summary proceedings are also authorized to take property from the hands of a receiver of a state court. *In re Merchants Ins. Co.*, 6 N. B. R. 43; *In re Lengert Wagon Co.*, 110 Fed. Rep. 927; *In re Storck Lumber Co.*, 114 Fed. Rep. 360; *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *Platt* v. *Archer*, 9 Blackf. 559; Fed. Cas. No. 11,215.

The proceeding in the state court for the appointment of a receiver of M. Zier & Co. was, in substance, a voluntary assignment, or bankruptcy proceeding. Every asset of the insolvent was placed by it in the hands of the receiver selected by it. The purpose was the distribution of these assets among all its creditors. *In re John A. Etheridge Furniture Co.*, 92 Fed. Rep. 329; *In re Storck Lumber Co.*, 114 Fed. Rep. 360.

The cases at bar do not involve either the question of property held by adverse claim, or that of a lien attaching more than four months previous to the bankruptcy proceedings. The following cases relied on by the petitioners are not, therefore, in point: *Peck* v. *Jenness*, 7 How. 625; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Metcalf* v. *Barker*, 187 U. S. 165.

The state court having no jurisdiction whatever after the filing of the petition in bankruptcy, it had no power to hear and determine the question of whether or not it would relinquish the property. It became its duty to do so at once, upon being informed of the proceedings in the United States court, and every step taken thereafter with reference to the property and its custody was *coram non judice.*

If a receiver is appointed by a Federal court and actually

takes possession of the property, possession will not be yielded to a receiver subsequently appointed by a state court, although the suit in the state court was commenced before that in the Federal court. *East Tenn., Virginia & G. R. Co.* v. *A. & T. R. Co.*, 49 Fed. Rep. 608; *Central Trust Co. of N. Y.* v. *Chattanooga R. Co.*, 69 Fed. Rep. 950.

Where a state court has no jurisdiction over property and loses the actual possession thereof to the Federal court, there remains no possession by the state court, either actual or constructive. *The Willamette Valley*, 62 Fed. Rep. 293; 66 Fed. Rep. 565; *Moran* v. *Sturges*, 154 U. S. 256, 293.

Where there is neither actual nor constructive possession there can be no obstacle to proceeding summarily, and an action thus taken cannot be invalidated by relation. *Moran* v. *Sturges*, 154 U. S. 256, 284.

The bankruptcy court having been given voluntary and peaceable possession, the question of comity between the courts is not involved, except as it applies to the action of the state court in retaking the property. It is a question of the supremacy of the Constitution and laws of the United States. *In re Tune*, 115 Fed. Rep. 906; *East Tenn., etc., R. Co.* v. *A. & T. R. Co.*, 49 Fed. Rep. 608.

Where property is in the custody of the bankruptcy court, no other court, and no person acting under any process from any other court, can, without the permission of the bankruptcy court, interfere with it; and to so interfere is a contempt of the bankruptcy court. *In re Vogle*, 7 Blackford, 18; *Moran* v. *Sturges*, 154 U. S. 256; *Freeman* v. *Howe*, 24 How. 450, 459.

Mr. Solicitor General Hoyt for the United States.

I. The argument of counsel for petitioners relates exclusively to the manner in which the District Court exercised its jurisdiction over the property in dispute.

The power of a bankruptcy court to enforce its jurisdiction by contempt proceedings is unquestioned. Whether the facts presented warranted petitioners' conviction and the punishment imposed, were matters within the judgment of the District

Court to determine, as they are within the power and discretion of this court to review. Acts similar to those committed by petitioners have been held to constitute contempt in the following cases: *In re Vogel*, 2 N. B. R. 427; Fed. Cas. 16,983; *In re Ulrich*, 8 N. B. R. 15; Fed. Cas. 14,328; *In re Litchfield*, 13 Fed. Rep. 186; *Ex parte Davis*, 112 Fed. Rep. 139; *Royal Trust Co.* v. *Washburn, etc., Ry. Co.*, 113 Fed. Rep. 531. See particularly *Anderson* v. *Comptois*, 48 C. C. A. 1, and note, p. 7; also reported in 109 Fed. Rep. 971.

II. Upon the filing of the petition in bankruptcy the jurisdiction of the District Court immediately attached, and was exclusive. *In re Merchants' Ins. Co.*, 6 N. B. R. 43; *In re Lady Bryan Mining Co.*, 6 N. B. R. 252; *Watson* v. *Citizens' Savings Bank*, 11 N. B. R. 161; *In re Gutwillig*, 90 Fed. Rep. 475; *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *In re Rouse & Co.*, 91 Fed. Rep. 96; *Lea* v. *George M. West Co.*, 91 Fed. Rep. 237; *In re Smith*, 92 Fed. Rep. 135; *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329; *In re Richard*, 94 Fed. Rep. 633; *In re Lengert Wagon Co.*, 110 Fed. Rep. 927; *In re Storck Lumber Co.*, 114 Fed. Rep. 360; *Parmenter Mfg. Co.* v. *Hamilton*, 172 Massachusetts, 178; *Harbaugh* v. *Costello*, 184 Illinois, 110.

Only a pretense of argument is made against the jurisdiction of the District Court over the property of the bankrupts. Within four months prior to the filing of the petition they had committed acts of bankruptcy by making preferences denounced by the statute. Besides, the amendment of February 5, 1903, to the Bankruptcy Act makes the appointment of a receiver by a state court because of insolvency an act of bankruptcy. That amendment is on its face retroactive, and applies to a case where a receiver "has been" appointed within four months of the filing of the petition in bankruptcy. In the original act, a retroactive effect was expressly provided against, and proceedings commenced under state insolvency laws before its passage were explicitly not to be affected, but the amendatory act contains no such provision.

That the jurisdiction of the District Court is not seriously attacked, is shown by the fact that opposing counsel frankly

state that the question here is not as to the right of possession, but of proper procedure.

III. The question as to the authority of a bankruptcy court summarily to take property over which it has acquired jurisdiction from the possession of a state court or its officers, does not arise on this record. The District Court did not summarily seize the property but the same was voluntarily surrendered to its receiver. The fact that the receiver of the state court was not authorized to make the transfer, does not affect the legality of the possession received by the District Court, but was a matter wholly between the state court and its receiver. An order of the state court directing the surrender of the property could give the District Court no additional right to the possession. That right was already perfect.

IV. Assuming, however, for the sake of argument, that the property was summarily taken from the state court, it is apparent that, under the decisions of this court, summary action in such a case was authorized. The attitude of the state court toward the Federal court is indicated by the order enjoining the bankrupt's creditors from proceeding in any other court.

The attempt to defeat the jurisdiction of the District Court is evident.

The necessity for prompt and forcible action by the Federal courts, in order to enforce the provisions of the National Bankruptcy Law, when one exists, even as against the state courts, is recognized by section 720 of the Revised Statutes, which provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Among the powers conferred upon the courts of bankruptcy by section 2 of the act of 1898, are—"to (15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." 30 Stat. 546.

The twelfth general order in bankruptcy provides: "3. Applications . . . for an injunction to stay proceedings of a

court or officer of the United States, or of a State, shall be heard and decided by the judge."

And section 2, clause 3, of the act of July 1, 1898, authorizes courts of bankruptcy to "appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

A forced conception of what constitutes "proper procedure" should not, therefore, be allowed to defeat the Federal jurisdiction.

V. It is not asserted that the rule of comity does not apply to bankruptcy cases. On the contrary, the importance of a due observance of that rule is fully recognized. But it is contended that the rule of comity has its limitations; that it is not so one-sided as to operate only on the Federal court, and that it ceases to apply when the state court becomes remiss in its duty.

Counsel urge that the proper course is to appeal to the highest court of the State, and thence, if necessary, to this court. In the meantime the property of the bankrupt might be dissipated or destroyed. It would be curious, indeed, if the administration of the National Bankruptcy Law could be thus defeated by a state court. What would then become of the supremacy of the Constitution and laws of the United States? How does this view agree with the "incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it?" *Ex parte Siebold*, 100 U. S. 395.

The doctrine of *Peck* v. *Jenness*, 7 How. 611, and *Johnson* v. *Bishop*, Woolworth, 324, is not so much a rule of comity as a rule of law, and applies only to cases in which the state court had full and complete jurisdiction, or where the jurisdiction of the state court is concurrent, such as suits to enforce valid pre-existing liens, or suits by assignees in bankruptcy to recover property of a bankrupt in the hands of an adverse claimant.

VI. But the authority of receivers or marshals in bankruptcy

is not to be measured by that of assignees under the act of 1867 or trustees under the present act.

The observation in *Bardes* v. *Hawarden Bank*, 178 U. S. 531, that courts of bankruptcy could hardly be considered as empowered by the provisions of the Bankruptcy Act to authorize receivers or marshals forcibly to seize property in the hands of adverse claimants, was stated to have been an inadvertence and therefore withdrawn in the subsequent case of *Bryan* v. *Bernheimer*, 181 U. S. 189, 197.

It seems plain that in *Bryan* v. *Bernheimer*, the court perceived that, since receivers or marshals were only to be appointed "in case it is necessary for the preservation of the property of the bankrupt," the right to authorize them to proceed summarily might in some cases be absolutely essential to the accomplishment of that purpose.

In *White* v. *Schloerb*, 178 U. S. 542, it was held that the District Court sitting in bankruptcy had authority, by summary proceedings, to compel the return of property taken from it on a writ of replevin from a state court, sued out after the jurisdiction of the District Court had attached. It is true that in *Metcalf* v. *Barker*, 187 U. S. 165, the court said that "this cautious utterance . . . sustains, as far as it goes, the converse of the proposition when presented by a different state of facts." In *White* v. *Schloerb* the District Court, at the time of the seizure of the property by the state court, not only had the possession of the property, but the right of possession as well. In the present case, at the time of the alleged seizure of the property by the District Court, the state court had absolutely no right of possession. In this respect it may indeed be said that this case is the converse of *White* v. *Schloerb*.

The destinction between cases where the state court has jurisdiction and where it has none, was pointed out in *Clarke* v. *Larremore*, 188 U. S. 486, decided February 23, 1903. In that case the right of the bankruptcy court to enjoin the officers of a state court and summarily take possession of property in their hands, when necessary to the enforcement of the exclusive jurisdiction in bankruptcy, is distinctly recognized.

The possession of the state court was in virtue of the title

of this bankrupt. A mere refusal to surrender does not constitute an adverse holding. *Mueller* v. *Nugent*, 184 U. S. 1.

VII. The possession of the District Court being coupled with exclusive right, could not afterwards be disturbed, even by the court from which it was taken, unless it be that two wrongs make a right. In no case has it been held that a court which has been summarily dispossessed by another court having the exclusive right of possession, may retake what it has no further right to hold. It is futile to say that the "constructive possession" remains in the state court. Constructive possession is necessarily dependent on the right of possession, and at the time of the recaption, the right of possession, as well as the actual possession, was in the District Court.

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

In this matter writs of certiorari as well as of *habeas corpus* were issued, and the record returned to us includes the evidence below, which was duly preserved by bill of exceptions. The District Court held that a flagrant contempt of the court in bankruptcy was committed on the twentieth of February by the taking of the property of Zier & Company out of the possession of its receiver, in whose hands, in the view of the court, it had been voluntarily placed; and that defendants Watts and Sachs were so connected with that transaction as to subject them to like condemnation.

The New Albany Trust Company was appointed receiver of the property of Zier & Company under section 1245 of the Revised Statutes of Indiana, Thornton's Rev. Stat. of 1897, providing that this might be done, "when a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;" and it was directed to complete unfinished contracts but to make no new ones. The winding up of the business was contemplated and entered upon. Whether the transfers of $3100 and $9600 could have been overhauled in that suit we need not inquire, as they were undoubtedly acts of bankruptcy, and as such justified the

application to the bankruptcy court. And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of preëxisting liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the District Court brought his appointment to the knowledge of the Floyd Circuit Court and requested the delivery of the assets.

We think there can be no reasonable doubt that the judge of the Floyd Circuit Court and Messrs. Watts and Sachs entertained the conviction in good faith that the custody of the state court could not be lawfully interfered with by the bankruptcy court by summary proceedings. Their view was that the jurisdiction of the state court having attached, that court was, in all circumstances, entitled to exercise it until voluntarily surrendered. But if the state court had taken into consideration that Zier & Company had committed acts of bankruptcy in the matter of preferential transfers; that the amendatory bankruptcy act of February 5, 1903, provided that acts of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United

States;" and that the intent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts, it appears to us that instead of continuing the application of the Federal receiver for three weeks, the court should have directed the surrender of the property to him at once, or at least after the report of its own receiver on returning from Indianapolis.

The state court, however, did not approve of the assurance given by its receiver at Indianapolis, and refused to allow the surrender of possession, so that the delivery to Connor by the Trust Company presently made was unauthorized by the court, whose receiver and officer the Trust Company was.

We are not now dealing with the right of the District Court to take possession *in invitum*, but with the voluntary delivery of property by the officer of a court, without the court's consent, and, therefore, unlawful. We say, "voluntary," for we decline to entertain the suggestion that the District Court intimidated the Trust Company and Watts, or that members of the bar can be intimidated in the discharge of their duty.

It is true that the state court had authorized the Trust Company and Mr. Watts to appear at Indianapolis and explain the situation, but in doing so it was attempted to limit the operation of the order to a special appearance in the bankruptcy court, while by the order continuing the Federal receiver's application it was attempted to make him a party to the proceedings in the state court and bound by them. Obviously the state court did not wish its receiver to be bound by going before the District Court, and did wish the receiver of the District Court to be bound by his appearance in the state court.

On the other hand the District Court made an order on February 17, which recited the presence of the Trust Company and of Watts, the voluntary offer of the Trust Company, with the approval of Watts, in open court, to surrender possession, and then directed Connor to present a certified copy of the order of February 11 to the Trust Company, and thereupon to take possession. Mr. Watts had no notice or knowledge of this order until February 23, and Sachs first saw it on that day, though he was informed of its existence February 22.

The situation February 19 was this: The Trust Company and Watts were under rules to show cause for disregard of the orders of the state court. One had done, and the other had advised the doing, that which the state court had not consented to, and it was after it had signified its disapproval that the District Court receiver obtained possession without such consent. The state court thereupon concluded that it was entitled to restore the *status quo*, and accordingly it entered the orders of February 20, under which Connor was dispossessed.

This was a reassertion of the jurisdiction which the state court insisted it was entitled to exercise, that it had not voluntarily parted with, or been lawfully deprived of.

The petitioners were sentenced to imprisonment for contempt because of their alleged participation in this action of the state court.

It is the action of the state court that was complained of, and the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.

But here we do not have the ordinary case of advice to clients, but the case of judicial action alleged to have been induced by the advice complained of. The theory of the condemnation is that of conspiracy between the state court and the attorneys to obstruct the administration of justice and to bring the authority of the United States court into contempt.

We are of opinion that such charges ought never to be indulged in, and that the ultimate consequences of attacks of such a character by the courts of one government on the courts of another are too serious to allow them to be made.

The state court was a court of original general jurisdiction. On the face of its record its jurisdiction had been properly invoked and been properly exercised and was not open to col-

lateral attack. Assuming that the proceedings in bankruptcy superseded further proceedings in the state court, and that nothing remained for the latter but to direct the surrender of the assets and the winding up of the accounts, the District Court was of opinion that it might by summary proceedings take the assets out of the possession of the state court. But Connor's possession was not acquired in that way. The contention is that the property was given up voluntarily by the state court receiver and not in obedience to any order entered on summary proceedings to which that receiver was a party. And the difficulty is that the receiver had no power to make the surrender when it was made. It was the representative of the state court. The property in its hands was property *in custodia legis*, and it had only such authority as was given to it by the court, and could not exceed the limits prescribed by the court. Without doubt the receiver agreed to give up the property in its hands to the receiver of the court in bankruptcy on the supposition that the state court would assent to its doing so. But the state court took a different view, and therefore the possession of Connor was from its standpoint a wrongful possession.

In order to the adequate enforcement of the provisions of the bankruptcy law, it is necessary that the powers of courts in bankruptcy should be, as they are, most comprehensive.

Section 720 of the Revised Statutes provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

By section two of the bankruptcy act of 1898 the bankruptcy courts are empowered to "(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" . . . "(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;" . . . "(15) make such orders,

issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

The twelfth general order in bankruptcy provides: "3. Applications . . . for an injunction to stay proceedings of a court or officer of the United States or of a State shall be heard and decided by the judge."

But no writ of injunction as such was granted in this case. The order of February 11, for the appointment of a receiver, provided that the Trust Company should deliver up the property to the Federal receiver and should refrain from interfering with his possession and control of the same. That order was entered on the application of the Inland Steel Company, which had appeared in the state court at the creditors' meeting of January 24, and had interposed no objection to the order then entered for the completion of pending contracts and the running of the plant for that purpose. It was one of the contentions in support of the jurisdiction of the state court that the Inland Steel Company was thereby estopped from resorting to the bankruptcy court and obtaining the appointment of a receiver there. In *Simonson* v. *Sinsheimer*, 95 Fed. Rep. 948, it was held by the Circuit Court of Appeals for the Sixth Circuit, in a careful opinion by Taft, J., that a creditor might be estopped from filing a petition in involuntary bankruptcy, in the circumstances therein detailed, and *In re Curtis*, 91 Fed. Rep. 737, and 94 Fed. Rep. 630, in which a different conclusion was reached, was distinguished. We express no opinion on the matter, but it should be noted, in passing, as one of the elements of controversy entering into the views of counsel in the state court.

The completion of contracts by the state receiver and the procuring of materials therefor had been authorized at the creditors' meeting, in which the petitioning creditor participated, and the work had been entered upon, and it is possible that a state of facts might have existed which would involve the application of the doctrine of estoppel to some extent.

We do not understand it to be contended that the passage of the bankruptcy act in itself suspended the statute of Indiana

in relation to the appointment of receivers, but only that when the proceedings for such appointment took the form, as they did here, of winding up the affairs of the insolvent corporation, the proceedings in bankruptcy displaced those in the state court and terminated the jurisdiction of the latter. But the acceptance of that view does not necessarily involve the concession that these attorneys were guilty of contempt of the District Court because of the action of the state court.

They could not be found guilty because they believed and declared their belief that the state court had jurisdiction and that the District Court had not. Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt. In point of fact the state court agreed with them, and would certainly not have entered orders of whose validity it entertained any reasonable doubt.

The distinction between the exclusive jurisdiction of the court in bankruptcy, proceeding, as it were *in rem*, to determine the *status* of a debtor and his assets, and the jurisdiction over property subjected to particular liens, and the like, exercised by courts of concurrent jurisdiction, was probably thought by them not to apply in the circumstances existing here, and advice based on that opinion could not in itself constitute contempt.

What evidence is there that these attorneys, or either of them, gave any advice or took any action in bad faith, not in the honest discharge of their duty as counsel, but with the deliberate intent to have the Federal court set at defiance and its orders treated with contempt?

When Mr. Watts returned from Indianapolis he had been disabused of his conviction that the District Court would modify its order of February 11, when fully informed of the actual situation of the suit in the state court, and the participation in the proceedings therein of the creditor on whose application that order had been granted, and he appears to have earnestly sought to bring about the delivery over of the property, the discharge of the Trust Company, and the withdrawal from the record of the petition and order of February 14.

But he realized, when about to appear before the state court,

that his promise to endeavor to bring about the surrender of the property had been made under the pressure of expediency, and not by reason of change of judgment, and that he had placed himself in the embarrassing position of acting without leave and in disregard of the limitations of the order he had himself framed and procured to be entered. This led him to request Mr. Sachs to accompany him as his friend to New Albany, and assist in representing his situation in as favorable a light as possible to the state court. It is not disputed that Mr. Sachs visited New Albany solely in obedience to the dictates of friendship, and that he had no connection whatsoever with the litigation.

The result was, however, and it might well have been anticipated, that it appeared to the state court that its jurisdiction had been treated cavalierly by the attorney who had represented the original complainant, who had insisted that the court retained jurisdiction, and who could not deny that he was of the same opinion still. It was then, and on the twentieth, that Mr. Sachs, without the assent or connivance of Mr. Watts, unless suspicion be allowed to supply the want of proof, signed and verified a certain statement by the United States Tube Company, which represented that the Trust Company had "wrongfully, unlawfully and without leave of this court" turned over the possession to Connor, and prayed for its removal, and the appointment of a successor. This statement is recited in the order of that date entered by the judge of the state court, disallowing the application of the Trust Company to resign because of its action "without leave or permission," and stating that "the judge of this court, upon his own motion and because of the open contempt of said receiver for the orders, judgment and process of this court, does now order and direct that said receiver be and it is hereby removed from its trust." The Trust Company was ordered to account immediately for all the assets, and Kelso was appointed as receiver in succession by the judge "upon his own motion," and directed to demand possession of the property, and in case of refusal to report to the judge for further action in the premises. This was followed by the qualification of the new receiver, the de-

mand on Connor, the report of his refusal, the issue of the writ to the sheriff, and its execution.

Mr. Sachs testified that on the 19th the judge of the Circuit Court insisted on retaining the property and in declining to approve of the promise Mr. Watts had made; that when it was known that the property had been delivered the judge still declined to discharge Mr. Watts; that on the forenoon of the 20th the judge announced that he had made up his mind to remove the Trust Company and appoint another receiver; that he, Sachs, expressed the opinion that if the judge did that the better procedure would be for the new receiver to interplead in the District Court, setting up all the facts from the beginning and obtaining a determination in that court; that the judge asked Kelso to bring the facts in respect of the delivery of the plant to the official knowledge of the court, when he would remove the Trust Company and appoint Kelso. That in the afternoon Kelso desired him to sign the statement bringing the facts to the court's notice, which he, Kelso, objected to doing, because he was to be appointed receiver, and Sachs signed it supposing the course to be followed would be an application to the District Court in the nature of an interpleader; that he did not know what became of the paper and did not know, until after the commencement of the pending proceedings, what order had been entered upon it; that he did not know that any proceedings were contemplated or in course of preparation or prepared with the view of retaking the property; and did not advise or assist in any such, or believe any such would be undertaken.

In seeking to extricate Mr. Watts from his anomalous position, Sachs found himself involved, by the attitude of the state court, in similar embarrassment, for the state court adhered to its views as to jurisdiction, and insisted that it had never voluntarily yielded the position it occupied, which afforded the basis for testing the question. It does not seem to have occurred to Sachs that the mere effort to get an issue which could be transmitted to the District Court for determination subject to petition for review or such other appellate remedy as the bankruptcy act provided, could be regarded as

contempt of that court, and want of intention to commit contempt is entitled to great weight in such circumstances.

There is some conflict of evidence as to Sachs' participation by way of suggestion in the preparation of papers on the twentieth, or knowledge of the preparation of the final order and writ, but, without attempting to review the evidence and pass upon its weight, we find nothing in this conflict to justify the conclusion of an intention to contemn.

State courts are entitled to the assistance of the gentlemen of the bar in the maintenance of their dignity and jurisdiction, and the fearless discharge of their duty by the latter should not be shaken by liability to punishment for mere errors of judgment in rendering such assistance.

The presumption on the verified response and plea of Sachs, which was sustained by his testimony, was that he had not been in any way a party to the dispossession of Connor, and had not advised it or expected it; that he not only had not intended any contempt, but had committed none. And as the record of the state court showed that the orders were entered by the judge of that court "upon his own motion," that presumption could not be overthrown without collaterally impeaching the record, and that we think was inadmissible.

It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way.

We cannot but express our regret at the unfortunate collision between the two courts and the belief that the considerate observance of the rule of comity is adequate to avert such occurrences.

We are of opinion that there was no legal evidence to sustain these convictions for contempt, and the order in each case must be

Petitioner discharged.

MR. JUSTICE HARLAN, concurring.

I concur in that part of the opinion of the court which shows that there was no evidence whatever upon which to base a judgment for contempt against Watts and Sachs, or either of them. That view of the evidence is sufficient to dispose of the case without reference to any other question arising on the record. My concurrence in the judgment discharging the petitioners is solely on the ground just stated.

O'NEAL *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 534. Submitted May 4, 1903.—Decided June 1, 1903.

This was a proceeding in contempt and the contention was that on the facts no case of contempt was made out. *Held:*

(1) That the contention was addressed to the merits of the case, and not to the jurisdiction of the court, and therefore that the case did not come within the class of cases specified in section 5 of the judiciary act of March 3, 1891, in which the jurisdiction of the court is in issue.

(2) And that as the judgment was in effect a judgment in a criminal case, this court had no jurisdiction to revise it on error.

THE case is stated in the opinion of the court.

Mr. W. A. Blount for plaintiff in error.

Mr. B. C. Tunison for defendant in error.

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

This was a proceeding in the District Court of the United States for the Southern District of Florida, commenced by the

filing of an affidavit of Greenhut, a trustee in bankruptcy, charging W. C. O'Neal with contempt of court in committing an assault upon him.

A rule to show cause was entered and served on O'Neal, to which he filed a demurrer, assigning as grounds that the affidavit did not show that respondent had committed any offence of which the court had jurisdiction, or had done any act punishable by the court as a contempt thereof; or had committed any act of contempt against the court.

The demurrer was overruled and O'Neal answered. Hearing was had on the rule and answer, and evidence introduced on both sides, and the court found respondent guilty of the acts and things set forth in the affidavit, and that they constituted a contempt of court, and thereupon sentenced O'Neal to imprisonment in the county jail at Pensacola, Florida, for the term of sixty days.

The District Court certified the question of its jurisdiction for decision, and a writ of error directly from this court was allowed on the assumption that the case came within the first of the six classes of cases enumerated in section 5 of the judiciary act of March 3, 1891. That class embraces cases "in which the jurisdiction of the court is in issue," that is, where the power of the Circuit and District Courts of the United States to hear and determine is denied. *Smith* v. *McKay*, 161 U. S. 355; *Vance* v. *Vandercook Company*, (*No. 2*,) 170 U. S. 468, 472; *Mexican Central Railway Company* v. *Eckman*, 187 U. S. 429, 432.

But the question here is asserted in the certificate to be whether the District Court had "jurisdiction to try and punish the said defendant for contempt thereof, upon the facts and for the causes stated in said rule and affidavit."

Jurisdiction over the person and jurisdiction over the subject matter of contempts were not challenged. The charge was the commission of an assault on an officer of the court for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out.

In other words, the contention was addressed to the merits

of the case and not to the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18, 26; *Ex parte Gordon*, 104 U. S. 515.

And while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. Section 5, act of March 3, 1891, 26 Stat. 826, c. 517, as amended by the act of January 20, 1897, 29 Stat. 492, c. 68; *Chetwood's Case*, 165 U. S. 443, 462; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Cary Manufacturing Company* v. *Acme Flexible Clasp Company*, 187 U. S. 427, 428.

Writ of error dismissed.

TUBMAN *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 574. Submitted May 18, 1903.—Decided June 1, 1903.

1. The general rule is that a final judgment cannot be set aside by the court which rendered it, on application made after the close of the term at which it was entered; and as this case comes within that rule the judgment is affirmed.
2. The Court of Appeals dismissed the appeal, but inasmuch as if it had entertained it, that court would have been compelled to affirm the order appealed from, this court is not obliged, in the circumstances disclosed by the record, to modify or reverse even if that court might have maintained jurisdiction of the appeal.

THE case is stated in the opinion of the court.

Mr. William A. Meloy for plaintiff in error.

Mr. George E. Hamilton and *Mr. Frederic D. McKenney* for defendant in error.

THE CHIEF JUSTICE: The declaration in this action was filed March 26, 1895, and several demurrers were interposed thereto the following June. August 6, 1901, the case was dismissed for want of prosecution. After the term at which that judgment was entered had expired, and on May 19, 1902, plaintiff made a motion to set it aside, and the motion was denied. From the order denying the motion, plaintiff took an appeal to the Court of Appeals of the District of Columbia, which was dismissed, and this writ of error then allowed. The case comes before us on a motion to dismiss or affirm. The appeal to the Court of Appeals was dismissed on the ground that the order overruling the motion to vacate the judgment of dismissal was not the subject of appeal, and we think there was color for the motion here to dismiss the writ of error. But in the view we take, we must decline to sustain that motion, and will dispose of the case on the motion to affirm.

In its opinion the Court of Appeals said, among other things, that the "motion to vacate was not made until after the lapse of more than two terms of the court in which the original judgment was entered. It is not shown that there was any fraud or surprise in procuring the judgment of dismissal of the action by the court." The Court of Appeals and the Supreme Court of the District obviously agreed in this finding, and a careful examination of the record affords no basis for questioning the conclusion, if it were permissible for us to do so. The general rule is that a final judgment cannot be set aside on application made after the close of the term at which it was entered, by the court which rendered it, because the case has passed beyond the control of the court. *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665.

In the latter case jurisdiction was taken on error to review a final order setting aside a judgment on motion made at a subsequent term. And in *Hume* v. *Bowie*, 148 U. S. 245, *Phillips* v. *Negley* was considered, and the distinction between a judgment ordering a new trial when the court has jurisdiction to make such an order and a judgment where such jurisdiction does not exist was pointed out. See *Macfarland* v. *Brown*, 187 U. S. 239, 243.

In the present case the motion to set aside was denied, not granted, and as it was made after the lapse of the term, and came within no exception, the general rule was applicable. If then the Court of Appeals had entertained jurisdiction, the result would have been an affirmance; and even if the court erred in declining jurisdiction, the difference between dismissing the appeal and affirming the order does not, in the circumstances, require reversal or modification.

Judgment affirmed.

WRIGHT *v.* HENKEL.

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

No. 661. Argued April 28, 29, 1903.—Decided June 1, 1903.

1. The general principle of international law in cases of extradition is that the act on account of which extradition is demanded must be a crime in both countries.
2. As to the offence charged in the case, this applicable treaty embodies that principle in terms by requiring it to be "made criminal by the laws of both countries."
3. If the offence charged is criminal by the laws of the demanding country and by the laws of the State of the United States in which the alleged fugitive is found, it comes within the treaty and is extraditable.
4. Bail cannot ordinarily be granted in extradition cases, but it is not held that the Circuit Courts may not in any case, and whatever the special circumstances, extend that relief.

WHITAKER WRIGHT applied to the Circuit Court of the United States for the Southern District of New York for writs of *habeas corpus* and certiorari on March 20, 1903, by a petition which alleged:

(1.) That he was a citizen of the United States restrained of his liberty by the Marshal of the United States for the Southern District of New York, by virtue of a warrant dated March 16, 1903, issued by Thomas Alexander, "United States Commis-

sioner for the Southern District of New York, and commissioner duly authorized by the District Court of the United States for the Southern District of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," which warrant was couched in these terms:

"Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before me, Thomas Alexander, one of the commissioners appointed by the District Court of the United States for the Southern District of New York, and also commissioner especially appointed to execute the acts of Congress, entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery of certain offenders,' approved August 12, 1848, and of the several acts amendatory thereof, that one Whitaker Wright did heretofore, during the month of October, in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore in the month of October, in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whit-

aker Wright has so as aforesaid been guilty is an offence within the treaty between the United States and Great Britain."

(2.) That the warrant was issued on a complaint by His Britannic Majesty's consul general at the port of New York, as follows:

"First. That one Whitaker Wright did heretofore and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December, 1900, at the city of London, aforesaid, then being a director of a certain body corporate, to wit, the London and Globe Finance Corporation, unlawfully make, circulate and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

"Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

"Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offence within the treaty between the United States and Great Britain.

"Fourth. That deponent's information and belief are based upon messages received by cable from his Majesty's Secretary of State for Foreign Affairs, one of said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offence herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

"That deponent has since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for fuller details as to said crime, and an answer is directly expected, but that the said Whitaker Wright may be

detained, pending the arrival of such information, deponent asks for a provisional warrant herein."

(3.) "That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant and for the detention of your petitioner; that it does not state any facts which show that your petitioner has been guilty of any offence within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland."

(4.) That he had duly objected to the continuance of any proceedings under the complaint and warrant on the ground that the commissioner had no jurisdiction, but his objections had been overruled, and the commissioner had adjourned the proceedings until March 30, 1903.

(5.) That on March 18, 1903, he presented to the commissioner an application to be admitted to bail pending the proceeding, and in support of the application filed with the commissioner the affidavit of his attending physician, which was to the effect that petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment; but that the commissioner denied the application on the ground that no power existed for admitting petitioner to bail; (6) that the cause of imprisonment was the charge and the refusal to admit to bail.

(7.) That the imprisonment and detention were illegal, and the warrant void, the complaint stating no jurisdictional facts to warrant imprisonment and detention. That the denial of the right to give bail constitutes a violation of the Eighth Amendment of the Constitution, and section 1015 of the Revised Statutes, and of the common law of the United States, and constitutes a deprivation of liberty without due process of law.

The writs prayed for were granted and after hearing dismissed and the application to be admitted to bail denied, March 30, the opinion being filed March 25, and copy of final order served March 28. The case was then brought to this court by appeal.

At the argument it was made to appear that on March 31 His Majesty's consul general at New York made a new complaint, which reiterated the original charge, with some amplification, and added that Wright "did also, at the times and places aforesaid, then being a director and manager of said company or corporation aforesaid, with intent to defraud, alter and falsify books, papers and writings belonging to the said company or corporation and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also, at the times and places aforesaid, then being a director of the said company or corporation as aforesaid, alter and falsify books, papers and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons."

It was further stated: "That deponent's information and belief are based upon a certified copy of a warrant, issued by one of His Majesty's justices of the peace, for the city of London, for the apprehension of the said Whitaker Wright, for the offence herein first enumerated, and a certified copy of the information and complaint of the Senior Official Receiver in Companies Liquidation (acting under the order of the High Court of Justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams on which information and complaint and depositions, the said warrant was granted for the apprehension of the said Whitaker Wright," etc. Copies of these papers accompanied the complaint, and reference was made to cable messages from the Secretary of State for Foreign Affairs.

On this complaint a warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would abandon all further proceedings under the complaint of March 16, and consented

to the discharge of the prisoner from the arrest thereon. The commissioner held that as the proceedings under the previous warrant had been carried into the Circuit Court, he was without power to discharge the prisoner under that warrant. Subsequently the order of the Circuit Court dismissing the writs of *habeas corpus* and certiorari and remanding the prisoner was brought to the commissioner's attention, but counsel for the prisoner stated that papers were being prepared for the purpose of removing the case to the Supreme Court. The commissioner ruled that pending such proceedings he must decline to dismiss the complaint and discharge the prisoner.

Article X of the treaty of 1842, 8 Stat. 572, 576, reads as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assult with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: *Provided* That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

Article I of the treaty of 1889, 26 Stat. 1508, is:

"The provisions of the said tenth article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offences against the laws of both countries for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

Sections 83 and 84 of chapter 96, 24 and 25 Victoria, are as follows:

83. "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be

liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

84. "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Section 75 provided for a liability, on conviction of the misdemeanor therein mentioned, "at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Section 166 of the Companies' Act of 1862, 25 and 26 Vict. c. 89, provides:

"If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labor."

Section 514 and subdivision 3 of section 611 of the New York Penal Code read as follows:

"Sec. 514. *Other cases of forgery in third degree.* A person who either, (1) being an officer or in the employment of a corporation, association, partnership or individuals falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys

any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association or partnership or individuals; . . . is guilty of forgery in the third degree."

"SEC. 611. *Misconduct of officers and employés of corporations.* A director, officer, agent or employé of any corporation or joint stock association who: . . . (3) knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false; . . . is guilty of a misdemeanor."

Section 525 provides: "Forgery in the third degree is punishable by imprisonment for not more than five years."

By section 15 it is provided:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

By the extradition act of Great Britain of 1870, 33 and 34 Vict. c. 52, it is provided that: "A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." The accused is, on committal, to be informed of this, and "that he has a right to apply for a writ of *habeas corpus*." If he is not surrendered and conveyed out of the United Kingdom "within two months after such committal, or, if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster," on notice, to order him to be discharged, unless sufficient cause is shown to the contrary.

The first schedule contained a list of crimes, which includes: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force."

By section 5273 of the Revised Statutes, Title LXVI, Extradition, it is provided that whenever any person committed under the title or any treaty "to remain until delivered up in pursuance of a requisition," is not so delivered up and conveyed out of the United States within two calendar months after such commitment, he may be discharged by any judge of the United States or of any State, on notice, unless sufficient cause is shown to the contrary.

Section 5270 is as follows:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Mr. Samuel Untermyer and *Mr. Louis Marshall* for appellant.

I. The crime charged against the appellant is not one which is "made criminal by the laws of both countries," to wit, the United States and the United Kingdom of Great Britain and Ireland, and does not, therefore, come within the terms of the

extradition treaties between these governments. 1 Moore on Extradition, 21; *United States* v. *Rauscher*, 119 U. S. 407; *Terlinden* v. *Ames*, 184 U. S. 270; Art. X, Webster–Ashburton Treaty of 1842; Art. X, Supplemental Treaty of 1889. The language of the treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatures of the treaty have expressly created. The whole subject of foreign intercourse is committed to the Federal government. *Tucker* v. *Alexandroff*, 183 U. S. 436; *Doe* v. *Braden*, 16 How. 657; *People ex rel. Barlow* v. *Curtis*, 50 N. Y. 321. As to definitions of the word country, see Webster's Dictionary; *Stairs* v. *Peaslee*, 18 How. 521; *United States* v. *The Recorder*, 1 Blatchf. 27; *S. C.*, 27 Fed. Cas. 718; Vattel, Bk. 1, c. 19, § 211.

As to meaning of phrase and English interpretation, see *Re Windsor*, 6 Best & Smith, 522; *Re Arton*, *No. 2*, 1896, L. R. Q. B. D. 509; *Re John C. Eno*, 10 Quebec L. R. 194; *Re Lamirand*, 10 Jur. 290; *Re Tully*, 20 Fed. Rep. 812, citing English cases. The language of the treaty is not "made criminal by *a law* of both countries" but "*by the laws* of both countries;" the case is not determined by saying that a statute of a State is a law of this country; it must be ascertained what is *the* law.

The right to extradite and the rules of evidence to establish the crime are not convertible propositions. *Re Farez*, 7 Blatchf. 345; *Re Wadge*, 15 Fed. Rep. 864; *Re Charleston*, 34 Fed. Rep. 531, cited and distinguished. Sec. 5209, U. S. Rev. Stat., applies only to national banks and cannot be considered as the counterpart of the English statute relating to frauds by directors of corporations; N. Y. Penal Code, § 611, is materially different from § 84 of the English Larceny Act. An examination of the statutes of every State and Territory shows that in a majority thereof there is no provision whatever defining criminal acts of directors of corporations and in most instances where such offences are defined the offence is materially different from that described in the English Larceny Act.

The contention of the British government is that if instead of landing in New York, the petitioner had landed in a State in which the act complained of is not made criminal he could

not be extradited but he can be because he landed in New York.

II. The court below in the exercise of its inherent power had the power and jurisdiction to admit the appellant to bail. Bail was denied on the ground that there was no power to admit to bail one arrested under the extradition act.

Neither the treaty nor the Revised Statutes contain prohibitions against admitting to bail. If the petitioner had been arrested here for a heinous crime (not capital), if he had been arrested in England for this crime, if he were a fugitive from the United States and had been arrested for an extraditable offence, if he had been arrested in interstate rendition proceedings, he could have been admitted to bail. It is the policy of this government to admit to bail any person arrested in any kind of proceeding except for contempt and for capital offences. Eighth Amendment U. S. Const.; Art. I, § 5, Const. New York; § 1015, U. S. Rev. Stat. As to power of United States commissioners to admit to bail, see *United States* v. *Hom Hing*, 48 Fed. Rep. 638, and see also *United States* v. *Hamilton*, 3 Dallas, 17; *Ex parte Virginia*, 100 U. S. 343; *Hudson* v. *Parker*, 156 U. S. 277; *Benson* v. *McMahon*, 127 U. S. 457, 462; *United States* v. *Volz*, 14 Blatchf.; 28 Fed. Cas. 384; *United States* v. *Rundlett*, 2 Curt. 41; 27 Fed. Cas. 915; *United States* v. *Dana*, 68 Fed. Rep. 886, and cases cited. The right to give bail has been recognized under the Chinese Exclusion Act in proceedings which are analogous to extradition proceedings. *Re Ah Kee*, 21 Fed. Rep. 701; *Re Chow Goo Pooi*, 25 Fed. Rep. 77; *In re Li Sing*, 180 U. S. 486; *United States* v. *Mrs. Gue Lim*, 176 U. S. 459; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 652; *Chin Bak Kan* v. *United States*, 185 U. S. 213. The law of New York recognizes the right to give bail. Code Civil Procedure, §§ 550—592; Code Criminal Procedure, § 831. See also *State* v. *Hufford*, 23 Iowa, 579, and cases cited as to inherent powers of courts, *infra*.

The right to give bail in England is recognized. *Queen* v. *Spilsbury*, (1898) 2 Q. B. D. 615; *Ex parte Foster*, (1872) Consol. Digest of Quebec, *sub.* Extradition. The general proposition may be stated that any court or magistrate having power to

try a prisoner has jurisdiction to discharge him and *a fortiori* to admit him to bail. *People* v. *Goodwin*, 1 Wheeler's Criminal Cas. 434; *People* v. *McLeod*, 1 Hill, 377; 1 Burr's Trial (Robertson) 18–20 and 106; *People* v. *Van Horne* (murder), 8 Barb. 158; *State Treasurer* v. *Rolfe*, 15 Vermont, 9; *State* v. *Edney*, 4 Dev. & B. 378. As to power of English courts, *Rex* v. *Rudd*, Cowp. 331; *Rex* v. *Marks*, 3 East, 157; *Rex* v. *Baltimore*, 4 Burrows, 2179; 3 Hawk. Pl. Cr. 225; 4 Black. Com. 299; 1 Hale's Pl. Cr. 129; 4 Coke's Inst. 71; *Comb's Case*, 10 Mod. 334; Habeas Corpus Act, 31 Charles II; 2 Hale's Pl. Cr. 128; *Rex* v. *Judd*, 2 T. R. 255; *Linford* v. *Fitzroy*, 13 Jur. 303; *Ex parte Tayloe*, 5 Cow. 39. Other American authorities on inherent power of the court to take bail: *United States* v. *Evans*, 2 Fed. Rep. 152; Church on Habeas Corpus, 2d ed. § 390; 1 Bishop's New Cr. Proc. §§ 251, 1406, 1407; *Ex parte Robinson*, 19 Wall. 505; *United States* v. *Hudson*, 7 Cranch, 302; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; *Ex parte Terry*, 128 U. S. 302; *Cartright's Case*, 114 Massachusetts, 230; *In re Neagle*, 39 Fed. Rep. 856; *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 124 U. S. 131, 143. As to general inherent powers: *Bath County* v. *Amy*, 13 Wall. 244; *Labette County Commr.* v. *United States*, 112 U. S. 217; *Matter of Henderson*, 157 N. Y. 423. *In re Carrier*, 57 Fed. Rep. 578, distinguished; *Gorsline's Case*, 21 How. Pr. 85, cited and distinguished as overruled in *People* v. *Clews*, 77 N. Y. 39, and *Taylor* v. *Taintor*, 16 Wall. 371; *Re Vonder, The*, 85 Fed. Rep. 959, and see also *Cosgrove* v. *Winne*, 174 U. S. 64.

III. Assuming that the power to take bail exists there is every reason why the petitioner should be admitted to bail.

IV. The petitioner should be discharged or the court below instructed to admit him to bail.

Mr. Charles Fox for His Britannic Majesty's consul general at New York, appellee.

I. No examination having been commenced prior to the proceedings on *habeas corpus* now here for review, this court will confine its inquiry to the question of jurisdiction of the commissioner. *Terlinden* v. *Ames*, 184 U. S. 270, citing *Ornelas*

v. *Ruiz*, 161 U. S. 502; *Bryant* v. *United States*, 167 U. S. 104; *In re Shipp*, 12 Blatch. 501.

II. The commissioner had jurisdiction to issue the warrant upon the complaint made by the appellee. A complaint in an extradition case need not be as precise, technical and formal as an indictment. It is sufficient if it be clearly set forth and it appears that a treaty offence is charged. *Rice* v. *Ames*, 180 U. S. 371; *Re Roth*, 15 Fed. Rep. 507; *Re Farez*, 7 Blatch. 48; *Re Sterneman*, 77 Fed. Rep. 576; *Re Heinrich*, 5 Blatch. 414, 460; *Re Adutt*, 55 Fed. Rep. 376; *Re Grin*, 112 Fed. Rep. 790.

III. The complaint could be made on information and belief. Cases cited and *Re Kane*, 6 Fed. Rep. 34.

IV. The offence charged in the complaint is made criminal by the laws of both countries. §§ 83, 84, ch. 96, 24 & 25 Vict.; Companies Act of 1862, 25 & 26 Vict. ch. 89, § 166; § 5029 U. S. Rev. Stat.; Art. X, Treaty of 1842. That laws of New York are to govern, 4 Op. Atty. Genl. 330; *Re Farez*, 7 Blatch. 357; *Re Wadge*, 15 Fed. Rep. 865; *Re Clarkson*, 34 Fed. Rep. 533; and see as to evidence, *Grin* v. *Shine*, 187 U. S. 181. The treaty should be construed liberally. *Tucker* v. *Alexandroff*, 183 U. S. 424; *Grin* v. *Shine*, 187 U. S. 181. Under the laws of New York, where the appellant was found, the offence is a crime the same as in England. Penal Code, N. Y. § 611. See *Re Arton, No. 2*, 1896, 1 Q. B. D. 509. *Re Windsor*, distinguished. The same construction was applied to treaty between France and Great Britain. *Re Bellecontre*, 17 Cox C. C. 253; *Ex parte Piot*, 15 Cox C. C. 208.

V. The petitioner has no right of asylum in the United States. *Kerr* v. *Illinois*, 119 U. S. 436; *Grin* v. *Shine*, 187 U. S. 181.

VI. That the appellant is a citizen of the United States gives him no immunity to commit crimes in other countries, and does not prevent his surrender under a treaty of extradition, which makes no exception in favor of subjects of the surrendering country. *Neely* v. *Henkel*, 180 U. S. 123; Moore on Extradition, § 136; Executive Docs. U. S. No. 156, 1884.

VII. The appellant is not entitled to be discharged from

custody by reason of the insufficiency of the complaint before the court, a new complaint having been made remedying the defects in the first complaint. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Iasigi* v. *Van De Carr*, 166 U. S. 392. The arrest on the second warrant was not illegal. *Re McDonnell*, 11 Blatch. 170.

VIII. The appellant is not entitled to be enlarged on bail, under any rule of law of the United States. *Queen* v. *Spilsbury*, 2 Q. B. D. 615, distinguished. The right to bail is negatived by implication. The laws of the United States never contemplated any provision whereby there should be a possibility of a miscarriage of the provisions of the treaty, and have carefully refrained from permitting a nullification of the treaty in a particular case by a release on bail and escape. Bail in interstate cases is taken in virtue of statutes. Where no statute exists it has been held bail could not be taken.

IX. It was not necessary that a warrant should have been issued or an indictment had before the commencement of these proceedings. *Grin* v. *Shine* and *Re Farez*, cited *supra*.

Mr. Solicitor Genl. Hoyt, with whom *Mr. Assistant Attorney Genl. Purdy* was on the brief, on behalf of the United States.

The appeal herein should be dismissed for the reason that all proceedings under the complaint of March 16, 1903, and the warrant of arrest issued thereon have been abandoned by the British Government.

If the laws of the State of New York, wherein the petitioner was arrested, make the act charged in the complaint criminal, which act is made criminal by the laws of Great Britain, the petitioner could be properly held for extradition under the extradition treaty between the United States and Great Britain, notwithstanding the fact that such acts as are charged in the complaint are not made criminal by the statutes of the United States. Moore on Extradition, secs. 337, 344; 4 Op. Atty. Gen. 330; *In re Muller*, 17 Fed. Cas. 975; *In re Farez*, 7 Blatchf. 345; *Grin* v. *Shine*, 187 U. S. 181; *Cohn* v. *Jones*, 100 Fed. Rep. 639; *In re Frank*, 107 Fed. Rep. 272; sec. 611, par. 3, Penal Code of New York; sec. 84, c. 96, 24 & 25 Vict.

The petitioner was not entitled to be enlarged on bail under

any law of the United States, for the reason that no provision is made in the law relating to extradition of criminals for admission to bail. *Queen* v. *Spilsbury*, 2 Q. B. D. 615; *In re Carrier*, 57 Fed. Rep. 578; Art. VIII, U. S. Const.; sec. 5, Art. I, New York Const.; secs. 5270, 1014, 1015, Rev. Stat.

That the offence must be one made criminal by the laws of both countries is a principle inherent in all extradition treaties. This is obvious because of the reciprocal nature of such engagements and the existence and similarity of crime in all places, whatever the differences as to definition and incidents of any particular crime. Phillimore, International Law, vol. I, p. 413. Treaties plainly imply the doctrine, but do not ordinarily express it. Such is the force of the phrase "mutual requisitions." Art. X, Webster-Ashburton Treaty. When different systems are to be adjusted, the treaty often contains a definiton. Treaties with France of 1843 and 1845, with Italy of 1868, with Belgium of 1882. Such cautions are necessary; international agreements are weighty matters; their precise meaning must be clear. But as confidence between nations has grown, the liberal view of extradition treaties as effectuating common and proper purposes emphasizes the broad, essential correspondences, and minor technical distinctions and mere designations have less weight. *Grin* v. *Shine*, 187 U. S. 181; *United States* v. *Bryant*, 167 U. S. 104.

The following ideas should guide and govern all extradition inquiries: that the charge has been deliberately and authoritatively made by a responsible and friendly civilized power; a strong presumption of verity and good faith attaches; the matter is of the highest comity and reciprocal concern; the accused person is the demanding government's offender, and under their charge it is to be presumed that he is seeking covert refuge in the country of arrest and is a fugitive from justice. The full rights of defence revive in the trial jurisdiction.

The United States and England denote with especial accuracy the scope of the various major offences. As statutory enactments in each country enlarge or qualify the contents of common law crimes, the new meaning is recognized, if not adopted, in the other country. Offences falling generally under

the head of fraud and breach of trust have only in recent times come within the reach of criminal law. They were formerly visited only with civil liabilities, and it is often still difficult to establish their criminal character.

No phrase was needed in the treaty of 1889 to explain the crimes of murder, burglary, etc., nor to express the necessity of criminality in both countries. They *are* criminal in both countries without that. The difference as to clause 4 of the treaty of 1889 with England respecting fraud by bailee is that as to that class of offences, not yet completely established as criminal, the two powers decline to engage respecting species still carrying a mere civil liability, and therefore the phrase "made *criminal* by the laws of both countries" was used. Provided the particular variety is *criminal* in both jurisdictions, exact correspondence is not necessary. The essence and substance are to be regarded, and highly technical considerations fall away.

The opinion in the *Windsor* case was rendered by eminent judges, but at that period the more liberal and cordial view of extradition had not much affected either governments or courts. The offence involved was not, apparently, a crime in England at all, and the decision was rather that the New York law was novel and exceptional in denominating false entry as forgery, than that the law was not a law of this country.

In the present case the commissioner's jurisdiction on the merits ought not to be withdrawn by the accused's writ of *habeas corpus* and appeal to this court at this stage. Other parts of the code of New York may be pertinent and ought to be examined and considered here or by the commissioner. When the object of the New York statute, its language, and the evil to be remedied are carefully considered, there can be no reasonable doubt that it is an exact analogue of the English law. Literal identity is not to be expected. Both statutes denominate the offence a misdemeanor; that the punishment is greater in England can make no difference.

The "laws of both countries" include the laws of all the component parts of each, and when the intention is otherwise there is an express reservation. Treaty of 1887 with the Netherlands.

It must be borne in mind in considering the elements of the authority to take bail that it is not a question of absolute *right* in a defendant, but of *power* and discretion in the courts. The Federal law as to bail is limited to crimes and offences against the United States. *Rice* v. *Ames*, 180 U. S. 371. Not only is there no affirmative authority for taking bail in extradition, but sec. 5270 directs commitment to jail, "there to remain," etc., when the evidence is deemed sufficient to sustain the charge. That a magistrate may finally discharge does not necessarily justify admission to bail in the interim. In the particular and peculiar subject of extradition a magistrate must look forward to possible surrender, and must guard his custody so that the contract may be performed. For an analogy see *Gorsline's Case*, 21 How. Pr. 85.

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

The writ of *habeas corpus* cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings, *Ornelas* v. *Ruiz*, 161 U. S. 502; *Terlinden* v. *Ames*, 184 U. S. 270; and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offence within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offence was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the States.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin* v. *Shine*, 187 U. S. 181; *Tucker* v. *Alexandroff*, 183 U. S. 424.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offence charged in this case the treaty of 1889 embodies that principle in terms. The offence must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offence under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other States agree with that of New York on this subject; and that sections 73 and 74 of the act of Congress to define and punish crimes in the District of Alaska, 30 Stat. 1253, c. 429, and section 5209 of the Revised Statutes, in respect of the officers of National Banks, are largely to the same effect as the English statute.

As the State of New York was the place where the accused was found and in legal effect the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of

both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offence. There are no common law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson* v. *McMahon*, 127 U. S. 457.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases as they occur necessarily depend upon the laws of the several States in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French mission: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the State or place where the criminal may be found." Moore on Extradition, § 344; *United States* v. *Warr*, 28 Fed. Cas. 411.

So Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That in every treaty of extradition the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offences defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure as well with respect to the definition of crimes, as to the mode of procedure against criminals, and the manner and extent of punishment." Moore on Extradition, § 337 *n.*

In *Muller's* case, 5 Phila. 289, 292, the definition of the offence in the State where the fugitive was found was applied by the District Court for the Eastern District of Pennsylvania, and Judge Cadwalader said:

"In the series of treaties which have been mentioned, certain offences, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon Government had, therefore, been made out.

"There is no jurisprudence or common law of the government of the United States. . . . No legislation of their government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offence here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed as it was by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, as to the slave trade, though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was

criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin* v. *Shine* we applied the definition of embezzlement given by the laws of California, but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress.

It is true that in the case of *Windsor*, 6 B. & S. 522, (1865,) a contrary view was expressed, but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offence of forgery in the third degree could not properly be regarded as extending the force of the treaty to offences not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offences made such only by the legislation of particular States of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the Circuit Court erred in denying the application to be let to bail.

By section 1015 of the Revised Statutes it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offence is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding sec-

tion to arrest and imprison offenders." But this must be read with section 1014, the preceding section, and that is confined to crimes or offences against the United States. *Rice* v. *Ames*, 180 U. S. 371, 377. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. p. 91, c. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised Statutes is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And section 5273 provides that when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the lauguage used in the statute would seem generally applicable to release pending examination.

The subject was considered by the District Court of Colorado in the case of *Carrier*, 57 Fed. Rep. 578, and Hallett, J., held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in such cases had on several occasions

been made to the Circuit Court, and that they had been uniformly denied.

In *Queen* v. *Spilsbury*, 2 Q. B. Div. (1898) 615, it was held that the Qneen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act, and the distinction, existing ordinarily, between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the power to admit to bail existed, held that as matter of judicial discretion it ought not to be exercised in that case.

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding government to withdraw the proceeding first initiated and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

Order affirmed.

TENNESSEE *v.* VIRGINIA.

ORIGINAL. IN EQUITY.

No. 6. Submitted May 18, 1903.—Decided June 1, 1903.

Report of commissioners appointed to ascertain, retrace, re-mark, and re-establish the real, certain and true boundary line between the States of Tennessee and Virginia from White Top Mountain to Cumberland Gap confirmed.

A compact having been entered into by the States of Tennessee and Virginia expressed in concurrent laws of said States which received the consent of Congress, this court modifies the line delineated in the report of the commissioners as to so much thereof as is affected thereby, and that portion of the line is determined, fixed and established in accordance with such compact.

The commissioners having ascertained and recommended the straight line from the end of the "diamond-marked" compact line of 1801–1803 to the corner of the States of North Carolina and Tennessee as the true boundary line between the States of Virginia and Tennessee between those two points, this court approves and adopts such recommendation.

THE proceedings appear in the decree of the court.

Mr. Charles T. Cates, Jr., attorney general of the State of Tennessee, for complainant.

Mr. William A. Anderson, attorney general of the State of Virginia, for defendant.

MR. CHIEF JUSTICE FULLER announced the decree of the court.

This cause came on to be heard on May 18, 1903, on the proceedings heretofore had herein, and upon the report of William C. Hodgkins, James B. Baylor and Andrew H. Buchanan, commissioners appointed by the decretal order herein of April 30, 1900, to ascertain, retrace, re-mark and reëstablish the real, certain and true boundary line between the States of Tennessee and Virginia, as actually run and located from White Top Mountain to Cumberland Gap, under proceedings had between

the two States in 1801–1803, and as adjudged and decreed by this court in its decree of April 3, 1893, in a certain original case in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant; which report is annexed hereto and made part hereof.

And it appearing to the court that said report was filed in this court on the 5th day of January, 1903, and that the same is unexcepted to by either party in any respect; therefore, upon the motion of the State of Tennessee, by her Attorney General, and of the State of Virginia, by her Attorney General, it is ordered that said report be, and the same is hereby, in all things confirmed.

It is thereupon ordered, adjudged and decreed that the real, certain and true boundary line between the States of Tennessee and Virginia, as actually run and located under the compact and proceedings had between the two States in 1801–1803, and as adjudged by this court on the third day of April, 1893, in said original cause in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant as aforesaid, was at the institution of this suit, and now is, except as hereinafter shown, as described and delineated in said report filed herein on January 5, 1903, as aforesaid.

And it further appearing to the court, and it being so admitted by both parties, that since the institution of this suit and the decretal order of April 30, 1900, as aforesaid, a compact was entered into by the States of Tennessee and Virginia, expressed in the concurrent laws of said States, namely, the act of the general assembly of Tennessee, approved January 28, 1901, entitled "An act to cede to the State of Virginia a certain narrow strip of territory belonging to the State of Tennessee, lying between the northern boundary line of the city of Bristol, in the county of Sullivan, and the southern boundary line of the city of Bristol, in the county of Washington, State of Virginia, being the northern half of Main street, of the said two cities," and the reciprocal act of the general assembly of Virginia approved February 9, 1901, entitled "An act to accept the cession by the State of Tennessee to the State of Virginia, of a certain narrow strip of territory claimed as belonging to

the State of Tennessee, and described as lying between the northern boundary line of the city of Bristol, in the county of Sullivan, State of Tennessee, and the southern boundary line of the city of Bristol, in the county of Washington, State of Virginia, being the northern half of the Main street of the said two cities."

And it further appearing that said compact received the consent of the Congress of the United States by joint resolution approved March 3, 1901, as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That a recent compact or agreement having been made by and between the States of Tennessee and Virginia, whereby the State of Tennessee, by an act of its legislature approved January twenty-eighth, nineteen hundred and one, ceded to the State of Virginia certain territory specifically described in said act and being the northern half of the main street between the cities of Bristol, Virginia, and Bristol, Tennessee, and the State of Virginia, by act of its general assembly, approved February ninth, nineteen hundred and one, having accepted said cession of the State of Tennessee, the consent of Congress is hereby given to said contract or agreement between said States fixing the boundary line between said States as shown by said acts referred to, and the same is hereby ratified."

And said commissioners, in their said report, having ascertained and recommended the straight line from the end of the "diamond-marked" or compact line of 1801–1803 to the corner of the States of North Carolina and Tennessee as the true boundary line between the States of Virginia and Tennessee between those two points, the court, approving said recommendation and finding of said commissioners, doth adopt the same.

And the court, being of opinion that it is proper to recognize the line so established by said last-mentioned compact of 1901 as the real, certain, and true interstate boundary line within and between said two cities, and to definitely determine and fix in this cause what is the real, true and certain boundary line between said States throughout the entire length thereof

from the corner of the States of North Carolina and Tennessee, on Pond Mountain, to the corner of Virginia and Kentucky, at Cumberland Gap, doth therefore adjudge, order, and decree that the entire real, certain, and true boundary line between the States of Tennessee and Virginia is the line described and delineated in said report filed herein on January 5, 1903, modified as to so much of said line as lies between the two cities of Bristol, by the aforesaid compact of 1901 between the two States, and as so described, delineated, and modified said boundary line from the said North Carolina corner to the eastern end of the compact line of 1801–1803, known as the "diamond-marked" line, and thence to Cumberland Gap, is hereby determined, fixed, and established.

It is further ordered, adjudged and decreed that the compensation and expenses of the commissioners and the expenditures attendant upon the discharge of their duties be, and they are hereby, allowed at the several sums set forth in their report, as hereinbefore confirmed, and that said charges and expenses, together with all the costs of this suit to be taxed, be equally divided between the parties hereto.

It is further ordered that the clerk of this court do, at the proper charges of the parties to this cause, deliver fifty printed copies of this decree including said report to the Attorney General of each of said States.

The report of the commissioners, filed January 5, 1903, is as follows:

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your commissioners, appointed by the decree of this honorable court, dated April 30, 1900, to ascertain, retrace, re-mark and reëstablish the boundary line established between the States of Virginia and Tennessee, by the compact of 1803, which was actually run and located under proceedings had by the two States in 1801–1803, and was then marked with five chops in the shape of a diamond, and which ran from White Top Mountain to Cumberland Gap, respectfully represent that they have completed the duties assigned to them by the said

decree of April 30, 1900, that they have retraced and re-marked the said boundary line as originally run and marked with five chops in the shape of a diamond in the year 1802, and that for the better securing of the same they have placed upon the said line, besides other durable marks, monuments of cut limestone, four and a half feet long and seven inches square on top, with V's cut on their north faces and T's on their south faces, set three and a half feet in the ground, conveniently located as hereinafter more fully described, so that the citizens of each State and others, by reasonable diligence, may readily find the true location of said boundary; all of which is more particularly set forth in the detailed report of their operations, which your commissioners herewith beg to submit, together with two maps explanatory of the same, a list of the several permanent monuments and other durable marks, and a complete bill of costs and charges. And your commissioners further pray that this honorable court accept and confirm this report; that the line as marked on the ground by said commissioners in the years 1901 and 1902 be declared to be the real, certain and true boundary between the States of Tennessee and Virginia; that your commissioners be allowed their expenses and reasonable charges for their own services in these premises, as shown on the bill of costs which forms a part of this report; and finally, that your commissioners be discharged from further proceedings in these premises.

WILLIAM C. HODGKINS, [SEAL.]
Commissioner.

JAMES B. BAYLOR, [SEAL.]
Commissioner.

ANDREW H. BUCHANAN, [SEAL.]
Commissioner.

Detailed report of the operations of the commission appointed by the Supreme Court of the United States, April 30, 1900, to retrace and re-mark the boundary line between the States of Tennessee and Virginia.

At the date of the above decree and for several months thereafter the State of Virginia had no funds available for the pro-

ceedings ordered by the court, and none could be had until there could be a session of the state legislature to make the needed appropriation. It was therefore necessary for your commissioners to seek an extension of the time within which they might make their report and upon the motion of the Attorney General of Virginia an extension was granted until the next term of court.

At a session of the General Assembly of Virginia, held in the winter of 1900–1901, the sum of five thousand dollars was appropriated for the purpose of paying Virginia's share of the expenses of this boundary survey.

The Tennessee legislature had previously made a like appropriation.

Your commissioners therefore made preparations for beginning the execution of their duties under your decree of April 30, 1900, as early in the season of 1901 as the weather conditions should permit.

The commission held its first meeting at Washington, D. C., on May 16, 1901, and organized by choosing William C. Hodgkins, of the State of Massachusetts, as chairman; James B. Baylor, of the State of Virginia, as secretary, and Andrew H. Buchanan, of the State of Tennessee, as treasurer.

At this meeting there was a full discussion of the problem presented and of the method of work which might be most suitable under all the conditions. Arrangements were also made for procuring the necessary camp outfit and supplies.

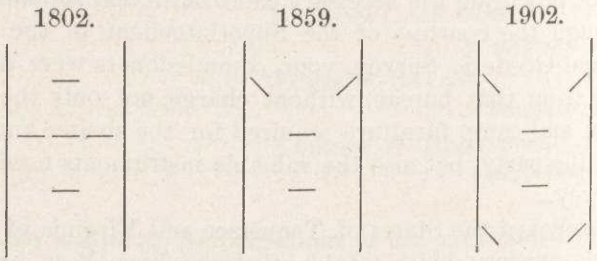
Through the courtesy of the Superintendent of the U. S. Coast and Goedetic Survey, your commissioners were able to procure from that bureau, without charge, not only the outfit of tents and camp furniture required for the shelter and comfort of the party, but also the valuable instruments needed for the survey.

This relieved the States of Tennessee and Virginia of a considerable expense which would otherwise have been unavoidable. The two States were spared another heavy item of expense by the fact that each of your commissioners is a civil engineer and entirely familiar with work of this nature. It was, therefore, unnecessary to follow the usual course of em-

ploying engineers or surveyors to carry out the field-work under the direction of the commissioners. Instead of that, your commissioners themselves conducted all the field-work, hiring only such rodmen, axemen, etc., as were necessary from time to time. By such methods and by exercising rigid economy in all of their expenditures, your commissioners have been able to complete the entire work, including the setting of cut-stone monuments, and also including the amount charged for their own remuneration, for the sum of $9475.99, which is but little more than the amount charged to the State of Virginia alone by the joint commission of 1858–1859.

It having been decided at the first meeting of the commission that the most convenient place for beginning field operations would be the city of Bristol, which is located directly upon the boundary line, the commission adjourned to that place.

Field-work was begun on May 22, 1901, with the examination of a portion of the line east of Bristol, where a number of trees were found which bore the marks of the surveys of 1802 and 1858–'59. As there has been considerable controversy and conflicting testimony in regard to the nature of these old marks, it may be well to show by diagrams and photographs the actual arrangement and appearance of those of both years, as well as of the somewhat different mark which was used for the present re-marking by your commissioners.



While the marks made in 1858–'59 are still numerous in forested areas and are generally easily distinguishable, those made in 1802 are becoming scarce and sometimes are barely discernible when found.

This is shown in the accompanying photograph of a large white-oak tree, upon which the marks of 1858–'59 can readily be traced, while only three of those made in 1802 can be distinguished and those with difficulty. The marks of 1802 were apparently made with a small and light hatchet and on many trees which have a thick and rough bark the hatchet does not seem to have reached the wood and in such cases the gradual exfoliation of the bark has often nearly or entirely obliterated the mark. Where the wood was wounded a small burr has formed which can nearly always be recognized, but cuts which did not completely penetrate the bark have sometimes disappeared.

The marks left by the survey of 1858–'59 were found of very great value as guides to the older "diamond" marks of 1802. Both marks were often found on the same tree and it was a rare occurrence to find the diamond mark without the mark of 1859, either above or below it. In fact, it was very soon noticed that the mere fact of finding the mark of 1858–'59 either above or below the normal position on a tree was an almost certain indication that a diamond mark had been found there at the date of the later marking, even though, through the action of time and the elements, all vestiges of it may now have disappeared. Since the date of the last survey, very many marked trees have been destroyed through various agencies, especially since the more rapid development of this section in recent years has caused a greater demand for lumber, and in some places the trees bearing the old marks are so far apart and the marks themselves are so faint that great trouble and delay would often have been experienced in the search for these old marks had it not been for the aid afforded by the marks of 1858–'59, which always proved reliable guides by which to find the older marks.

In this connection it may not be inappropriate for your commissioners to state that they everywhere found that the joint commission of 1859 did its work in a careful and conscientious manner, and that they believe its line, as marked on the growing timber, is identical with that marked by the joint commis-

sion of 1802, and that full credence should be given to statements of fact in the report of that survey.

From a point about a mile and a quarter east of Bristol, the line was traced without difficulty, other than that due to the broken nature of the country traversed, as far as the beginning of what is commonly known as the Denton Valley offset.

At this point occurs the greatest and most remarkable irregularity in the whole course of this line, there being a deflection from the direct course of 66° 10′ for a distance of 8715.6 feet. The portion of the boundary east of the offset is further north than that west of the offset, so that the deflection is to the south in going westward from the eastern end of the line, the direction in which it was originally run out, or to the north in working eastward from Bristol, as was done in the present survey for reasons of convenience. In either case, the deflection is to the left hand; but it is not the same in each case, as the two portions of the line east and west of the offset are not exactly parallel to each other. This difference of direction amounts to 1° 30′ as shown on the map of the line accompanying this report.

Owing to the long controversy over this offset and the persistent assertions of certain parties that marked timber would be found on the eastern prolongation of the portion of the line extending from Bristol to Denton's Valley, if the same were run out, your commissioner felt obliged, in order to settle the question for all time, to run out this line and make a careful search for marked timber along its course. This was accordingly done, and a careful examination of the timber on each side of the transit line was made as the work progressed; but with only negative results.

Although several weeks were spent in running this line across the series of very rough and heavily timbered mountains lying between Denton's Valley and Pond Mountain, near the corner of North Carolina, and although every story brought to the commissioners by people interested in the result was carefully examined, your commissioners were utterly unable to find or to have pointed out to them one authentic mark of the line of 1802, either on this line or anywhere in its vicinity.

On the other hand, the "offset line" and the portion of the line running eastward from the offset to the vicinity of the White Top Mountain were found well marked; both the 1802 and the 1858–'59 marks were found at frequent intervals.

In order to be assured that these marks were authentic, blocks were cut from several of these trees, at different points on said offset line, and the ages of the marks were determined by counting the rings of the annual growth. These tests showed that the marks were of the supposed age. The ages of the most important marks were verified by the U. S. Bureau of Forestry. As was found in 1858–'59 the marking of the timber ceased (or began) on a comparatively low eminence, known as Burnt Hill, which from the neighboring heights of White Top or of Pond Mountain seems to be in the bottom of a hollow.

The apparent discrepancy between this situation and the language of the report of the joint commission of 1802, which reads —"Beginning on the summit of the mountain generally known as the White Top Mountain," etc., has led some to suppose that the line should be extended further east, to the summit of the so-called "divide" or watershed between the tributaries of the Holston and New Rivers.

There seems, however, nothing to support this theory except the somewhat hazy idea that the eastern end or point of beginning of this line ought to be on a summit.

As a matter of fact, the actual end of the line on Burnt Hill is on quite as much of a summit as if it had been on the "divide," which in this place is so low and flat as to be scarcely perceptible as an elevation of any importance. It certainly could never be supposed to be the summit of White Top Mountain, which towers far above it, its huge, dome-like bulk filling the northeastern horizon.

No marked trees of 1802 or of 1858–'59 could be found east of Burnt Hill, though the line was produced through heavy timber of original growth to the "divide" and careful search was made for them. The same condition was found in 1859, as reported by the commission of that year. A point which that commission seems to have overlooked is the important fact that the eastern end of the marked line at Burnt Hill is almost

exactly in line between the corner of North Carolina, on Pond Mountain, and the summit of White Top Mountain. What more likely than that the commissioners of 1802, who agreed to lay out a line equally distant from the older lines, known as Walker's and Henderson's and beginning on the summit of the mountain generally known as the White Top Mountain, should begin at the point where the Walker line reached the northwestern corner of North Carolina, and where accordingly the jurisdiction of Tennessee should begin, and run thence in the direction of the most important peak to the northward and eastward until they reached the desired middle point between the lines of Walker and Henderson, and from that point started on their westerly course. It is hard to understand why they should have omitted to mark this part of their line; but this small bit of boundary, extending from the northeast corner of Tennessee to the northwest corner of North Carolina, seems to have been somewhat overlooked in more recent proceedings. Your commissioners respectfully recommend that the straight line between these two points be declared to be the boundary, believing, as they do in the absence of any marks to the contrary, that this was the original and true line. All of this section is composed of very rugged and densely wooded mountains with but a scanty population.

The progress of the work in this mountainous and almost inaccessible region was delayed not only by the nature of the country and by the fact that in this very worst part of the whole line it was necessary to run out these two independent lines, doubling the labor to be expended, but also by the unfortunately rainy weather which was experienced. The frequent and heavy rains often stopped field-work, washed the few roads so badly that they became almost impassible and raised the streams so high that sometimes for days at a time it was impossible to ford them.

It was not until September 21 that your commissioners were able to close work in the White Top region and return to Bristol to start westward from that place toward Cumberland Gap.

For the remainder of the season, however, both the weather and the nature of the country were much more favorable for

field operations and excellent progress was made, though it was impossible to entirely complete the work before the approach of winter.

So far as the portion of the boundary passing through the central part of the city of Bristol is concerned, the labors of your commissioners were forestalled by a special act of the General Assembly of the State of Tennessee, approved January twenty-eighth, nineteen hundred and one, ceding to the State of Virginia the northern half of the main street of the two cities. The General Assembly of Virginia accepted the cession by an act approved February ninth, nineteen hundred and one, and the action of the two legislatures was subsequently ratified by the Congress and approved by the President of the United States, March third, nineteen hundred and one. This cession covers, however, but a small part of the boundary, extending only from the northwest corner of the old town of Bristol on the west to the western boundary of the Bristol cemetery on the east. As it is important to guard against the possible renewal of this long-standing controversy, and as the town is already extending beyond the above limits, it was deemed proper to mark the old diamond line by monuments, just as if there had been no legal change in the boundary for this short distance. But your commissioners regret to report that they have been unable to reach a unanimous conclusion in regard to the true location of the said diamond line within and near the above limits.

Commissioners Hodgkins and Buchanan, after careful study of all the evidence of record and after diligent examination of the ground, are of the opinion that the said diamond line of 1802–1803 runs from monument No. 25, near the first marked tree east of Bristol, in a straight line, to monument No. 26, on the western boundary of the Bristol cemetery and on the north line of Main or State street; thence along the northern line of said Main or State street to "a planted stone in the edge of a field formerly owned by Z. L. Burson, being the northwest corner of the corporate territory of the old town of Bristol," referred to in the act of cession, *supra;* and thence in a straight

line to monument No. 28 in the fork of the main road and near the first marked trees west of Bristol.

Commissioner Baylor, on the other hand, after equally careful consideration of all the evidence of record and diligent examination of the ground, is of the opinion that the said diamond line of 1802–1803 runs from monument No. 25, near the first marked tree east of Bristol, in a straight line to monument No. 27, situated just outside of the wall of the Bristol cemetery and on the middle line of Main or State street as it runs west from this point; and thence in a straight line along the middle of Main or State street to monument No. 28, near the center of the fork of the main road, and near the first marked trees of 1858–'59, west of Bristol.

The said line, running through the center of Main or State street, is just 30 feet south of monument No. 26 on the north property line of Main or State street, outside the western wall of Bristol cemetery.

Westward from Bristol, the boundary was retraced without difficulty by the marked trees, just as in the previous work to the eastward.

Only one marked deviation from the general course of the line was encountered during the remainder of the season. This was on the property formerly known as the Hickman place, in the vicinity of the village of Bloomingdale, Tennessee.

Here the line was found to have a deflection of 8° 30′ to the right, or north, for the distance of 3161.8 feet. From the western end of this offset, the line resumed its general westerly course, and so continued until the end of the work of that year. As the season advanced, it became evident that even under the most favorable conditions it would be impossible to complete the survey without working far into the winter, which on many accounts was undesirable.

The Attorneys General of the two States therefore joined in a request for a further extension of time within which your commissioners might file their report, and this honorable court thereupon extended that time until the opening of the October term, 1902.

The field operations for the season of 1901 were closed at the

end of October, at which time the survey had been extended to the Clinch River, 43 miles east of Cumberland Gap the total length of boundary retraced being 70 miles, besides 16 miles of trail line run on the extension of the "straight line" from Denton's Valley to Pond Mountain.

Before the opening of field-work for the season—1902, a complaint reached your commissioners from a citizen of Johnson County, Tennessee, supposed to be reliable, to the effect that interested parties were interfering with the marks placed on the line the previous year, and that in some cases at least the monuments had not been properly placed by the persons employed for that purpose.

Although these statements seem scarcely credible, in view of the general interest taken in the work by the inhabitants, your commissioners thought it best to investigate the matter and to satisfy themselves by personal inspection that the monuments had remained undisturbed in their proper places.

This was accordingly done at the outset of the season's work and it was ascertained that the stories of falsification of the marking were without any foundation of fact, that all of the monuments between the northeast corner of Tennessee and Bristol had been properly set and that none of them had been disturbed.

These preliminary operations occupied the time from June 23 to July 4, on which *your* day your commissioners returned to Bristol. After placing some additional monuments on the old line in and near Bristol, they proceeded to Gate City, Virginia, where the camp outfit had been stored at the close of work in the preceding autumn, and at once went into camp at Robinett, Tennessee, west of the North fork of Clinch River.

The survey of the boundary line was resumed at the point where it had been suspended the year before, at the crossing of Clinch River near Church's Ford.

From this point to Cumberland Gap the line crosses a succession of mountains and valleys, with comparatively little level or cleared land. Little difficulty was experienced in tracing the line in this part of its course, the marked trees being generally found at frequent intervals. The line preserved its

general course as before, except that two deflections to the northward were found which were similar to that found the year before near Bloomingdale.

The first of these occurred on the mountain called Wallen's Ridge, where the line made a deflection of 19° to the north before reaching the summit, and kept that course for a distance of 4643.7 feet before resuming its usual direction. There were numerous trees with both the 1802 and 1859 marks on this deflected line.

The final deflection of 4° 10′ to the north for a distance of 6503.3 feet began at the "old furnace road" near Station Creek, less than three miles from the west end of the line on Cumberland Mountain. From the western end of this offset the line runs straight to the terminus.

There has been considerable controversy and litigation over these last three miles of the boundary and a number of witnesses have testified in the case of Virginia Ag't Tennessee, Supreme Court, U. S., Oct. term, 1891, that there were none of the marks of the previous surveys remaining between Station Creek and the summit of Cumberland Mountain, owing to the destruction of the timber in that area during the military operations of the Civil War.

Your commissioners were able to find, however, three trees well marked with the mark of the 1859 survey, and at least one of these bore evidence in the position of this mark that an old diamond mark was formerly visible above it.

These marked trees were found on the east and west part of the line west of the offset and are in excellent alignment, and settled beyond the possibility of doubt the location of this part of the boundary, and hence the short remaining distance to the summit of Cumberland Mountain. This line passes near and a little south of the old mill several times referred to in the case above cited, and thence across the Union Railroad station, leaving most of the town of Cumberland Gap in Tennessee. The summit of Cumberland Mountain was reached on Saturday, August 23d, 1902, and on the following Monday the field-work of the survey was completed and the camp outfit was packed and shipped to Washington. Your commissioners then

separated, Professor Buchanan returned to his home at Lebanon, Tennessee, to work up his field-notes; and Mr. Hodgkins to Washington to attend to business of the commission and to draft a report of its operation; while Mr. Baylor remained on the ground until September 13, superintending the placing of monuments along the part of the line surveyed in 1902.

In conclusion, your commissioners state that they have found the duties imposed upon them by your instructions often arduous and exacting and that the survey just completed proved far more laborious and was attended by greater hardships than any of them had anticipated, but that they have nevertheless given the same careful attention to every part of it and that they believe it to be correct throughout.

List of Monuments of Cut Limestone and Other Durable Marks, as Hereinafter More Fully Described.

(1)—At northeast corner of Tennessee, at Burnt Hill.

(2)—On summit of Flat Spring Ridge.

(3)—On Valley Creek road, on John Toliver place.

(4)—On road from Laurel River to White Top Mountain near an old mill.

(5)—On road up Laurel River, near a double ford.

On summit of Iron Mountain, near the north end of the rocky bluff, a cairn of rocks was erected.

(6)—At eastern foot Holston Mountain, a short distance from Beaver Dam Creek, and the Virginia and Carolina Railway.

Coast and Geodetic Survey triangulation station "Damascus" on summit of Holston Mountain, a stone marked $\begin{matrix} \text{U S} \\ + \\ \text{C S} \end{matrix}$

(7)—On Rockhouse Branch road in the valley, on Mary Nealy place.

(8)—On road from Barron Railway station to New Shady road, cut-stone monument of 1858–'59.

(9)—In woods, north of New Shady road where the line changes its course to south 23° 50′ west (mag.) a marked deflection from the general course of the line.

(10)—On the New Shady road, where this deflected line crosses it.

(11)—In woods, on Little Mountain, west of Cox Creek, where this bearing of 23 50′ west (mag.) ends, and the line resumes its general course to the westward.

(12)—On road just north of cross-road leading to Thomas Denton place.

(13)—On road on hill on C. D. Short place.

(14)—On road on east bank of the South fork Holston River, cut-stone monument of 1858–'59.

(15)—On hill in George Garrett's cow lot, west and north of South fork Holston River.

(16)—On road to King's mill, near John Buckly house.

(17)—On road to King's mill, via Thomas place.

(18)—On summit of open hill east of Painter place, concrete monument.

(19)—On road running east of Painter house.

(20)—On road running west of Painter house, cut-stone monument of 1858–'59.

(21)—On road through woods west of Painter property.

(22)—On summit of first high ridge east of Paperville road.

(23)—On Paperville road, at Jones place.

(24)—On road west of Carmack house.

(25)—On Booher place near first marked tree, (of 1858–'59) east of Bristol.

(26)—On north property line of the main street of Bristol outside the western wall of the cemetery. Commissioner Baylor does not consider this a part of the true line.

(27)—Outside the street wall of the Bristol cemetery, at the point where the average center line of main street intersects said wall. Commissioners Hodgkins and Buchanan do not consider this a point on the boundary.

A stone post in the edge of a field, formerly owned by Z. L. Burson, at the northwest corner of the old corporate territory of the old town of Bristol. Commissioner Baylor does not consider this a point on the boundary.

(28)—In the fork of the main road, west of the town of Bristol.

(29)—On road to Bristol, east of Worley place.

(30)—On road to Bristol, west of Worley place.

Coast and Geodetic Survey triangulation station "Dunn" on summit of ridge, on old Dunn place stone marked $\frac{U\ S}{C\ S}$ +

(31)—On Dishner Valley road.

(32)—On road to Bristol, east of Gum Spring.

(33)—On road to Bristol, near Tallman house.

(34)—On road in valley, west of old abandoned railway bed.

(35)—On Scott road.

(36)—On road west of Akard place.

(37)—On road near Jackson place.

(38)—On Boozey Creek road.

(39)—On road to Hilton ford, cut-stone monument 1858–'59.

(40)—On Timbertree road.

(41)—Between two roads just east of Gate City road.

(42)—In woods, west of Gate City road, where there is a deflection of 8° 30′ to the right, or north, from the general course of the line, on old Hickman place.

(43)—In woods northeast of Bloomingdale, where this 8° 30′ deflection from the general course of the line ends, in going westward, and line resumes its general course.

(44)—On road to Bloomingdale.

(45)—On Wall Gap road.

(46)—On road up ravine.

(47)—On Carter Valley road.

(48)—On Gate City and Kingsport road, cut-stone monument of 1858–'59.

Coast and Geodetic Survey triangulation station "Cloud" on bluff of North Holston River, stone marked $\frac{U\ S}{C\ S}$ +

(49)—On east bank of North Holston River.

(50)—On road on west bank of North Holston River.

(51)—At cross-roads on Stanley Valley road, cut-stone monument of 1858–'59.

(52)—On Stanley Valley road, on hill at turn in road.

(53)—On Cameron Post-office road.

(54)—On Stanley Valley road south of barn of N. J. Bussell, cut-stone monument of 1858–'59.

(55)—On Stanley Valley road, cut-stone monument of 1858–'59.

(56)—On road which runs across Opossum Ridge.

(57)—On Moore's Gap road.

(58)—On Caney Valley road.

(59)—On Little Poor Valley road, south of Mary Field house.

(60)—On Poor Valley road, cut-stone monument of 1858–'59.

On summit of Clinch Mountain cairn of rocks erected, a few feet south of the Coast and Geodetic Survey triangulation station

U S

"Wildcat," which station marked with + cut in sandstone rock.

C S

(61)—On Clinch Valley road.

(62)—On road on east bank of Clinch River, above Church's ford.

(63)—On road at Jane Bagley's house.

On summit of open hill east of Fisher Valley road line crosses solid rock. Small hole drilled in it, with T cut south of hole, and V north of it.

(64)—On Fisher Valley road.

On summit of high ridge, east of Robinett line crosses solid rock. Small hole drilled in it, with V cut on north side of hole, and T on south of it.

(65)—On road at Robinett.

On side of ridge at east edge of woods line crosses rock. Small hole drilled in it, with V cut on north side of hole and T on south of it.

On summit of Newman's Ridge line crosses rock similarly marked.

(66)—On Rogersville and Jonesville road.

(67)—On Little Creek Road.

(68)—On Sneedville and Black Water Salt Works road.

(69)—On Black Water Valley road, near J. Mullen's house. Coast and Geodetic Survey triangulation station "Powell," on

summit of Powell Mountain, large sandstone rock marked $\frac{U\ S}{C\ S}$ +

(70)—On Mulberry Gap and Wallen Creek road, near large poplar.

(71)—Near junction of Mulberry Gap and Jonesville roads.

(72)—On east face of Wallen Ridge, on edge of trail over ridge, where there is a deflection to the right, or north, of 19° from the general course of the line.

On summit of Wallen Ridge line crosses large sandstone rock. Small hole cut in it with V. cut north of hole and T. south of it.

(73)—On west face of Wallen Ridge, in open field, on the boundary fence of Mollie Thompson and J. W. Moore, where this deflection of 19° from the general course of the line ends, in going westward, and line resumes its general course.

(74)—On road east of Powell River, and north of Welch or Baldwin ford.

On rock bluff west of Powell River, a small hole was cut with V north of this hole and T. south of it.

(75)—On Powell River and Sneedville road, on hill west of Powell River, rough stone monument with V. cut on north face and T on south face.

(76)—On Powell River and Sneedville road.

(77)—On Martin Creek road.

(78)—On Low Hollow road.

(79)—On Four Mile Creek road.

(80)—On Bayles' Mill road.

(81)—On Ball's Mill road.

Coast and Geodetic Survey triangulation station "Minter," on summit of hill, near gate and fence corner.

(83)—On road south of Jacob Estep's house.

(84)—On East Machine Branch road.

(85)—On West Machine Branch road.

(86)—On Dicktown road.

(87)—On Mud Hollow Hole road, near large limestone spring.

(88)—On Hoskins' Valley road, near large limestone spring.

(89)—On George Souther's saw mill road.

(90)—On Louisville and Nashville Railway, near Brook's crossing.

(91)—On old iron-works road, where there is a deflection of 4° 10′ to the right, or north, from the general course of the line.

(92)—On Station Creek road.

(93)—On east side of Poor Valley Ridge, where this deflection of 4° 10′ from the general course of the line ends, in going westward, and line resumes its general course.

(94)—On Cumberland Gap and Virginia road, east of Cumberland Gap.

(95)—On small hill just east of road connecting Cumberland Gap with Old Virginia and Cumberland Gap road, in the edge of the old town park.

(96)—On the side of open hill facing south, about 2½ squares east of the Tazewell and Kentucky road, at Cumberland Gap.

(97)—On west side of Tazewell and Kentucky road, and just east of woolen factory at Cumberland Gap.

(98)—At foot of Cumberland Mountain, west of the Union Railway station, and in line with the south edge of the south chimney of said Union Railway station.

(99)—On summit of Cumberland Mountain. The monument of cut limestone has "V" and "T" cut on its adjacent vertical faces, and "Corner" cut on its top. Its base is set in cement and broken rock with one diagonal running east and west. The summit of the sandstone ledge was blasted in order to set this monument.

In addition to the cut-stone monuments and other durable marks, your commissioners marked with six chops, thus:—

the trees on and within ten feet of this line on each side.

Your commissioners unanimously agree in recommending that the rights of individuals having claims or titles to lands on either side of said boundary line, as ascertained, re-marked, and reëstablished by your commissioners, shall not in consequence thereof in anywise be prejudiced or affected, where said individuals have paid their taxes, in good faith, in the wrong State.

WILLIAM C. HODGKINS, [SEAL.]
Commissioner.
JAMES B. BAYLOR, [SEAL.]
Commissioner.
ANDREW H. BUCHANAN, [SEAL.]
Commissioner.

OCTOBER 13, 1902.

Report of the Treasurer of the Tennessee and Virginia Boundary Commission.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The treasurer of the commission appointed by the decree of this honorable court, dated April 30, 1900, to reëstablish the boundary between the State of Virginia and Tennessee, herewith submits the abstracts of the monthly expenditures of the entire work—ten in number—beginning May, 1901, and ending September, 1902, as follows:

No. 1. May 1901	$ 384.05
No. 2. June 1901.	1083.75
No. 3. July 1901	1070.18
No. 4. August 1901	1197.76
No. 5. September 1901	1263.11
No. 6. October 1901	1565.63
No. 7. June 1902	262.13
No. 8. July 1902	1045.45
No. 9. August 1902	1245.34
No. 10. September 1902	358.59
	$9475.99
Amount chargeable to each State	4738.00

General Summary.

Remuneration of commissioners at $10 per day.	$5730.00
Transportation to and from field . . .	274.04
Transportation in field (about) . . .	1085.58
Stone monuments	678.90
Labor, freight, etc.	1707.47
Total	$9475.99
Cash received from Virginia	$4737.99
Cash received from Tennessee	4738.00
Total	$9475.99

The above is respectfully submitted.

A. H. BUCHANAN,
Treasurer of the Boundary Commission.

J. C. W. United States Department of Agriculture, Bureau of Forestry, Washington, D. C.

Office of the Forester.

AUGUST 20, 1901.

This beech block came from the "offset" near its western end and just east of the "Shady road."

J. B. BAYLOR,
Commissioner.

Mr. J. B. Baylor, Tenn.-Va. boundary commission, Abingdon, Virginia.

DEAR SIR: Your letter of August 17, and also the beech block are at hand. In the absence of Mr. Sudworth, with whom your previous correspondence has been, I am glad to give you my opinion as to the questions stated in your letter.

Owing to the very slow growth of the tree, from which this block was cut, in early life, it is not possible to count the annual rings, even with the aid of a strong magnifier, with absolute certainty of accuracy. The results I have obtained show that its age in 1802 was 96 years, and that its diameter, not includ-

ing bark, was about six inches, or about 6¼ inches including the bark. There are five wounds shown in this block. Two of these occurred in my judgment, 43 years ago, or in the year 1858. The three older wounds I believe were made 99 years ago, or in 1802.

This beech block will be carefully stored away in this bureau.

Very truly, (Signed) OVERTON W. PRICE,
Acting Forester.

J. C. W. United States Department of Agriculture, Bureau of Forestry, Washington, D. C.
Division of forest investigation.

NOVEMBER 11, 1901.

This hemlock block came from near the eastern end of the "off-set line"—a short distance from where the marked trees end.

J. B. BAYLOR,
Commissioner.

Mr. J. B. Baylor, Tenn.-Va. boundary commission, Bloomingdale, Sullivan County, Tenn.

DEAR SIR: The hemlock blocks sent to this office some time ago have remained unexamined so long on account of my absence from the office. I regret to have thus delayed the answer so long.

I have just examined the specimens, and find that the deeper scar in the larger of the two specimens was made in the year 1802. Ninety-nine annual rings were formed since the scar was made. This year's growth is still in a formative stage.

The somewhat superficial scar in the smaller specimen was made in 1858, 42 annual rings having been laid on since the mark was made. The last season's growth is not complete.

As requested in your letter of Sept. 8, these blocks will be retained subject to further advices from you.

Very truly yours,

(Signed) GEORGE B. SUDWORTH, *Chief.*

Property List Purchased for Field Outfit in the Boundary Survey.

3 saddles, bridles and blankets	$27.50
1 cooking stove and repairs	7.00
1 heating stove	2.25
8 joints of stovepipe	1.35
1 crowbar	.65
1 shovel	.85
1 grindstone	.90
6 axes	3.90
2 files	.20
4 lamps	1.00
1 saw (large)	1.35
1 trowel	.50
2 pairs of tree-climbers	3.50
1 cot	2.50
1 office table	2.50
1 dining table	1.00
Total	$56.95

Of the above at the close of the field-work the following were sold:

2 saddles	$3.00
2 stoves	2.50
2 tables	2.00
3 lamps	.50
1 grindstone	.50
1 saw	.75
2 axes	.65
1 cot	.50
1 shovel	.60
Total	$11.00

For the remainder, not worn out, purchasers could not be found without the delay of a commissioner in the field at a greater expense than they were worth. The proceeds of the sales made—$11.00—have been returned, one half to each State.

A. H. Buchanan, *Treasurer.*

Decree entered accordingly.

MONTGOMERY *v.* PORTLAND.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 47. Argued April 9, 1903.—Decided May 18, 1903.

While section 12 of the act of Congress of September 19, 1890, forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the Secretary of War, in navigable waters of the United States, "except under such regulations as may be prescribed from time to time by him" it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Under existing enactments the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State is not complete and absolute without the concurrent or joint assent of both the Federal government and the state government. *Cummings* v. *City of Chicago*, 188 U. S. 410, and *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1, followed.

THIS writ of error brings up for review the final decree in a suit instituted in one of the courts of Oregon by the City of Portland and Port of Portland against James B. Montgomery, who died during the progress of the cause, and was succeeded as defendant by his executrix, the present plaintiff in error.

The principal question in the case is whether, under the circumstances to be presently stated, Montgomery, as owner of land situated within the limits of Portland on the Willamette River, had the right to extend his wharves into the river beyond certain harbor lines established in 1892.

The City of Portland was authorized by its charter to regulate the building of wharves within its limits and to establish a line beyond which wharves should not be built nor piles driven. That provision was in force on and after February 19, 1891.

By an act of the Oregon Legislature of February 18, 1891, the inhabitants of the Port of Portland were created a corporation "to so improve the Willamette River at the cities of Portland, East Portland and Albina, and the Willamette and Columbia Rivers between said cities and the sea, as that there shall be made and permanently maintained in said Willamette River

at said cities and in the said Willamette and Columbia Rivers between said cities and the sea a ship channel of good and sufficient width and having a depth at all points at mean low water both at said cities and between said cities and the sea, of not less than twenty-five feet." And so far as was necessary to carry out that object, the corporation was given full control of those rivers at those cities and between them and the sea, to the full extent that the State could grant the same, and was authorized to remove such obstructions from them and erect such works in them as were found necessary or convenient in creating and maintaining the required channel. The power so conferred was to be exercised by a Board of Commissioners. Such a Board had been appointed and organized prior to the institution of this suit.

A copy of the act incorporating the Port of Portland was sent to the Secretary of War, "who approved the same," and the work done by that Port in improving the Willamette and Columbia Rivers was conducted in conjunction with the United States engineers in charge of those rivers, and who acted under instructions from the Secretary of War. The engineers annually reported to the Secretary the nature and amount of such work.

By the River and Harbor Act of July 13, 1892, amending the seventh section of the River and Harbor Act of September 19, 1890, it was provided:

"§ 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly

of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments or other works under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor or other navigable water not wholly within the limits of such State." 26 Stat. 454; 27 Stat. 88, 110.

"§ 12. That section 12[1] of the River and Harbor Act of August eleventh, eighteen hundred and eighty-eight, be amended and reënacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulk-heads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offence." 26 Stat. 426, 455.

[1] SEC. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him." 25 Stat. 400, 425, c. 860.

On the 9th day of August, 1892, the Secretary of War, proceeding—so the finding of facts states—under section twelve of the act of 1890, caused certain harbor lines to be established in the Willamette River within the limits of Portland. And by an ordinance adopted December 12, 1892, the Common Council of the city adopted as its wharf lines the harbor lines so established.

On or about May 21, 1898, Montgomery applied to the Secretary of War to have the above harbor lines relocated or located farther out in front of certain water lots belonging to him, his complaint being that, as established in 1892, those lines were too far inland. By order of the Secretary a public hearing was had on this application. A number of the leading business men of Portland attended and made protests against the proposed relocation. An account of this meeting, with all the papers relating to it, was sent to the Chief of Engineers, who made a report to the Secretary of War favorable to Montgomery's application. A map accompanied that report, showing the proposed new line. Under date of September 23, 1898, Mr. Meiklejohn, Acting Secretary of War, approved Montgomery's application and assented to the proposed change or relocation of the harbor line.

Having been notified by the local United States engineer that the War Department had approved the new line, Montgomery began the construction of a wharf by the driving of piles partly outside of the line of 1892 and in front of his lots, but wholly inside of the relocated line as indicated on the above map. He did not drive any piles or place any obstruction in the river outside of the relocated line.

On or about November 2, 1898, the Board of Commissioners of the Port took official action about the new line and Montgomery's construction of wharves beyond the line of 1892. They declared of record that the extension of wharves into the river outside of the line of 1892 would greatly damage the Port and its shipping interests, and they ordered Montgomery and those acting under him to cease the construction of any wharf beyond that line and at once to remove any piling or other obstruction that he may have placed in the river in front of his property and

beyond such wharf line. Subsequently, on November 23, 1898, the Port Commissioners took further action and declared that the wharf proposed by said Montgomery would interfere with the navigation of the river by creating shoal places in its now navigable waters and obstruct the work of making and maintaining a channel in the river twenty-five feet in depth, as provided for in the act incorporating the Port of Portland.

Of this action by the local authorities Montgomery and those in his employment were notified in writing.

The suit was brought to prevent the continuance of the work upon which Montgomery entered. The defendant resisted the relief asked and insisted that the action of the Secretary of War gave him complete authority to proceed despite any objections urged by the City and Port of Portland. The defence was sustained by a decree of the court of original jurisdiction and the bill was dismissed. But that decree was reversed by the Supreme Court of Oregon, its conclusions of law being: That the wharf lines established on the 12th day of December, 1892, were then, and ever since have been, the legal and authorized wharf lines of the Port of Portland; and that the respondent had no right to drive piles or extend any wharf beyond the wharf lines so established. The respondent, her attorneys, agents, servants, and employés were by a final order enjoined from driving piles or putting any structure in the river outside of the wharf lines so established, and commanded to remove all piles driven or structures of any description erected therein, beyond said wharf lines. *Portland* v. *Montgomery*, 38 Oregon, 215.

Mr. John H. Mitchell for plaintiff in error.

As to the pleadings. The facts stated in the bill of complaint are insufficient to constitute a cause of suit.

I. The bill of complaint does not state facts sufficient to constitute a cause of suit in this, that there is no proper averment, either that the wharf being constructed by the respondent, Montgomery, is or ever will be any obstruction whatever to the navigation, or other use of the harbor, or that such wharf is or ever will be a public nuisance, or that its construction as pro-

posed will in any manner, or to any extent, interfere with the work of the Port of Portland in improving such harbor.

The objection that the complaint does not state facts sufficient to constitute a cause of suit is not waived by failure to demur, and this objection may be taken advantage of in the Appellate Court. Hill's Annotated Laws of Oregon, vol. 1, sec. 71, p. 210; *Brown* v. *Emerson*, 3 Oregon, 452; *Evarts* v. *Steger*, 5 Oregon, 147; *Mack* v. *Salem*, 6 Oregon, 275; *Olds* v. *Carey*, 13 Oregon, 362; *Caldwell* v. *Ruddy*, 1 Idaho, N. S. 760; *Willits* v. *Walter*, 32 Oregon, 411.

II. The court below had no jurisdiction of this cause, for the reason that the bill of complaint does not state facts sufficient to confer jurisdiction upon a court of equity. The court below, therefore, did not err in dismissing appellant's bill, and this objection is not waived by failure to demur. Hill's Annotated Laws, vol. 1, sec. 71, p. 210, and authorities, *supra.*

III. The defendant, plaintiff in error here, was entitled to judgment on the pleadings, dismissing the plaintiff's bill of complaint for the reason that no replication whatever was filed by the plaintiffs to the further and separate answer of the defendant setting up new matter. Therefore all the material averments in such separate answer must be taken as admitted by the plaintiffs to be true, and these admissions entitle the defendant to a decree dismissing the plaintiff's bill.

On the merits. I. By article 1, section 8, clause 3 of the Constitution of the United States, a grant of power is given to Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

This clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States, leaves to the States, in the absence of Congressional legislation, the power to regulate matters of local interest, which affect international and interstate commerce only incidentally; but the power of Congress over commerce with foreign nations and interstate commerce is exclusive whenever the matter is national in character, and admits of a uniform system or plan of regulation.

In other words, as to those subjects of commerce which are

local or limited in their nature or sphere of operation, such as the erection of bridges, the establishment of harbor lines in harbors, etc., the city may prescribe regulations, until Congress assumes control of them, but as to such as are national in their character, and require uniformity of regulation, the power of Congress is exclusive, and until Congress acts such commerce is entitled to be free from state regulation, exactions and burdens. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *State of Maryland*, 12 Wheat. 419; *Wheeling Bridge Case*, 13 How. 421; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Cannon* v. *New Orleans*, 20 Wall. 577; *Wisconsin* v. *Duluth*, 96 U. S. 388; *Turner* v. *Maryland*, 107 U. S. 38; *South Carolina* v. *Georgia*, 93 U. S. 4; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 624; *Morgan Steamship Co.* v. *Louisiana*, 118 U. S. 455; *United States* v. *Duluth*, 25 Fed. Cases, 925; *Ouchita Packing Co.* v. *Aiken*, 121 U. S. 444; Gould on Waters, sec. 138, page 254; *Lawton* v. *Steele*, 152 U. S. 137; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204.

II. The establishment of harbor lines in the navigable waters of the United States by Congress is an exercise of the constitutional grant of power to regulate commerce with foreign nations and among the several States, and although the State, or a municipality acting under authority from the State, may, in the absence of any action by Congress, establish such harbor lines, such action relating to a subject of local interest, and which affects international and interstate commerce only incidentally, yet, whenever Congress acts, then the power of the State is at an end, and if any conflict exist between the lines established by the National and state Governments respectively, those of the State must give way to those established by the General Government. Same authorities as above.

III. Congress has jurisdiction, in the exercise of its power to regulate commerce, over the navigable waters of a river lying wholly within the limits of a single State. *Gibbons* v. *Ogden*, 9 Wheaton, 1; *Veasie* v. *Moor*, 14 How. 568; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 251; *Sillman* v. *Hud-*

son River Bridge Co., 2 Wall. 403; *Gilman* v. *Philadelphia*, 3 Wall. 713; *The Passaic Bridges*, 3 Wall. 782; *Pound* v. *Turck*, 95 U. S. 459; *Brown* v. *Houston*, 114 U. S. 622; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, and authorities, *supra*.

IV. The action of Congress in enacting sections 7 and 12 of the River and Harbor Act of September 19, 1890, 26 Stat. 454, conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and said sections are constitutional. *Wayman* v. *Southard*, 10 Wheaton, 1–43; Cooley's Constitutional Limitations, 137; Sutherland on Statutory Construction, sec. 68; *United States* v. *The Eliason*, 16 Peters, 291; *Gratiot* v. *United States*, 4 How. 80; *Smith* v. *Whitney*, 116 U. S. 167; *Tilley* v. *R. R. Co.*, 5 Fed. Rep. 641; *R. R. Co.* v. *Dey*, 35 Fed. Rep. 866; *In re Griner*, 16 Wisconsin, 447; *United States* v. *Ormsbee*, 74 Fed. Rep. 209; *Field* v. *Clarke*, 143 U. S. 649–693; *Locke's Appeal*, 72 Penn. St. 491; *South Carolina* v. *Georgia*, 93 U. S. 13; *Miller* v. *Mayor of New York*, 109 U. S. 385; *United States* v. *City of Moline*, 82 Fed. Rep. 596; *United States* v. *North Bloomfield Gravel Mining Co.*, 81 Fed. Rep. 253; *State* v. *Railroad Co.*, 37 N. W. Rep. 782; *State* v. *Railroad Co.*, 35 N. W. Rep. 118; *Stone* v. *Trust Co.*, 116 U. S. 307; *United States* v. *Romard*, 89 Fed. Rep. 157; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112; *State* v. *Gerhardt*, 145 Indiana, 439; sec. 12, Deficiency Act, March 9, 1891, 26 Stat. 800, 868; sec. 4, River and Harbor Act, August 17, 1894, Supp. Rev. Stat. vol. 2, p. 250; *Illinois* v. *Illinois Central R. R. Co.*, 91 Fed. Rep. 955.

V. The power conferred on the Secretary of War by sections 7 and 12 of the River and Harbor Act of September 19, 1890, *supra*, is plenary and the enactment of those sections by Congress was a full exercise of all the constitutional power possessed by Congress in reference to the establishment of harbor lines, while the other portions of the act, relating to bridges, was only a partial exercise of the power exercised by Congress; therefore the two pieces of legislation, relating to the two different subjects, although all in the same act, are radically different in both purpose and scope, and the correct interpretation

and application of the one—that is, that portion of the act relating to bridges, as considered and interpreted in the case of the *Lake Shore and Michigan Railway Company* v. *Ohio*, 165 U. S. 365, can have no legitimate bearing in the interpretation and application of sections 7 and 12 relating solely to the establishment of harbor lines. Sections 4 and 5 and a part of section 7 of the River and Harbor Act of September 19, 1890, relate to bridges, 26 Stat. 426, 453, while section 12 and a part of section 7, same act, relate solely to the establishment of harbor lines. 26 Stat. 426, 453; Act September 19, 1890, 26 Stat. 453–455.

VI. The act of G. D. Meiklejohn, Acting Secretary of War, is the act of the Secretary of War. Rev. Stat. sec. 177; Supp. Rev. Stat. vol. 1, 2d ed. p. 707.

VII. The power given to the Secretary of War by section 12 of the act of September 19, 1890, *supra*, to establish harbor lines, implies necessarily the power to modify, change or create anew. *United States* v. *The Eliason*, 16 Peters, 291; *United States* v. *Romard*, 89 Fed. Rep. 157.

VIII. The facts, as presented by the pleadings and evidence, conferred jurisdiction on the Secretary of War to relocate and reëstablish the harbor line in the manner the same was relocated and reëstablished by him September 23, 1898. Numbers sixth, seventh and eighth of the findings of fact.

IX. The harbor lines caused to be established by the Secretary of War in front of the property of the respondent, Montgomery, August 9, 1892, was on proper application changed and reëstablished by the Secretary of War, September 23, 1898. Sixth, seventh and eighth findings of fact; sec. 12, act of September 19, 1890, 26 Stat. 455.

X. Although it should be conceded that the Secretary of War is without power to change or reëstablish a harbor line previously established by him, as contended for by counsel for appellants, it is clear beyond question that he had by virtue of sections 7 and 12 of the River and Harbor Act of September 19, 1890, *supra*, power to grant a permission to the respondent, Montgomery, to extend his wharf outside the harbor line established August 9, 1892, and having on proper application done

so, neither the State of Oregon, the City of Portland, nor the Port of Portland, had any right or power to prevent it. Sections 7 and 12, River and Harbor Act of September 19, 1890. Sixth, seventh and eighth findings of fact.

XI. The wharf being constructed by respondent is located on lands bordering on the navigable waters of the Willamette River in Portland harbor, within the limits of the City of Portland, the fee of which is in the respondent, James B. Montgomery. Paragraph VII, bill of complaint; answer, paragraph VI; separate answer, paragraph I; fifth finding of fact.

XII. The riparian owner in Oregon, in the absence of restrictive legislation, has the right by the common law to connect his shore line by means of wharves, piers or docks constructed over the shoal or shallow waters immediately bordering upon his land with the waters which are navigable in fact. This he has the right to do not only in his own interest as a riparian proprietor, but as well also in the interest of the public, and of national and interstate commerce. *Railway Company* v. *Schurmeier*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 297; *Weaver* v. *Harbor Commissioners*, 18 Wall. 57; *Dutton* v. *Strong*, 1 Black, 23.

XIII. But in the State of Oregon there is added to this common law right of the riparian owner, *supra*, an express grant from the State. Section 4227, act of 1862, Hill's Code, authorizes the owner of any land in Oregon lying upon any navigable stream, within the corporate limits of any incorporated town, to construct a wharf or wharves upon the same, and to extend such wharf or wharves into such stream beyond the low water mark "so far as may be necessary and convenient for the use and accommodation of ships, or other boats or vessels that may or can navigate such stream." Act of 1862, Hill's Code, sec. 4227.

XIV. The question as to what constitutes a public nuisance must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a State can declare any particular business or structure a nuisance in a summary mode and enforce its decree at its own pleasure. Whether a bridge or a pier is a public nuisance or not, whether

the same is an obstruction to navigation and commerce or not, is a question of fact, and no simple declaration of a municipality can determine the question. *Dutton* v. *Strong*, 1 Black, 32; *Yates* v. *Milwaukee*, 10 Wall. 504; Angell on Tide Waters, 196; *West Hartford* v. *Hartford Water Co.*, 68 Connecticut, 323; *Milne* v. *Davidson*, 16 Am. Dec. 195; Cooley on Constitutional Limitations, 6th ed. 741, note; *Everett* v. *Council Bluffs*, 46 Iowa, 67; *Railroad Co.* v. *Joliet*, 79 Illinois, 44; *Butchers' Union* v. *Crescent City*, 111 U. S. 746; *Smith* v. *Minto*, 30 Oregon, 353; 2 Dillon on Mun. Corp. 4th ed. sec. 800; *Grossman* v. *City of Oakland*, 30 Oregon, 478.

XV. The provision of the city charter conferring power on the City of Portland, "to regulate the building of wharves and the driving of piles in the Willamette River within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles be driven" (bill of complaint, Abstract of Record, 2), does not authorize it to declare by a special ordinance that a private wharf is an obstruction to navigation and a public nuisance, if in point of fact it is not such obstruction or a public nuisance. Authorities, *supra.*

XVI. Conceding the right of both the City of Portland and the Port of Portland, as claimed by appellants, to establish wharf lines in the harbor of the City of Portland, it is respectfully submitted that any action taken by the respondents in that regard in order to have any binding effect whatever, must be reasonable, and we submit that the location of the line by the City of Portland was an unreasonable exercise of municipal power upon the part of appellants and binds nobody. Authorities, *supra.*

XVII. Conceding for the argument that the City of Portland had the power to establish a wharf line, and to declare that wharves should not be extended outside of such line, even then the simple declaration of the municipality that the wharf was being constructed outside of such lines, and that the construction of the same was an obstruction to navigation and therefore a public nuisance, will not determine the question; and on such a declaration alone in the complaint, especially if the answer denies that the construction of the wharf does in any manner

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interfere with navigation or commerce, or the improvement of the river, and that it is not a nuisance, either public or private, the plaintiff, the municipality, must prove by evidence, other than the mere declaration of the city itself, that the structure does interfere with navigation, or the improvement of the river or commerce, and that it is a public nuisance. *Yates* v. *Milwaukee*, 10 Wall. 498; Angell on Tide Waters, 196, and authorities, *supra*.

XVIII. In the incorporation act of the Port of Portland there is no authority whatever conferred upon the Port of Portland to establish harbor lines or wharf lines. The act, therefore, upon the part of the commissioners of the Port of Portland in establishing by resolution wharf lines on both sides of the Willamette River, was *ultra vires* and amounts to nothing. Secs. 6, 7, 12, River and Harbor Act, September 19, 1890, 26 Stat. 453, 456; sec. 7, act 1890, as amended July 13, 1892, Supp. Rev. Stat. vol. 2, p. 30.

XIX. The harbor lines having been established in the Portland harbor by the Secretary of War, August 9, 1892, in pursuance of the power conferred on him by the twelfth section of the River and Harbor Act of September 19, 1890, 26 Stat. 46, therefore, the ordinance of the common council of the City of Portland, approved December 12, 1892, establishing harbor or wharf lines, Abstract of Record, 2, was unconstitutional and wholly inoperative, except in so far as the harbor or wharf line established by such ordinance did not conflict with the line established by the Secretary of War. Authorities, *supra*.

XX. From the pleadings in this case it is shown, and conceded by complainants, that no action whatever had been taken either by the City of Portland or the Port of Portland, establishing either harbor or wharf lines in the harbor of Portland prior to August 9, 1892, when the harbor lines in said harbor were caused to be established by the Secretary of War. And it is further shown and conceded by said bill of complaint, that the State of Oregon had not, prior to September 19, 1890, the date of the passage of the River and Harbor Act, *supra*, conferring power on the Secretary of War to cause harbor lines to be established in the navigable harbors of the United States, passed

any act conferring upon the City of Portland power to establish harbor or wharf lines. This power on the part of the city only dates from February 19, 1891. When, therefore, the General Government, in the interest of international and interstate commerce, assumed jurisdiction of the waters of the Portland harbor by establishing harbor lines therein, neither the State of Oregon, nor the City of Portland, nor the Port of Portland, had established or attempted to establish any such harbor lines.

XXI. "The authorities of a town will not be permitted to locate an imaginary deep water line away from the navigable part of a river or bay and without making the water navigable up to that line, so as to deprive the riparian owners of the advantages of wharves, under a provision of law conferring upon such town the right to regulate the line of deep water to which wharves may be built." *Wool* v. *Edenton*, 117 S. C. 1, and authorities, *supra.*

XXII. Whenever a police power is so exercised by a State as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Henderson* v. *The Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; *Morgan* v. *Louisiana*, 118 U. S. 464.

XXIII. The police power does not extend to depriving any person of the lawful use of property without due process of law, and without just compensation. *Matter of Jacobs*, 98 N. Y. 110; *Matter of Cheesbrough*, 78 N. Y. 232; *Rockwell* v. *Nearing*, 35 N. Y. 302; Fourteenth Amendment, Const. U. S.

XXIV. "Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river." *Transportation Co.* v. *Parkersburg*, 107 U. S. 707. No foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf. Mr. Justice Field in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 205.

Mr. Thomas D. Rambaut and *Mr. C. E. S. Wood* for defendants in error, with whom *Mr. George H. Williams* was on the brief.

The material facts in the case at bar are quite similar to

those in the case of *Cummings* v. *Chicago*, decided by this court February 23, 1903, where it is held that private parties must obtain the assent of the constituted agencies of the State as well as the assent of the agent of the National Government before erecting a structure in navigable waters wholly within the State, and the authority of the decision in that case compels the affirmance of the judgment of the Supreme Court of Oregon in this case unless the court is persuaded to overthrow the doctrine it has so recently enunciated. *Cummings* v. *Chicago*, 188 U. S. 410. No ground for the reversal of that doctrine has been suggested, and a review of the decisions by this court shows that it has been the established policy of the National Government to leave to the several States plenary authority over such purely local matters as the location of wharf lines in navigable waters lying wholly within the limits of the respective States. *Gibbons* v. *Ogden*, 9 Wheaton, 1; *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wallace, 713; *Keokuk N. L. P. Co.* v. *Keokuk*, 95 U. S. 377; *Mobile County* v. *Kimball*, 102 U. S. 238; *Cincinnati &c. Packet Co.* v. *Trustees Catlettsburg*, 105 U. S. 559; *Parkersburg Transportation Co.* v. *Parkersburg*, 107 U. S. 801; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 17.

The River and Harbor Act passed by Congress in 1890, does not expressly exclude the previously exercised authority of the States over such matters, but deals with the harbor area only, and leaves to the respective States plenary control over the wharf area wholly within their limits. The established policy of this Government in permitting States to control wharves is not to be overthrown by a mere inference. *Lake Shore & Mich. So. Ry.* v. *Ohio*, 165 U. S. 365; *Cummings* v. *Chicago*, *supra*. The delegation to the Secretary of War of authority to establish a line beyond which no wharf shall extend into the protected harbor area, without his permission, does not confer upon that officer the power to give original authority to build wharves in the wharf area between the protected harbor area and the shore. If the act of Con-

gress of 1890 purports to confer upon the Secretary of War this authority, it is tantamount to conferring upon that officer the power to regulate commerce with foreign nations and among the several States, and is unconstitutional. Art. X, Amendments to U. S. Constitution.

Congress and the States have concurrent authority over navigable waters wholly within the States until Congress excludes the State's authority. The intention to exclude the State's authority must be clearly manifest, and while, no doubt, this court could confirm the judgment of the Supreme Court of Oregon upon the authority of the recently decided *Cummings* case, still this court should take advantage of the opportunity to declare invalid the act of Congress of September 19, 1890, before further mischief be done under it. *Gibbons* v. *Ogden*, *supra*. The attempt of the Secretary of War to reëstablish the harbor line was inoperative. If his authority be limited to a mere executive act he became *functus officio* when the original harbor line was established; but if his authority be to locate harbor or wharf lines at his discretion, then Congress attempted to transfer to this officer the regulation of international and interstate commerce, and the act is void. The power to regulate commerce is wholly a delegated power from the States, and it cannot be redelegated by Congress. Art. X, Amendments to U. S. Constitution. It would be contrary to the fundamental principles of this Government to permit a body elected by the people, as Congress is, to turn over to an appointive officer the power entrusted to it. The incongruity of the act is apparent when it is realized that the mere deputy of this appointed cabinet officer can exercise this enormous national power during the temporary absence of his chief, as was done in this case.

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

This case cannot be distinguished in principle from *Cummings* v. *City of Chicago*, 188 U. S. 410, decided at the present term. In that case it appeared that the Secretary of War, proceeding

under the act of September 19, 1890, and other legislation of Congress, had given his assent to the rebuilding of a certain dock in Calumet River, within the limits of Chicago; which river, being one of the navigable waters of the United States, had been surveyed by the direction of the Government, and for its improvement Congress had made appropriations from time to time. When that action was commenced there was in force an ordinance of the City of Chicago, enacted under the authority of the State, forbidding the construction of any pier, dock or other structure in navigable waters within the limits of that city without first obtaining a permit from its Department of Public Works. And the question was whether under the acts of Congress, including that of 1890, the above ordinance was of any avail as against the permit of the Secretary.

The contention of the plaintiff was that Congress, by its appropriations for the improvement of Calumet River, had taken such complete possession of that stream as to deprive the local authorities of all power in respect of the building or maintenance of structures in that river. In determining that question the court took into consideration various enactments, including the tenth section of the River and Harbor Act of March 3, 1899, c. 425, (passed after the present suit was brought,) as follows: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the

Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 30 Stat. 1121, 1151.

In that case we recognized the doctrine as long established that the authority of a State over navigable waters entirely within its limits was plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States. After referring to *Lake Shore & Michigan Railway* v. *Ohio*, 165 U. S. 365, 366, 368, (1896), we said that if Congress had intended by its legislation, prior to that decision, "to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the Government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended. We do not overlook the long-settled principle that the power of Congress to regulate commerce among States 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Brown* v. *Houston*, 114 U. S. 630. But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erec-

tion of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies."

There is nothing in the present case to distinguish it from the *Cummings* case. While section 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the Secretary of War, in navigable waters of the United States, "except under such regulations as may be prescribed from time to time by him," it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the Secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the States. Congress has not, however, indicated its purpose to wholly ignore the original power of the States to regulate the use of navigable waters entirely within their respective limits. Upon the authority then of *Cummings* v. *City of Chicago*, and the cases therein cited—to which we may add *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1—we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the General and state Governments. Of course, the right of the Government to erect public structures in a navigable water of the United States rests upon different grounds.

In this view it is unnecessary to consider the general question discussed at the bar whether Congress has or not, by some of its enactments relating to structures in navigable waters, committed to the Secretary of War the determination of mat-

ters that are legislative in their nature and which, under the Constitution, could only be determined, in the first instance, by Congress. It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question does not, when reasonably interpreted, indicate any purpose upon the part of Congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the States in respect of the erection by private parties of structures in waters wholly within their respective limits.

The judgment of the Supreme Court of Oregon is

Affirmed.

WILKES COUNTY *v.* COLER.

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

No. 247. Argued April 17, 20, 1903.—Decided May 18, 1903.

The North Carolina ordinance of March 8, 1868, has been declared by the Supreme Court of that State and by this court, (180 U. S. 532,) to have been the law of North Carolina when bonds were issued by Wilkes County for subscription to stock of the Northwestern North Carolina Railroad Company. All the conditions of the ordinance as to the route of the railroad and the approval of a majority of the qualified electors of the county having been met, the county had power to subscribe to the stock of the road and to issue its bonds therefor, and it cannot now contend that the bonds are invalid for want of power on its part to issue them.

THE case is stated in the opinion of the court.

Mr. A. C. Avery for petitioners.

Mr. John F. Dillon for respondents. *Mr. Harry Hubbard*, *Mr. John M. Dillon* and *Mr. Charles Price* were on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action against Wilkes County, North Carolina,

upon certain bonds, each reciting that it was issued in payment of the subscription by that county to the capital stock of the Northwestern North Carolina Railroad Company, "by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes County, by an election regularly held for that purpose on the 6th day of November A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April A. D. 1889."

Coler & Co., holders of some of the bonds, obtained a judgment against the county in the Circuit Court. The case was then carried to the Circuit Court of Appeals, which certified certain questions to this court under the Judiciary Act of March 3, 1891, c. 517. Those questions were answered, and the answers having been certified to the court below, the case was finally tried, resulting in the affirmance of the judgment against the county. *Wilkes County* v. *Coler*, 180 U. S. 506; *Board of Commissioners* v. *Coler*, 113 Fed. Rep. 725. It is now here on writ of certiorari sued out by Wilkes County.

The facts out of which this litigation arose are fully set forth in the former opinion. It is necessary to restate some of them as well as to recall the points heretofore decided.

It appears that the principal question in the case, when formerly here, was as to the effect of the recitals in the bonds.

The plaintiffs contended that being *bona fide* holders they were entitled to assume that there had been a compliance with all the provisions of the act of February 20, 1879, upon the authority of which the bonds purported to have been issued.

The defendant contended that as the journals of the respective houses of the Legislature did not show that the yeas and nays were entered on the second and third readings of the bill subsequently published as the act of February 20, 1879, that act was void under section 14 of Article 2 of the state constitu-

tion, providing that "No law shall be passed . . . to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

This contention of the county was supported by several decisions of the Supreme Court of North Carolina that are referred to in our former opinion; and one of the questions propounded to this court was whether the Circuit Court should accept those decisions as controlling in respect of the alleged invalidity of the act of 1879. That question was answered in the affirmative, this court being of opinion that as matter of propriety and right the decision of the state court on the question as to what is a *law* of the State was binding upon the courts of the United States. 180 U. S. 506, 526.

That answer, of course, eliminated from the case the act of 1879 as giving authority to issue the bonds in suit; and it, therefore, became necessary to inquire whether such authority could be found elsewhere in the legislation of the State—this court being of opinion that the invalidity of the act of 1879, as conferring power to issue the bonds, did not estop holders of bonds from showing that there was in fact ample authority to issue them.

It was insisted that sufficient authority was to be found in the Ordinance of March 8, 1868, passed by the Convention that assembled at Raleigh, North Carolina, on January 14, 1868, for the purpose of framing a constitution for that State.

By that Ordinance, which took effect from its passage, it was provided: "That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by way of Salem and Winston, in Forsyth County, to some point in the northwestern boundary line of the State, to

be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, . . . § 1. . . . That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars. § 2. . . . That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem in Forsyth County, which portion of said railroad, when completed, shall constitute its first division: *Provided*, That if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section. § 5. . . . That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, [Atlantic and North Carolina Railroad Company,] for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company. § 12. . . . That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia." § 13.

The act incorporating the Atlantic and North Carolina Railroad Company, referred to in the Ordinance of 1868, was passed in 1852. Laws of N. C. 1852, pp. 484, 499. By section 33 of that act it was made "lawful for any incorporated town or county near or through which said railroad may pass to

subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of such county, in manner and form as hereinafter provided." By section 35 it was provided "that if upon the return of such constable . . . it shall appear that a majority of the qualified voters of such town and by the return of the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the subscription, the corporate authorities of such town, and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county and on such time as shall be agreed on by said town officers and the justices of such county." Laws of N. C. 1852, c. 136.

After referring to certain decisions of the Supreme Court of North Carolina, relating to the Ordinance of 1868—particularly *Hill* v. *Com'rs*, 67 N. C. 367, and *Belo* v. *Com'rs*, 76 N. C. 489—we said: "It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the Ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was in force and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds just as Forsyth County had done." 180 U. S. 529.

Another principle announced in our former opinion was that the rights of the parties were to be determined by the law of the State as it was declared by the state court to be at the time the bonds were issued in the name of the county and put upon the market.

As indicating some of the points left undecided, we make this extract from our opinion:

"We have referred fully to the *Hill* and *Belo* cases because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the Ordinance of 1868, without the aid of subsequent legislation, gave full power to Wilkes County to issue such bonds. This view suggests various questions as to the

scope and effect of that Ordinance. Assuming, as we must, that the *Belo* and *Hill* cases held that the Ordinance of 1868 remained in force after the adoption of the constitution, did the general power given by that Ordinance to the North Western Railroad Company to construct a railroad from its eastern terminus, 'running by way of Salem and Winston, in Forsyth County, to *some* point in the northwestern boundary line of the State, *to be hereafter determined*,' invest Wilkes County with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes County in the same category with Forsyth County? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the State to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the State? Did Wilkes County have authority, under the Ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell? These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the Circuit Court of Appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this court should, under the questions certified, consider and determine the entire merits of the case." 180 U. S. 532.

That the qualified voters of Wilkes County gave their sanction to a subscription to the capital stock of the Northwestern North Carolina Railroad Company; that the bonds in suit are part of those issued in payment of such subscription; that stock was issued to the county to the full amount subscribed; that

the road desired by the people of the county was constructed and is in operation: that for many years the county paid interest upon the bonds; and that the plaintiff purchased the bonds in suit for value and in good faith; these propositions are not disputed. However strongly these facts appeal to every one's sense of right and justice, they do not estop the county from raising the question of its power to have made the subscription and issued the bonds in question. We repeat what was said in the former opinion—indeed what had been held in many previous decisions—that if there was an absolute want of power to issue the bonds in question every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name they were issued. Such power could not be created by mere recitals in the bonds.

Did the county of Wilkes have power to issue these bonds? The plaintiff insists that the county had double legislative authority for issuing them; first, under the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company; second, under the above sections of the Code of North Carolina of 1883.

We have seen that at the time the bonds were issued the Ordinance of 1868 was in force and gave power to counties embraced by its provisions to take stock in the Northwestern North Carolina Railroad Company and pay for it in county bonds. This was held, in our former opinion, to be taken as the law of North Carolina, because so declared by the Supreme Court of that State when the bonds were issued, and therefore as the law by which the rights of the parties were to be determined. So that the vital inquiry, on this part of the case, is whether the road in question was embraced by the provisions of the Ordinance of 1868, and therefore one that could be aided under that Ordinance by county subscriptions and bonds. If so, Wilkes County was plainly in the same category as Forsyth County, and its bonds (issued in payment of the subscription made by it) must be sustained as valid upon the same grounds as the Supreme Court of North Carolina approved in reference to the bonds issued by Forsyth County.

Turning now to the Ordinance of 1868, we find that the North-

western North Carolina Railroad Company was incorporated to construct a railroad of one or more tracks "from some point on the North Carolina Railroad between the towns of Greensboro and Lexington, running by way of Salem and Winston in Forsyth County to some point in the northwestern boundary line of the State, to be hereafter determined." No question arises in the present case as to the route adopted for the road that was constructed from its beginning point or eastern terminus to Salem and Winston, two towns near each other. It was mandatory under the ordinance that the road should run by the way of Salem and Winston. The road that Wilkes County desired to be built was from Salem and Winston to Wilkesboro. That was the road in aid of the construction of which its bonds were issued. If a road from Salem and Winston to Wilkesboro was substantially in the direction of "the northwestern boundary line of the State," then it would be one authorized by the Ordinance of 1868. The Ordinance did not fix the particular point in the northwestern boundary at which the northwestern terminus of the road should be established. It was some point, on that boundary, to be thereafter determined. Unless the legislature interfered and itself fixed the northwestern terminus of the road, the railroad company had the power to establish it at its convenience or as the necessities of the situation required, taking care that whatever route was adopted the road as constructed from time to time was to be, substantially, in the direction of some point in what was reasonably to be deemed the northwestern boundary line of the State. Undoubtedly those interested in the enterprise, as well as the Convention, contemplated that the road would be built mainly by money derived from municipal subscriptions and bonds. The railroad company was, therefore, left free to adopt a general route that would take the road "near or through" such counties as would aid the enterprise—no condition as to route being imposed except that the road should be in the direction of some point on the northwestern boundary line of the State. The authority of counties, by subscription of stock and bonds, to aid in the construction of a part of the road, did not depend upon the northwestern terminus being first established. If a county

had authority, under any circumstances, to subscribe stock and issue bonds that authority could be exercised with reference to that part of the road in which, by reason of its location, it was immediately concerned. We are of opinion that the part of the Northwestern North Carolina Railroad which is here in question was, in a substantial sense, in the direction of some point in the northwestern boundary line of the State—due regard being had to the physical nature of the country through which it was to pass. The contention to the contrary cannot be sustained.

Looking further into the Ordinance of 1868, we find that it contemplated and authorized subscriptions by counties. It provided that all counties and towns subscribing stock to said company should do so in the same manner and under the same rules, regulations and restrictions as were set forth and prescribed in the charter of the Atlantic and North Carolina Railroad Company for the government of such towns and cities as were then allowed to subscribe to the capital stock of that company. Reading those provisions of the charter of the Atlantic and North Carolina Railroad Company into the Ordinance of 1868, it is, we think, clear that any county near or through which the Northwestern North Carolina Railroad might pass (in the direction of some point in the northwestern boundary line of the State) could subscribe stock to be paid for by its bonds, provided, always, that the subscription was first approved by a majority of the qualified electors of the county voting upon the question of subscription. All these conditions were met in the case of Wilkes County. The qualified voters sustained the proposition to subscribe, and there is no substantial ground upon which to rest the contention that the county was without power, under the Ordinance of 1868, to make the subscription in question and to issue its bonds in payment therefor.

Other questions relating to the Ordinance of 1868 were discussed by counsel; but in the view we take as to its scope and meaning those questions need not be noticed in this opinion.

The appellees further insist that ample authority to issue the bonds in suit is also found in sections 1996, 1997, 1998, 1999 and 2000 of the Civil Code of North Carolina.

We do not deem it necessary to determine the scope of those sections; for, as we have seen, Wilkes County, independently of those sections, had authority under the Ordinance of 1868 to make the subscription and issue the bonds here in question. And this conclusion rests upon the law of North Carolina as declared by the Supreme Court of the State to have been at the time Wilkes County made its subscription and issued its bonds. This is sufficient to dispose of the case.

The judgment is

Affirmed.

BOCKFINGER *v.* FOSTER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 175. Argued February 26, 1903. Decided June 1, 1903.

Until the title to lands within any townsite boundary has been finally disposed of as provided in the act of Oklahoma Townsite, May 14, 1890, no suit can be maintained against the Townsite Trustees as such to divest them of the title held by them in trust for occupants under that act; although a townsite occupant, after receiving title under the act, may be sued by any one claiming that he had acquired under the homestead laws a right as to the lands prior and superior to that held by the Townsite Trustees for the use and benefit of the townsite occupants.

The Townsite Trustees do not hold an indefeasible title as of private right, with power to dispose of at will, but only as trustees for such occupants as may be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the townsite boundary.

The investiture of the Trustees with title is only a step towards the transmission, finally, to the occupants of the full interest of the United States in the land.

THIS case involves the construction of the act of Congress passed May 14, 1890, entitled "An act to provide for townsite entries of lands in what is known as 'Oklahoma,' and for other purposes." 26 Stat. 109, c. 207.

As the purpose and scope of the act can be ascertained only by examining all of its provisions, it is here given in full:

"§ 1. That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such townsite, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees: *Provided*, That the Secretary of the Interior may when practicable cause more than one townsite to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

"§ 2. That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any townsite the subject of entry hereunder, shall be, taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder: *Provided*, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States

or the proclamation of the President thereunder: *Provided further*, That the certificates herein before mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

"§ 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such townsite, shall be conveyed to or in trust for the same.

"§ 4. That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

"§ 5. That the provisions of sections four, five, six and seven, of an act of the legislature of the State (of) Kansas, entitled 'An act relating to townsites,' approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

"§ 6. That all the entries of townsites now pending on application hereafter made under this act, shall have preference at the local land office of the ordinary business of the office and shall be determined as speedily as possible, and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit, and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act, and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality and when final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

"§ 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed; and such traveling and other necessary expenses as the Secretary may authorize and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

"§ 8. That the sum of ten thousand dollars or so much thereof as may be necessary is hereby appropriated to carry into effect the provisions of this act, except that no portion of said sum shall be used in making payment for land entered hereunder, and the disbursements therefrom shall be refunded to the Treasury from the sums which may be realized from the assessments made to defray the expense of carrying out the provisions of this act." 26 Stat. 110, c. 207.

The complaint shows that the appellees are the Trustees of Townsite Board Number Six, duly constituted and appointed by the Secretary of the Interior, and assigned to the townsite of West Guthrie, Oklahoma Territory, and had acquired the legal title to the western half of section eight, of township sixteen, north of range two, in Logan County, in that Territory.

Bockfinger, claiming to have become entitled, under the homestead laws of the United States, to the southwest quarter of that land—which was embraced within the townsite boundary—brought this suit in a territorial District Court against the appellees as Townsite Trustees. The relief sought was a decree that the Trustees hold the title in trust for his use and benefit, and be compelled to convey to him.

The defendants demurred to the complaint upon several grounds, among others upon the ground that the court had no jurisdiction of the subject of the action nor of the defendants

in their capacity as Townsite Trustees. The demurrer was sustained, and the plaintiff, electing to stand on his complaint, the suit was dismissed. Upon appeal to the Supreme Court of the Territory, the decree of the District Court was affirmed. 10 Oklahoma, 488.

Mr. James R. Keaton for appellant. *Mr. John W. Shartel, Mr. Frank Wells, Mr John H. Cotteral* and *Mr. C. G. Hornor* were on the brief.

Mr. Horace Speed and *Mr. Marsden C. Burch* for appellees.

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

The decisive question in the case is whether the plaintiff's claim to the land can be made the subject of a suit against the Townsite Trustees as such. Upon a careful scrutiny of the provisions of the act of 1890 we are of opinion that this question must be answered in the negative. The plaintiff asked a decree declaring that the title acquired by the Trustees under the act of Congress for the use of townsite occupants be held in trust for and conveyed to him. But no such relief could have been granted if the title acquired by the Trustees was held by them in trust for the purposes of the act of Congress and if, in every substantial sense, so far as real ownership is concerned, the land still belonged to the United States.

That the title was so held by the Townsite Trustees is, we think, clear. They did not hold an indefeasible title as of private right with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the townsite boundary. The trust was not, in any sense, of a permanent character. Its creation by Congress was only a step towards the ultimate transmission of the title of the United States to occupants under the Township Act. The United States retained its hold on the land until the title by proper conveyances should pass absolutely from it or

from its officers or agents, the Townsite Trustees, to such occupants. When an occupant thus acquired title, any one who claimed that he was entitled to the land could litigate the matter with the occupant in some court of competent jurisdiction; for, as between the United States and the occupant, the former had then parted with its title.

It is suggested that, under this view, many years might elapse before the person to whom, as occupant, the land was awarded could be sued by the person claiming a superior right to that acquired by the Townsite Trustees for the use and benefit of occupants. This is true, but it cannot alter the fact that, under the act of Congress, the title remained, in every essential sense, in the United States, until conveyed to the occupant. The United States, as the primary owner of the land, could prescribe the terms upon which it could be disposed of to occupants. A suit against the Townsite Trustees to compel them, without regard to the act of Congress, to convey to one who was not an occupant within the meaning of that act, was a suit to compel them to convey land which really belonged to the United States. Such a suit, it is plain, might defeat the execution of the act of Congress.

The general principle was fully stated in *Johnson* v. *Towsley*, 13 Wall. 72, in which this court, after observing that it had firmly refused to interfere with the Land Department in its administration of the public lands, *so long as the title was in the United States*, said: "On the other hand, it has constantly asserted the right of the proper courts to inquire, *after the title had passed from the Government, and the question became one of private right*, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another."

This was the ground upon which the court proceeded in *McDaid* v. *Oklahoma*, 150 U. S. 209, in which case the question was as to the right of Townsite Trustees to withhold a deed pending an appeal to the Commissioner of the General Land Office. In that case it became necessary to declare the scope and meaning of the act of 1890.

After referring to a decision of the Land Department, under the act of 1890, to the effect that "the issue of the patent to Townsite Trustees under the act was not a disposition of the Government title, but a conveyance in trust to be held under the direction of the Secretary of the Interior," the court in that case, speaking by Chief Justice Fuller, said: "This proposition is denied, and it is insisted that the authority of the Secretary relates solely to public lands, the title to which is still in the United States, and that by the issue of the patent to Townsite Trustees the title passes and all control over the lands embraced therein is lost. Hence that in this case the title of the United States passed by the patent to the trustees, and that they held it thereafter in trust for the occupants, free from the control of the Land Department. Reference is made to *Moore* v. *Robbins*, 96 U. S. 530, and like cases, to the point that when a patent has been awarded, issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the Executive Department of the Government. But those cases refer to the legal title directly and finally conferred, and the principle invoked can only be applicable on the assumption that by the townsite conveyance title was granted to the Oklahoma trustees for the purpose of divesting the Government of all authority and control over the final disposition of the property, and not for the purpose of putting title in the trustees as agents of the Government for the execution of the trust devolving upon them as such. Whether this assumption is justified or not must depend upon the terms and true construction of the act of May 14, 1890."

The court then examined the several sections of the act of 1890, and proceeded: "In the light of these provisions we perceive no reason for doubting that the trustees appointed by the Secretary under the act, and whose compensation and expenses were fixed by him, were agents of the Government for the purpose of carrying out the trust thereby created to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the title to them. While on the final entry the title of the United States was to be conveyed to the trustees, such conveyance was

explicitly declared as made 'for the uses and purposes in the act provided,' and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably acted in that regard as the representatives of the Government, and their decisions were properly subject to that appeal to the Commissioner and the Secretary, for which the Secretary's regulations provided. As matter of convenience, the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitively passed to the trustees by the patent for the whole site. The result is the same if the fourth section be construed as directing the Secretary to cause the trustees to execute the conveyances therein referred to. The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power of the Department of the Interior. Section 2387 of the Revised Statutes confirms this view, for the townsites there referred to were to be entered by the corporate authorities of the town, if incorporated, or, if not, by the judge of the county court for the county in which the town was located, and the trust as to the disposal of the lots and the proceeds of the sales thereof was to be executed in accordance with such regulations as might be prescribed by the legislative authority of the State or Territory in which the town might be situated, while under this special act, in reference to Oklahoma, the entry was to be made by trustees appointed by the Secretary and the trust conducted under such regulations as might be established by him. In the one case the Government parted with its connection with the land when the patent issued to the local authority; in the other, the Government retains its connection by having the entry made by its own agents, and the trust executed in the manner it directs. By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust

sub modo for the Government until the rightful claimants and the undisposed of or surplus lands are ascertained."

It is suggested that the question decided in the *McDaid* case was not the same as the one now under consideration. That is true, but the decision required the court to determine the meaning of the act of Congress of 1890; consequently, what was said in that case as to the scope of the act is pertinent here.

Several cases were cited in argument as sustaining such a construction of the act of Congress as would authorize a suit like this. We allude to *In re Emblen*, 161 U. S. 52, 56; *Germania Iron Co.* v. *United States*, 165 U. S. 379; and *Payne* v. *Robertson*, 169 U. S. 323.

In *Emblen's* case it appeared that pending a contest before the Secretary of the Interior between Emblen and Weed as to whom a patent should be issued for a tract of land in Colorado, Congress passed an act confirming Weed's entry and directing that a patent issue to him, which was done. Then Emblen sought by mandamus to compel the Secretary to rehear the case, and to decide the issue between him and Weed, independently of the act of Congress, which was alleged to be unconstitutional. This court, speaking by Mr. Justice Gray, said: "Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of preëmption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the Land Department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee; and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies"—citing *Johnson* v. *Towsley*,

13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47; *Turner* v. *Sawyer*, 150 U. S. 578, 586. So far from militating against the doctrine of the *McDaid* case, the above observations by Mr. Justice Gray, speaking for the court in the *Emblen* case, sustain the views expressed in the previous case. The patent referred to in the *Emblen* case was a formal, regular patent, designed to pass the title of the United States, and to invest the patentee with all the rights of the United States in the land.

In *Germania Iron Co.* v. *United States*, 165 U. S. 379, 383, the question was whether the court could by decree, in a suit brought by the United States, cancel a patent that had been issued by inadvertence and mistake, and thereby restore the jurisdiction of the Land Department to determine such disputed questions of fact as involved the title to the land patented. That suit was maintained and the patent was cancelled. It is clear that the decision has no bearing on the question now before us.

In *Payne* v. *Robertson* the question as to the right to maintain a suit directly against the Townsite Trustees for the purpose of divesting them of the title to the land in dispute does not appear to have been raised by the parties; it certainly was not decided by the court. The sole question, the court took care to say, was whether by reason of his entry into the Territory, and his presence there, under the circumstances stated, the plaintiff, who was a deputy marshal of the United States, was disqualified from making a homestead entry immediately upon the lands being opened for settlement. The court held against the plaintiff on that point, and that being conclusive of the case, the judgment of this court was placed entirely upon that ground. It was not necessary to go farther and decide the question here presented.

Nor is there anything in *Wilcox* v. *Jackson*, 13 Pet. 498, and *United States* v. *Schurz*, 102 U. S. 402, at all in conflict with the decisions in the above cases. Both the *Wilcox* and *Schurz* cases recognize the principle that after the title to public lands

has passed from the United States, that is, after the Land Department has performed the last act in the series necessary to pass the title of the Government, the courts will, as between parties asserting conflicting rights in such lands, determine, by appropriate judicial proceedings, which of the parties has the better right. But those cases equally recognize the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States.

Without further reference to authorities, we adjudge that until the title to lands within any townsite boundary has been finally disposed of as provided in the act of 1890, no suit can be maintained against the Townsite Trustees to divest them of the title held by them in trust for occupants under that act; although a townside occupant, after receiving title under the act, may be sued by any one claiming to have acquired under the homestead laws a right to the lands prior and superior to that held by the Townsite Trustees for the use and benefit of townsite occupants.

The decree of the Supreme Court of Oklahoma is

Affirmed.

Mr. Justice White dissented.

Mr. Justice McKenna did not hear the argument of this case nor participate in the decision.

JAMES v. BOWMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 213. Argued March 16, 1903.—Decided May 4, 1903.

Although section 5507, Rev. Stat., which provides for the punishment of individuals who hinder, control or intimidate others from exercising the right of suffrage guaranteed by the Fifteenth Amendment, purports on its face to be an exercise of the power granted to Congress by the Fifteenth Amendment, it cannot be sustained as an appropriate exercise of such power. That Amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. While Congress has ample power in respect to elections of Representatives to Congress, § 5507 cannot be sustained under such general power because Congress did not act in the exercise of such power.

On its face the section is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, State and Federal, and not in pursuance of the general control by Congress over particular elections. It would be judicial legislation for this court to change a statute enacted to prevent bribery of persons named in the Fifteenth Amendment at all elections, to one punishing bribery of any voter at certain elections.

Congress has the power to punish bribery at Federal elections but it is all important that a criminal statute should define clearly the offence which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it.

In December, 1900, an indictment was found by the United States District Court for the District of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon section 5507 of the Revised Statutes of the United States. The indictment charged in substance that certain "men of African descent, colored men, negroes, and not white men," being citizens of Kentucky and of the United States, were, by means of bribery, unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the Fifth Congressional District of Kentucky on the 8th day of November, 1898, for the election of a Representative in the Fifty-sixth Congress of the United States.

No allegation is made that the bribery was because of the race, color or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of *habeas corpus* on the ground of the unconstitutionality of section 5507. The District Judge granted the writ, following reluctantly the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Lackey* v. *United States*, 46 C. C. A. 189; 107 Fed. Rep. 114. From that judgment the government has taken this appeal.

Section 5507 is as follows:

"SEC. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

The Fifteenth Amendment provides:

"SEC. 1. The right of citizens of the United States 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.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

Mr. Solicitor General Hoyt for appellants.

The indictment was for an offence committed at a Federal election, therefore the only question in the case is as to the constitutionality of section 5507, Rev. Stat., with respect to such elections. The decision of the Circuit Court of Appeals for the Sixth Circuit in *Lackey* v. *United States*, 107 Fed. Rep. 114, holding that section 5507 was invalid as applied to state elections, has no application, even if it were controlling in this court. The source of the power, and the extent of the power of Congress in each case is quite different. The authority of

Congress over Federal elections is derived primarily from Article I, sec. 4, of the Constitution. This authority is "plenary and paramount," and under the decisions of this court extends to the protection of persons entitled to vote at such elections against the unlawful acts of individuals as well as officers of election, the right to vote for a member of Congress being itself founded upon the Constitution. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127 U. S. 731. On the other hand, the power of Congress over state elections is derived exclusively from the Fifteenth Amendment, and is limited to appropriate legislation to enforce that amendment.

It may be observed, however, as fortifying the argument in the abstract, that the *general* right of suffrage, at state as well as Federal elections, is contemplated by the law if the crucial discrimination occurs, because—

1. The Constitution so indicates,

(*a*) The language of the Fifteenth Amendment being unqualified, "the right . . . *to vote;*"

(*b*) The language of section 2 of the Fourteenth Amendment, on an associated subject and showing a cognate intention, including elections for state as well as Federal officers.

2. The statutes shows that intention: *e. g.*, section 2004 obviously applies to state elections and officers, and section 2010, although now repealed by the act of February 8, 1894, 28 Stat. 36, may be cited to show how the original intent, still apparent in section 2004, was followed up in other provisions of the act of 1870.

3. The clear inference from decisions of this court is to the same effect.

In the *Yarbrough case*, 110 U. S. 664, when the court said: "The Fifteenth Amendment of the Constitution . . . clearly shows that the right of suffrage was considered to be of supreme importance to the national government," etc., it is evident from the paragraphs following that the learned judge who delivered the opinion had passed on from exclusive consideration of the right to vote for a member of Congress.

But the questions as to the constitutionality of section 5507

in respect of Federal elections, and its application or constitutionality as to state elections, are distinct and separable. The validity of the statute in the one case cannot be made to depend upon its validity, or the circumstances which would control its validity, in the other case. It cannot be doubted that a law containing no substantive provision beyond the power of Congress—no provision clearly encroaching upon a field outside the competency of Congress—is none the less constitutional because there are occasions (in this instance, state elections) with respect to which its application might be challenged.

In *United States* v. *Reese*, 92 U. S. 214, the court merely held that a general statute relating to state as well as Federal elections, but which contained no reference to the Fifteenth Amendment, or to acts committed because of the race, color, or previous condition of the voter, when considered solely with reference to the power of Congress under that amendment, was not "appropriate legislation" for its enforcement. The court did not say, or intimate, that the statute was unconstitutional as an exercise of the power of Congress over Federal elections under the fourth section of the First Article of the Constitution. On the contrary, it expressly avoided that question. This itself is a complete answer to appellee's contention, as it shows that, in a case arising under a general statute, it is not necessary to consider the validity of the statute from any other point of view than that presented by the record. That the court in the *Reese* case, would have sustained the statute with respect to Federal elections, was affirmed by the Circuit Court in *United States* v. *Munford*, 16 Fed. Rep. 223, where the same statute, as incorporated into the Revised Statutes, was upheld in regard to such elections.

In the *Trade-Mark Cases*, 100 U. S. 82, the court held void an act of Congress dealing with the subject of trade-marks generally, because the power of Congress over trade-marks was limited to those used in interstate commerce. The principle of both the *Reese* and *Trade-Mark* cases is simply that, where Congress possesses only a special or limited power over a given subject, it must appear, in the act itself, or from its essential

nature, that it is legislating with regard to that subject and within the limits of the power granted. But the power of Congress over Federal elections is absolute; though its power with respect to state elections is limited. A general act relating to elections should therefore be construed to relate to Federal elections over which Congress has general control. If such a statute would be invalid as applied to state elections, and such invalidity would affect the entire statute, the intention of Congress to go beyond its jurisdiction must be clearly and explicitly shown. In the present case, the application of the statute to state elections is a matter of construction only, and, under well settled principles, that construction should be rejected, if it would have the result contended for.

In a case arising under section 5507 at a Federal election, it cannot be said, as was said in the *Reese* case (where the acts in question were committed at a state election), that section 5507 provides for an offence not within the jurisdiction of Congress. The power of Congress to punish bribery *per se* at a Federal election, without regard to motive, cannot be disputed. The court would not, therefore, be called upon in such a case, to alter or amend the statute so as to make it relate to an offence within the control of Congress. Whether section 5507 relate to bribery pure and simple, or to bribery committed because of the race, color, or previous condition of the voter, it is entirely within the power of Congress over Federal elections. The power to punish bribery *per se* being conceded, no question can be raised as to the power to punish bribery for any cause. The greater power necessarily includes the less.

Mr. Swager Sherley, with whom *Mr. W. B. Dixon* was on the brief, for appellee.

I. Congress has power to control Federal elections and to make punishable offences committed against the suffrage at such elections, irrespective of any power derived from the Fifteenth Amendment. *Ex parte Siebold*, 100 U. S. 375; *Ex parte Clarke*, 100 U. S. 399. In these cases Mr. Justice Bradley held sections 5515 and 5522 constitutional and in emphatic language declared the power of Congress to regulate and control Federal elections

and make punishable offences committed at such elections. Such power in Congress was not rested upon the Fifteenth Amendment, but on the provisions relative to the election of Representatives and the broad power of protecting the sources of its own existence. In *Ex parte Yarbrough*, 110 U. S. 651, and *Logan* v. *United States*, 144 U. S. 263, these cases were approved and followed, and so far as the actual facts decided, the court went a step further and held an indictment under §§ 5508 and 5520 found against an individual citizen, not an election officer, to be good.

II. The Fifteenth Amendment is the sole source of power whereby Congress is vested with the right to legislate as to state elections, but it is in addition to this a curb on the power of Congress to legislate as to Congressional elections. By its very terms it applies both to the Federal and state governments. What is prohibited to one is also prohibited to the other. The effect is to both enlarge and curtail Congressional power.

The second clause of the Fifteenth Amendment provides that "the Congress shall have the power to enforce this article by appropriate legislation." Now, in order for legislation making penal acts against the suffrage to be appropriate legislation under this amendment, such acts must be committed on account of race, color, or previous condition of servitude, and must be committed by the State or some agent of the State clothed with state power, though not necessarily acting within or in accordance with such state power. So far as this amendment is concerned, and we are now to be considered as limiting ourselves to it, the same would be true as to the United States and its officers or agents. *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 1 Woods, 308; *S. C.*, 92 U. S. 555; *Minor* v. *Happersett*, 21 Wall. 178.

The Circuit Court of Appeals for the Sixth Circuit has just rendered a decision involving these questions in the case of *Karem* v. *United States*. The opinion has not yet been reported in any publication, but we have received a record copy from which we quote. Karem, with certain other persons, was indicted in the District Court for the Western District of Kentucky for violation of § 5508, Rev. Stat. The indictment, in

substance, charged him with having conspired with others to injure, oppress, threaten, and intimidate certain negroes in the free exercise of the right of suffrage at a state election on account of their race, color, and previous condition of servitude. The court held that § 5508 did not embrace offences committed as a state election and reversed the case with instructions to sustain the demurrer to the indictment, quoting from *Slaughter House Cases*, 16 Wall. 36; *Ex parte Virginia*, 100 U. S. 339; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Harris*, 106 U. S. 629, 638; *Virginia* v. *Rives*, 100 U. S. 313; *Civil Rights Case*, 109 U. S. 3, 11; *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226.

The court said: "Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color or condition. The act commonly known as the enforcement act, being the act of May 31, 1870, 16 Stat. 140, contained a number of sections which were plainly intended to enforce the provisions of the Fifteenth Amendment. These sections were the first, third, fourth and fifth. The first has been carried into the Revised Statutes as section 2004. The third, having been held unconstitutional, is dropped out. The fourth, in a somewhat changed form, is carried into the Revised Statutes as section 5506, and the fifth section is section 5507 of the Revised Statutes. The third, fourth and fifth sections of that act have been held to have been in excess of the jurisdiction of the Congress under the Fifteenth Amendment, and therefore null and void. The ground upon which this conclusion was reached was that neither section was confined in its operation to discriminations on account of race, color or previous condition of servitude, and were broad enough to cover wrongful acts both within and without the jurisdiction of Congress under this article. *United States* v. *Reese*, 92 U. S. 214; *Lackey* v. *United States*, 46 C. C. A. 189."

While the Circuit Court of Appeals in the *Karem* case was addressing itself to state elections, yet so far as the Fifteenth Amendment, and the power derived alone therefrom, the reasoning is equally applicable and valid as to Federal elections,

and as to limitations upon the United States government as well as the state governments.

III. It is not contended that there are any statutes relating to offences at Federal elections other than sections 5507 and 5508. Section 5508 is a conspiracy section and is not involved here. The whole case, then, narrows down to the question of whether Congress has constitutionally exercised the power given it over offences of bribery committed at Federal elections. That it has the power to make punishable such offences we conceded in the fore part of this brief.

That section 5507 was intended to be appropriate legislation under the Fifteenth Amendment only is, we think, apparent. It was so regarded by the District Judge below, and in the opinion of that court, referring to this section, it is said: "Is this appropriate legislation, and within the power of Congress, under section 2 of the Fifteenth Amendment?" And nowhere in that opinion is there any attempt to base the constitutionality of the section upon other clauses of the Constitution.

That the section is not appropriate legislation under the amendment, though based on it, is, we think, apparent. This was the exact question decided by the *Lackey* case, *supra*, and the reason there given was "that section 5507 is void, as including within its operation offences not grounded upon race, color, or previous condition of servitude."

Can, then, a statute that is based on the Fifteenth Amendment, and that is meant to apply to offences committed at all elections, Federal and state, but which is not appropriate legislation under that amendment, and therefore not constitutional as to state election offences, be limited by judicial construction to Federal elections and upheld by reference to powers granted Congress as to Federal elections only?

We believe the answer to this question is found in the following cases: *United States* v. *Reese*, 92 U. S. 214; *Trade-Mark Cases*, 100 U. S. 82; *United States* v. *Harris*, 106 U. S. 629.

Section 5507 is a very different section in its scope and purpose from section 5508. This latter section is a general law that applies to a conspiracy to injure, etc., any person in the

free exercise of a right secured to him by the Constitution and laws of the United States. It applies to all manner of rights other than those simply of suffrage. It is limited to a Federal right. No question could arise as to its constitutionality; the only question would be whether it applied to any given case, and since the statute is general and does not show that Congress intended it to apply to any particular state of facts, the question of whether it so applies becomes one of whether Congress had the power to legislate as to the particular case. If it did not, the conclusion is that section 5508 was not meant to cover such a case, the presumption being that Congress intended to pass a constitutional law. So we find the courts holding the section constitutional in Federal elections, as in the *Yarbrough* case, and holding it not to apply in state elections, as in the *Karem* case.

But section 5507 plainly applies to all elections, and it requires judicial construction in the face of its plain meaning to restrict it to Federal elections. The court must add the words "at a Federal election" to so narrow it; and this is just what this court has said may not be done. The only case not in accord with this position that we have found is that of *United States* v. *Munford*, 16 Fed. Rep. 223. That court held section 5506 constitutional, and distinguished it from the *Reese* case by holding that when Congress reënacted section 4 of the enforcement act as section 5506, it modified it sufficiently to make that section apply only to Federal elections, "leaving out of it the words which, in the case of *Reese*, had been considered to bring it under the Fifteenth Amendment."

The appellee contends that section 5507 is unconstitutional, and while Congress may provide for the punishment of bribery by an individual at Congressional elections, it has not constitutionally done so, and that the judgment of the District Court must be affirmed.

Mr. Justice Brewer delivered the opinion of the court.

The single question presented for our consideration is whether section 5507 can be upheld as a valid enactment, for if

not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the Fifteenth Amendment, for it declares a punishment upon any one who by means of bribery prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action "by the United States or by any State," and does not contemplate wrongful individual acts. It is in this respect similar to the following clauses in the Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of these clauses has been often held to relate to action by a State and not by individuals. As said in *Virginia* v. *Rives*, 100 U. S. 313, 318:

"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals."

Again, in *Ex parte Virginia*, 100 U. S. 339, 346:

"They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."

Again, in *United States* v. *Cruikshank*, 92 U. S. 542, 554:

"The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government

is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was orignally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

In *Civil Rights Cases*, 109 U. S. 3, 13:

"And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be nec-

essary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."

In *United States* v. *Harris*, 106 U. S. 629, 639:

"The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

See also *Slaughter-House Cases*, 16 Wall. 36; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 233.

But we are not left alone to this reasoning from analogy. The Fifteenth Amendment itself has been considered by this court and the same limitations placed upon its provisions. In *United States* v. *Reese*, 92 U. S. 214, 217, we said:

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the

amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

In passing it may be noticed that this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority. The matter complained of was purely an individual act of the defendant. Nor is it charged that the bribery was on account of race, color or previous condition of servitude. True, the parties who were bribed were alleged to be "men of African descent, colored men, negroes, and not white men," and again, that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment to the Constitution of the United States." But this merely describes the parties wronged as within the classes named in the amendment. They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color or previous condition of servitude is charged.

These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color or previous condition of servitude is likewise destitute of support by such amendment.

But the contention most earnestly pressed is that Congress has ample power in respect to elections of Representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power. It is not legislation in respect to elections of Federal

officers, but is levelled at all elections, state or Federal, and it does not purport to punish bribery of any voter, but simply of those named in the Fifteenth Amendment. On its face it is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the Fifteenth Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to the statute. If the contention be sustained it is simply a transformation of the statute in its single purpose and scope. This question has been by this court in two cases carefully considered and fully determined. In *United States* v. *Reese*, *supra*, there was an indictment, one count of which was based upon the third and another upon the fourth section of the act of May 31, 1870, 16 Stat. 140, the fifth section of which act is substantially repeated in section 5507, Rev. Stat. It is true that, as stated, section four contains "no words of limitation or reference even that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment. That section has for its object the punishment of all persons who by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting." And it is also true that the government expressly waived the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment to the Constitution. Nevertheless the decision is directly in point. We said (p. 221):

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate

only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the goverment. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Again, in the *Trade-Mark Cases*, 100 U. S. 82, the validity of an indictment under the fourth and fifth sections of the act of Congress to punish the counterfeiting of trade-marks, 19 Stat. 141, was considered. The Congressional enactments at that time attempted to authorize trade-marks generally, and the statute referred to was equally general. It was held that under the Constitution, Congress did not have control over the subject of trade-marks generally, and, referring to the contention that to a limited extent it had, we said (p. 98):

"It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. . . . While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the

words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States* v. *Reese*, 92 U. S. 214. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude. It was urged, however, that the general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said" (and then follows the quotation we have already made from that case).

We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offences when committed in respect to the election of Federal officials. At the same time it is all-important that a criminal statute should define clearly the offence which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the National Constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fix some particular transaction which Congress might have legislated for if it had seen fit.

The judgment of the District Court is

Affirmed.

Mr. Justice McKenna took no part in the decision of this case.

Mr. Justice Harlan and Mr. Justice Brown dissented.

SWAN AND FINCH COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 258. Argued April 22, 23, 1903.—Decided May 18, 1903.

The placing on board vessels in the United States and bound for foreign ports of lubricating oils manufactured from imported rape seed on which duty has been paid and which oils are for use in, and to be consumed by the vessels is not such an exportation of the oils as entitles the sellers to drawbacks under § 22 of the act of August 28, 1894, reënacted as § 30 of the act of July 27, 1897.

This has been the uniform construction of the department charged with the execution of the statute.

Where the burden is placed upon the citizen, if there be a doubt it must be resolved in favor of the citizen; but as the right to drawbacks is a privilege granted by the government any doubt as to the construction of the statute must be resolved in favor of the government.

SECTION 22, of the act of August 28, 1894, 28 Stat. 509, 551, reënacted as section 30 of the act of July 27, 1897, 30 Stat. 211, is as follows:

"SEC. 22. That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: *Provided*, That when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in

the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

During the years 1895, 1896, 1897, the appellant, a corporation engaged in business as importer, manufacturer and exporter of oils at New York city and elsewhere in the United States, having used in the manufacture of certain kinds of lubricating oils imported rape seed oil on which duties had been paid, placed on board of vessels bound for foreign ports, lubricating oils so manufactured, and claimed a drawback of the duties paid on the imported rape seed oil used therein. The Treasury Department allowed and paid the drawback on such manufactured oils as were shipped to foreign countries and there landed, but refused to pay any on such as were placed on board for use and consumed in use on the vessels. The appellant brought this suit in the Court of Claims to recover the drawbacks on the last named oils. That court decided against it, 37 C. Cl. 101, and from such decision this appeal was taken.

Mr. William B. King for appellant. *Mr. George A. King* was on the brief.

Mr. Assistant Attorney General Pradt for appellee.

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

The statute allows the drawback "on the exportation," and the question is whether goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed, are exported.

The careful opinion of the Court of Claims, which in general we approve and to which we refer, relieves us from the necessity of an extended discussion. Whatever primary meaning may

be indicated by its derivation, the word "export" as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. "As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other." 17 Op. Attys. Gen. 583.

True, the context may sometimes give to the word a narrower meaning, and in the execution of the administrative affairs of government it may have been applied to cases in which there was not in the full sense of the term an exportation, yet these are exceptions and do not destroy its general signification. It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego as "exported," although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word "export." Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or State as the intended destination of the goods is essential to the idea of exportation.

Counsel for appellant, after quoting from several dictionaries, say:

"These definitions show that the word has two meanings:

"(1) Its primary, general or essential meaning—to carry or send out of a place; and

"(2) Its secondary, specific or especial meaning—to send out from one country to another.

"Of all goods sent out of this country but a small proportion fails to reach a foreign country; the amount consumed or lost at sea is minute in comparison. In ordinary use, therefore, the foreign destination is implied. We claim that, however usual, it is not essential, and that here the original and primary definition of the word should be applied to goods carried out of the country on vessels in the foreign trade, although they never reach a foreign country."

To this we are unable to yield our assent:

First. The fact that the words "export" and "exportation" are, as we have indicated, generally used in the sense of transportation from this to a foreign country, makes against the contention that it is here used in a different sense.

Second. The purpose with which the drawback statute was enacted is against it. In *Campbell* v. *United States*, 107 U. S. 407, 413, we said:

"The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country—articles which are not sold or consumed in the United States."

So also in *Tide Water Oil Company* v. *United States*, 171 U. S. 210, 216:

"The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

Third. The uniform construction placed by the department charged with the execution of the statute has been against it.

Fourth. Being a governmental grant of a privilege or benefit it is to be construed in favor of the government and against the party claiming the grant. Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the government. In *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616, the one rule was thus stated:

"We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers* v. *Barney*, 5 Blatch. 202; *United States* v. *Isham*, 17 Wall. 496, 504; *Gurr* v. *Scudds*, 11 Exch. 190, 191; *Adams* v. *Bancroft*, 3 Sumner, 384. See also *American Net & Twine Company* v. *Worthington*, 141 U. S. 468, 474.

On the other hand, in *Hannibal &c. Railroad Company* v. *Packet Company*, 125 U. S. 260, 271, we said, citing several authorities:

"But if there be any doubt as to the proper construction of this statute, . . . then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor."

For these reasons we think the judgment of the Court of Claims was correct, and it is

Affirmed.

MR. JUSTICE BROWN and MR. JUSTICE PECKHAM dissented.

MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* PHELPS.

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

No. 263. Argued April 24, 27, 1903.—Decided May 18, 1903.

Under the statutes of Kentucky service of a summons upon the insurance commissioner in an action against an insurance company doing business in the State is sufficient to bring the company into court. This applies to a company whose license has been cancelled by the commissioner but which after such cancellation has continued to collect premiums and assessments on policies remaining in force. A judgment based upon such service is, in the absence of anything else to impeach it, valid.

A proceeding, based upon a judgment so obtained, for the appointment of a receiver, is not a new and independent suit, but a mere continuation of the action already passed into judgment, and in aid of the execution thereof, and can be initiated by the filing of an amended or supplementary petition. When such an amended petition is filed the action cannot be removed to the Federal courts, as the time prescribed therefor by the statute has already passed. Nor has the Federal court jurisdiction in an equity action to enjoin proceedings under the supplementary petition, as it is a mere continuation of an action at law. Where a proceeding is not warranted by the law of a State, relief must be sought by review in the appellate court of the State and not by collateral attack in the Federal courts.

SECTION 631, Kentucky statutes, 1899, (Laws 1893, chap. 171, sec. 94,) reads as follows:

"SEC. 631. Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

On May 10, 1893, the appellant, The Mutual Reserve Fund Life Association, hereinafter called the association, acting under said section, by resolution of its board of directors, consented that the insurance commissioner of Kentucky should be authorized to receive service of process in any action brought or pending in Kentucky, and also that like valid service of process might be made upon every agent then or thereafter acting for it in Kentucky.

On October 10, 1899, the insurance commissioner cancelled the license which had theretofore been issued to the association, and gave it notice that from and after that date all authority granted by his department to it, and all licenses issued to its agents to do business in the State of Kentucky, were revoked. And from and after that date the association had no agent or agents in the State of Kentucky and did no new business whatever in the State, but at one time, for the convenience of the holders of certificates residing in Jefferson County, permitted them to remit dues and assessments through the Western Bank, located in the city of Louisville.

On February 28, 1900, James S. Phelps commenced an action in the Circuit Court of Jefferson County, Kentucky, against the association, alleging that on July 8, 1885, he had made application for membership, and that on July 16, 1885, his application had been approved and a certificate of insurance issued to him. Breaches of the agreement on the part of the defendant were alleged, and a judgment asked for $1994.20. A summons was issued and served on the insurance commissioner, and an alias summons was also issued and served upon Ben Frese, as the managing agent and chief officer and agent of the association in Jefferson County. The defendant appeared specially and moved to quash the service on each summons. The motion was heard on affidavits and overruled. The defendant taking no further action, judgment was rendered on May 19, 1900, in favor of the plaintiff for $1994 with interest.

On August 4, 1900, the plaintiff filed an amended and supplemental petition, in which he alleged the filing of the original petition, the judgment, the issue of execution, a return of *nulla bona;* that the defendant had a large number of policy holders in the State who at stated times and regular intervals became indebted to it for premiums and assessments upon its policies of insurance, and prayed for a general attachment, or in lieu thereof the appointment of a receiver to take charge of the business and property of the defendant in Kentucky, and that all revenues and income accruing to it from policy holders and other debtors be ordered paid to the receiver. Upon the filing of this amended and supplemental petition the court appointed the Fidelity Trust and Safety Vault Company, the other appellee, hereinafter called the company, a receiver of all the property of the defendant in Kentucky, directed it to receive and collect all moneys and debts then owing or thereafter to accrue to the said defendant, and ordered all debtors of the defendant to pay to such receiver all premiums and assessments which might become due or owing to it; such receivership to continue until the judgment of the plaintiff and all costs and expenses had been paid, and then to terminate. The company qualified as such receiver and gave notice to the policy holders of the defendant.

On August 22, 1900, the association applied by petition and bond for a removal of the case to the Circuit Court of the United States for the District of Kentucky, which application was denied. It does not appear that any copy of the record was filed in the Federal court. But it commenced this suit in that court against Phelps (the judgment creditor) and the company, to enjoin them from further proceeding under the order made by the state court. The court issued an injunction, as prayed for. 103 Fed. Rep. 515. On February 2, 1901, the defendants moved to dissolve the injunction, which motion was overruled and an appeal taken to the United States Circuit Court of Appeals for the Sixth Circuit. By that court the decision of the Circuit Court was reversed February 4, 1902, 50 C. C. A. 339; 112 Fed. Rep. 453, and the case remanded, with directions to dismiss the bill of complaint. From such decree the association appealed to this court.

Mr. William D. Guthrie and *Mr. Edmund F. Trabue*, with whom *Mr. George Burnham, Jr.*, and *Mr. Sewell T. Tyng* were on the brief for appellant.

The allegations of the bill, which, under defendant's motion must be taken as true, show that the relief sought by way of injunction is to restrain the enforcement of a void judgment entered in a court without jurisdiction of the defendant who is the complainant in this action. The judgment on its face is valid, and under the pretended authority thereof the defendants in this action are taking steps which will produce great and irreparable damages to complainant.

I. The appeal is authorized by § 6 of the act of March 3, 1891, because the jurisdiction of the Circuit Court rests not only on diverse citizenship but also on a controversy arising under the Fourteenth Amendment. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277; *Huguley Mfg. Co.* v. *Galeton Mills*, 184 U. S. 290.

II. While § 720, Rev. Stat., prohibits an injunction to stay proceedings in any court of a State, it does not prohibit an in-

junction against parties who are attempting acts of trespass under color of a void order or judgment. If the order be void upon its face, ordinarily a defence thereto is ample at law; but if valid upon its face, as in this case, equity will relieve. *York* v. *Texas*, 137 U. S. 15; *Pennoyer* v. *Neff*, 95 U. S. 714; *Northern Pacific Ry. Co.* v. *Kurtzman*, 82 Fed. Rep. 241, and cases cited on p. 243; *Terre Haute etc. Ry. Co.* v. *Peoria etc. Ry. Co.*, 82 Fed. Rep. 943. The difference between staying proceedings in a court and restraining trespass under a void judgment or order of a court acting without jurisdiction is fundamental. *Fitts* v. *McGhee*, 172 U. S. 516, 529; *Osborn* v. *Bank*, 9 Wheat. 738; *Smyth* v. *Ames*, 169 U. S. 466; *Balt. & O. R. Co.*, v. *Wabash R. Co.*, 119 Fed. Rep. 678. In fraud cases it has always been argued that relief by injunction could not be granted owing to § 720, but this court has uniformly supported the jurisdiction. *Marshall* v. *Holmes*, 141 U. S. 589, 599; other analogous cases are *French* v. *Hay*, 22 Wall. 238, 248; *Robb* v. *Vos*, 155 U. S. 13, and see cases cited p. 38; *Dietzsch* v. *Huidekoper*, 163 U. S. 494; *Wagner* v. *Drake*, 31 Fed. Rep. 849; *National Surety Co.* v. *State Bank*, 120 Fed. Rep. 593. Section 720 is limited by the due process of law provision of the Fourteenth Amendment. Decisions holding that replevin or injunction will not lie against an officer in possession of property of a stranger to the proceeding, at the suit of such stranger, are entirely consistent with the proposition that the property owner may maintain a suit to protect it against one assuming to act under void process. *Kern* v. *Huidekoper*, 103 U. S. 485, in which *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334, are distinguished; *Gumbel* v. *Pitkin*, 124 U. S. 131, 146. See also *Julian* v. *Central Trust Co.*, 115 Fed. Rep. 956; *Shields* v. *Coleman*, 157 U. S. 168, 182; *Central Nat. Bk.* v. *Stevens*, 169 U. S. 432; *Simpson* v. *Ward*, 80 Fed. Rep. 561.

The proposition that to determine the invalidity of, and give relief against, a state court order alleged to be void for want of jurisdiction it would be necessary to exercise appellate or revisory jurisdiction over that court has been answered by this court. *Johnson* v. *Waters*, 111 U. S. 640, 667; *Marshall* v.

Holmes, 141 U. S. 589, 599; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98. Under § 285, Civil Code of Kentucky, the state courts are prohibited from enjoining the execution of a judgment of another court of the State even though void, *Jacobsen* v. *Wernert*, 19 Ky. L. R. 662; and in a case like this no relief can be had except in the Federal courts, which are not bound by such a statute. *Barrow* v. *Hunton*, 99 U. S. 80.

III. Although in every case of special appearance to contest jurisdiction an issue is raised as to facts warranting jurisdiction, the defendant does not waive any right by the special appearance. *Harkness* v. *Hyde*, 98 U. S. 476; *Mex. Cent. Ry.* v. *Pinkney*, 149 U. S. 194, 209; *Goldey* v. *Morning News*, 156 U. S. 518, 526. There is no rule in Kentucky that such an appearance constitutes a general appearance, as was the case in *York* v. *Texas*, 137 U. S. 15, and *Kauffman* v. *Wootters*, 138 U. S. 285, but the rule is as above stated; but an appeal cannot be taken without entering a general appearance. *Sun Mut. Ins. Co.* v. *Crist*, 19 Ky. L. R. 305; *Newport News etc. Co.* v. *Thomas*, 96 Kentucky, 613; *Chesapeake etc. R. Co.* v. *Heath*, 87 Kentucky, 651, 659; *Maude* v. *Rodes*, 4 Dana, 147.

The ruling of a state court in determining its own jurisdiction is not conclusive in a direct proceeding to set aside a judgment or to enjoin its enforcement. *Rose* v. *Himely*, 4 Cranch, 241, 268; *Elliott* v. *Peirsol*, 1 Pet. 328, 340; *Harris* v. *Hardeman*, 14 How. 334, 341; *Starbuck* v. *Murray*, 5 Wend. 148, 158; *Thompson* v. *Wallace*, 18 Wall. 457, 468; and see also *Cooper* v. *Newell*, 173 U. S. 555, and cases cited p. 565; and cases, *supra*. In cases of removal to the Federal courts the decision of the state court in favor of its own jurisdiction is regarded as a usurpation. *Gordon* v. *Longest*, 16 Pet. 97, 104; *Insurance Co.* v. *Dunn*, 19 Wall. 214, 224; *Removal Cases*, 100 U. S. 457, 475; *Railroad Co.* v. *Mississippi*, 102 U. S. 135.

The authority of the insurance commissioner of the State to represent the association did not continue after its exclusion from the State. *Home Ben. Soc.* v. *Muehl*, 59 S. W. Rep. 520, distinguished, and see *Forrest* v. *Pittsburgh Bridge Co.*, 116 Fed. Rep. 357. A state court cannot, under pretence of construing a statute, affect the right or duty of the Federal court

to determine if a corporation was actually served within the jurisdiction. *Swann* v. *Mut. Res. F. L. Assn.*, 100 Fed. Rep. 922; *Millan* v. *Mut. Res. F. L. Assn.*, 103 Fed. Rep. 764; *Friedmann* v. *Empire L. Ins. Co.*, 101 Fed. Rep. 535; *Mut. Res. F. L. Assn.* v. *Boyer*, 62 Kansas, 31, 37–42; *St. Clair* v. *Cox*, 106 U. S. 350; *People* v. *Com. Alliance L. Ins. Co.*, 7 N. Y. App. Div. 297. The inquiry as to whether the state court acquires jurisdiction is a Federal question. *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Conn. Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 609; *McCord Lumber Co.* v. *Doyle*, 97 Fed. Rep. 22; *Moredock* v. *Kirby*, 118 Fed. Rep. 180; *Cady* v. *Associated Colonies*, 119 Fed. Rep. 420. See also *Williamson* v. *Berry*, 8 How. 495, 540.

As to the receivership proceeding, *Davidson* v. *Simmons*, 11 Bush, 330, does not apply, but a summons was requisite to jurisdiction. *Caldwell* v. *Bank*, 58 S. W. Rep. 589; *McCallister's Adm'r* v. *Savings Bk.*, 80 Kentucky, 684; *Brownfield* v. *Dyer*, 7 Bush, 505; *Hall* v. *Crogan*, 78 Kentucky, 11; *Kelly* v. *Stanley*, 86 Kentucky, 240; *Redwine* v. *Underwood*, 101 Kentucky, 191; §§ 70, 439, 441, Civil Code of Kentucky.

Kentucky statutes, 1899, §§ 965, 968, limit the control of courts over judgments for sixty days. *Louisville etc. Lime Co.* v. *Kerr*, 78 Kentucky, 12. Judgments cannot be controlled by the court after the term is over. *Brooks* v. *Railroad Co.*, 102 U. S. 107; *Muller* v. *Ehlers*, 91 U. S. 249; *City of Manning* v. *German Ins. Co.*, 107 Fed. Rep. 52; *Elder* v. *Richman etc. Min. Co.*, 58 Fed. Rep. 536; *Van Dorn* v. *Penn. R. R. Co.*, 93 Fed. Rep. 260. See also *Sibbald* v. *United States*, 12 Pet. 488, 492; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665, 672; *Hickman* v. *Ft. Scott*, 141 U. S. 415; *Morgan's S. S. Co.* v. *Texas etc. Ry. Co.*, 32 Fed. Rep. 525, 530; *McGregor* v. *Vermont L. & T. Co.*, 104 Fed. Rep. 709; *United States* v. *1621 Lbs. of Fur Clippings*, 106 Fed. Rep. 161; *Reynolds* v. *Manhattan Trust Co.*, 109 Fed. Rep. 97.

In Kentucky the filing of an amended or other pleading after judgment necessarily requires reopening the case and setting aside the judgment, and this can only be done in accordance with § 579. *Brown* v. *Vancleave*, 86 Kentucky, 381; *Meadows*

v. *Goff*, 90 Kentucky, 540; Civil Code Kentucky, §§ 342, 414, 518, 520; *Anderson* v. *Anderson*, 18 B. Mon. 95; *Hocker* v. *Gentry*, 3 Met. 463, 469; *Scott* v. *Scott's Exr.*, 9 Bush, 174; *Coffey* v. *Proctor Coal Co.*, 14 Ky. L. R. 415; *Maddox's Exr.* v. *Williams*, 87 Kentucky, 147.

In Kentucky a void judgment binds nobody, but may be resisted collaterally as well as attacked directly. *Spencer* v. *Parsons*, 89 Kentucky, 577; *Stevens* v. *Deering*, 10 Ky. L. R. 393; *Jacobsen* v. *Wernert*, 19 Ky. L. R. 662. There is nothing in these principles inharmonious with the rule that a court's jurisdiction continues until the judgment is satisfied. *Weyman* v. *Southard*, 10 Wheat. 1; *Riggs* v. *Johnson County*, 6 Wall. 166, 187, 197; *Covell* v. *Heyman*, 111 U. S. 176, 183; *Rio Grande R. R. Co.* v. *Gomila*, 132 U. S. 478, 483. The determination of the state court as to form of procedure not involving jurisdiction is conclusive. *Cornett* v. *Williams*, 20 Wall. 226, 250; *Laing* v. *Rigney*, 160 U. S. 531; *Hekking* v. *Pfaff*, 82 Fed. Rep. 403; *Lynde* v. *Lynde*, 181 U. S. 183; *Fish* v. *Smith*, 73 Connecticut, 377, 391.

Mr. Benjamin F. Washer, with whom *Mr. Frederick Forcht*, *Mr. William H. Field* and *Mr. Norton L. Goldsmith* were on the brief, for appellees.

I. The judgment of the state court was valid, being based upon jurisdiction in the court both of the subject matter and of the parties. The service on the insurance commissioner was sufficient. *Conn. Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602; *Swann* v. *Mut. Res. F. L. Assn.*, 100 Fed. Rep. 922; Kerr on Insurance, § 26; *Home Ben. Soc.* v. *Muehl*, 22 Ky. L. R. 1378; *Germania Ins. Co.* v. *Ashby*, 23 Ky. L. R. 1564. A state court can construe its own statutes. *Commercial Bank* v. *Buckingham*, 5 How. 317; *Lawler* v. *Walker*, 14 How. 149; *Central Land Co.* v. *Laidley*, 159 U. S. 103. The second summons was properly served on one who was ascertained to be the local treasurer of the defendant. All questions raised and determined in the state court were in the Federal court *res adjudicata*. *Mock* v. *Insurance Co.*, 10 Fed. Rep. 696; Work on Courts and their Jurisdiction, p. 164; Black on Judgments, § 273.

II. The appointment of the receiver was valid and the procedure adopted was legally sufficient. *Caldwell* v. *Deposit Bank*, 18 Ky. L. R. 156; *Lewis* v. *Deposit Bank*, 22 Ky. L. R. 684; *Brown* v. *Vancleave*, 86 Kentucky, 381; *Meadows* v. *Goff*, 90 Kentucky, 540; *Leathe* v. *Thomas*, 97 Fed. Rep. 136. *Laing* v. *Rigney*, 160 U. S. 542, cited and distinguished. A court of equity has power to sequester property through the medium of a receivership when the circumstances of the cause appear to demand such action. *Shields* v. *Coleman*, 157 U. S. 178; Thompson on Corp. § 6880; Cook on Corp. § 863, p. 2017; *Commercial Bank* v. *Corbett*, 5 Sawyer, 172. The appointment of the receiver was a question of procedure only, and due process of law under the Fourteenth Amendment was not involved. *Missouri* v. *Lewis*, 101 U. S. 31; *Walker* v. *Sauvinet*, 92 U. S. 93; *Brown* v. *New Jersey*, 175 U. S. 172; *Hurtado* v. *California*, 110 U. S. 516; *Hodgson* v. *Vermont*, 168 U. S. 262; *Bolln* v. *Nebraska*, 176 U. S. 83; *Iowa Central* v. *Iowa*, 160 U. S. 389.

III. The proceedings subsequent to the rendition of the judgment were not removable to the Federal court; the proceeding was in execution of a judgment. *Dere* v. *Strother*, 10 Fed. Rep. 406; *Cook* v. *Whitney*, 3 Woods, 715; *Claflin* v. *McDermott*, 12 Fed. Rep. 375; *Cortes Co.* v. *Thannhausen*, 9 Fed. Rep. 226; Desty's Fed. Procedure, 9th ed. p. 448. The petition came too late. *Fidelity Trust Co.* v. *N. M. & M. Co.*, 70 Fed. Rep. 403. The construction by the state court of § 631 of Kentucky statutes will be adopted by the Federal court if it does not violate the Constitution. *Com. Bank* v. *Buckingham*, 5 How. 326; *Murray* v. *Gibson*, 15 How. 423; Guthrie on Fourteenth Amendment, p. 44.

IV. The property impounded by the receivership was not a trust fund exempt from process in this suit. *Missionary Soc.* v. *Hinman*, 13 Fed. Rep. 161; *Beckett* v. *Sheriff*, 21 Fed. Rep. 32; *Simpson* v. *Ward*, 80 Fed. Rep. 561. The state court was the proper tribunal to decide this question. *Dere* v. *Strother* 10 Fed. Rep. 406; *Riggs* v. *Johnson County*, 6 Wall. 198; *Central Bank* v. *Stevens*, 169 U. S. 432.

V. No multiplicity of suits was threatened.

VI, VII. The state court possessed jurisdiction, and the receivership was only a proceeding to aid execution of the judgment previously obtained; and the Federal court was without authority to enjoin. § 720, U. S. Rev. Stat.; *Diggs* v. *Walcott*, 4 Cranch, 179; *Taylor* v. *Carryl*, 20 How. 583, and English decisions there cited as to jurisdiction; *Peck* v. *Jennes*, 7 How. 612; *Covell* v. *Heyman*, 111 U. S. 179; *Senior* v. *Pierce*, 31 Fed. Rep. 628; *Dohn* v. *Ryan*, 31 Fed. Rep. 638; *Rothschild* v. *Harbrook*, 65 Fed. Rep. 284; *In Re Hall*, 73 Fed. Rep. 530; *Leathe* v. *Thomas*, 97 Fed. Rep. 136; *Mills* v. *Provident Trust Co.*, 100 Fed. Rep. 344; *Southern Bank* v. *Thornton*, 75 Fed. Rep. 929; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 13 Wall. 334; *Am. Assn.* v. *Hurst*, 59 Fed. Rep. 5; *Hutchinson* v. *Green*, 6 Fed. Rep. 838; *Rensselaer* v. *Bennington R. Co.*, 18 Fed. Rep. 617; *Yick Wo* v. *Crowley*, 26 Fed. Rep. 207; *Rhodes Mfg. Co.* v. *New Hampshire*, 70 Fed. Rep. 72; *Dillon* v. *Kansas City R. Co.*, 43 Fed. Rep. 111; *Missouri R. Co.* v. *Scott*, 13 Fed. Rep. 793; *Tarble's Case*, 13 Wall. 401; *Gates* v. *Bucki*, 53 Fed. Rep. 964. Cases cited by appellant distinguished.

VIII. The proper method of bringing to the attention of a Federal court the decision of a state court involving the merits or jurisdiction is by an appeal to the highest court of the State and then a writ of error to the Supreme Court of the United States. *C. & O. R. R. Co.* v. *White*, 111 U. S. 137, and cases cited; *Peck* v. *Jennes*, 7 How. 612; cases cited in Judge Lurton's opinion below. A writ of prohibition might have been secured from the Kentucky Court of Appeals if the lower court was proceeding without jurisdiction. *Weaver* v. *Toney*, 107 Kentucky, 419, and see *Youngstown Bridge Co.* v. *White's Admr.*, 105 Kentucky, 282.

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

Many questions were elaborately discussed by counsel both orally and in brief, but we are of the opinion that the decisions of two or three will dispose of the case. First, the service of summons on the insurance commissioner was sufficient to bring

the association into the state court as party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Kentucky were continued in force after the action of the insurance commissioner on October 10, 1899, and that on said policies the association had collected and was collecting dues, premiums and assessments. It was, therefore, doing business within the State. *Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602. The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the State of Kentucky under license from the State. Under those circumstances the authority of the insurance commissioner to receive summons in behalf of the association was sufficient. Such was the ruling of the Court of Appeals of Kentucky. *Home Benefit Society of New York* v. *Muehl*, 22 Ky. Law Rep. 1378; 59 S. W. Rep. 520. In that case the society while doing business in the State issued the policy sued on, but in April, 1894, before the action was brought, ceased to do business and withdrew all of its agents. Service on the commissioner was held good. The court, in its opinion, after referring to a statute of 1870 and the change made by section 631, under which this service was made, said (p. 1379):

"It is sufficient to say that the agency created by the act of 1893 is, in its terms, broader than that created by the act of 1870. The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication. And when we consider the purpose of the act it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the State, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the State upon whom process might be served in suits upon contracts made in this State, whatever may be held as to suits upon contracts entered into elsewhere." See also *Germania Ins. Co.* v. *Ashby*, 23 Ky. Law Rep. 1564.

Such decision of the highest court of Kentucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek for the purpose of enforcing his claims the State in which the corporation has its home. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the State leaves the corporation without any person upon whom process can be served. In order to remedy this defect some States, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the State, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the State, but was in effect by the State prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the State had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens who had dealt with the association of

the right to obtain relief in its courts. We conclude, therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the state court, and there being nothing else to impeach the judgment it must be considered as valid.

Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of *nulla bona*. It is what is known as a supplementary proceeding, one known to the jurisprudence of many States, and one whose validity in those States has been recognized by this court. *Williams* v. *Hill*, 19 How. 246; *Atlantic & Pacific Railroad Company* v. *Hopkins*, 94 U. S. 11; *Ex parte Boyd*, 105 U. S. 647; *Street Railroad Company* v. *Hart*, 114 U. S. 654. It is recognized in some cases in Kentucky. *Caldwell* v. *Bank of Eminence*, 18 Ky. Law Rep. 156; *Caldwell* v. *Deposit Bank*, 22 Ky. Law Rep. 684. This proceeding was treated by the state court as one merely supplemental in its character. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the Federal court, the time therefor prescribed by the statute having passed. 24 Stat. 554; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673–684. Being a mere continuation of the action at law, and not removable to the Federal court, the latter had no jurisdiction to enjoin the proceedings under it. It is contended that such a supplementary proceeding is not warranted by the laws of Kentucky; that there is no statute of that State justifying it. But it has been sanctioned by the judgment of the court in which the proceeding was had, and cannot be treated by the Federal courts as unauthorized. *Laing* v. *Rigney*, 160 U. S. 531. See also *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, 478. If not warranted by the law of the State relief must be sought by re-

view in the appellate court of the State, and not by collateral attack in the Federal court.

For these reasons we think the decision of the Court of Appeals of the Sixth Circuit was right, and it is

Affirmed.

ATLANTIC AND PACIFIC TELEGRAPH COMPANY *v.* PHILADELPHIA.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 163. Argued February 24, 1903.—Decided June 1, 1903.

The following propositions as to the taxation by States and their municipalities of corporations engaged in carrying on interstate commerce have been settled:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects are national in their character, or admit only of one uniform system or plan of regulation. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492.
2. No State can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce.
3. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce.
4. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States.
5. No corporation, even though engaged in interstate commerce, can appropriate to its own use property public or private, without liability to a charge therefor.

Where telegraph companies, engaged in interstate commerce, carry on their business so as to justify police supervision, the municipality is not obliged to furnish such supervision for nothing, but it may, in addition to ordinary property taxation, subject the corporations to reasonable charges for the expense thereof.

The reasonableness of such charges will depend upon all the circumstances involved in the particular case, and, if in a case tried before a jury the evidence in regard thereto is not such as to exclude every conclusion except one, the question of reasonableness should be submitted to the jury.

THIS action was commenced in the Common Pleas Court of Philadelphia on December 31, 1891, to recover the sum of $3715 as license fees alleged to be due the city for the six preceding years. The case was removed by the defendant to the Circuit Court of the United States for the Eastern District of Pennsylvania. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff for a part of the sum claimed, which judgment was thereafter reversed by the Circuit Court of Appeals, 102 Fed. Rep. 254. A second trial was had in April, 1901, before the court and a jury, which resulted in a verdict and judgment for the full amount claimed with interest. From such judgment the case was brought to this court directly on writ of error, on the ground that it involved the construction and application of the Constitution of the United States; that the action was brought to recover from the telegraph company certain license charges imposed by the city which the company claimed the city had no right or power to impose, for the reason that it was a regulation of commerce between the States.

Mr. John F. Dillon and *Mr. H. B. Gill* for plaintiff in error. *Mr. Silas W. Pettit*, *Mr. George H. Fearons*, *Messrs. Brown & Wells*, *Mr. Rush Taggart* and *Mr. Henry D. Estabrook* were on the brief.

Mr. John L. Kinsey for defendant in error. *Mr. James Alcorn* was on the brief.

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

The question presented is as to the validity of the charges imposed by the ordinances of the city of Philadelphia upon the

defendant (plaintiff in error), a corporation engaged in interstate commerce. Few questions are more important or have been more embarrassing than those arising from the efforts of a State or its municipalities to increase their revenues by exactions from corporations engaged in carrying on interstate commerce. There have been many cases, in whose decision some propositions have been adjudicated so often as to be no longer open to discussion.

First. As said by Mr. Justice Bradley, speaking for the court, in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation."

In addition to the many cases referred to by him the following subsequent decisions may also be cited: *Fargo* v. *Michigan*, 121 U. S. 230, 246; *Philadelphia Steamship Company* v. *Pennsylvania*, 122 U. S. 326, 336, 346; *Western Union Telegraph Company* v. *Pendleton*, 122 U. S. 347, 357; *Bowman* v. *Chicago &c. Railway Company*, 125 U. S. 465, 497; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648; *Asher* v. *Texas*, 128 U. S. 129, 131; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148; *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Lyng* v. *Michigan*, 135 U. S. 161; *McCall* v. *California*, 136 U. S. 104, 109; *In re Rahrer*, 140 U. S. 545, 555; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Brennan* v. *Titusville*, 153 U. S. 289, 304; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 471; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 21; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Stockard* v. *Morgan*, 185 U. S. 27.

Second. No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211; *Pickard* v. *Pullman Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230, 245; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S.

326, 336; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645; *Asher* v. *Texas*, 128 U. S. 129; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *McCall* v. *California*, 136 U. S. 104, 115; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220.

Third. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. *State Tax on Railway Gross Receipts*, 15 Wall. 284, 293; *The Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 123; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 649; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Massachusetts* v. *Western Union Tel. Co.*, 141 U. S. 40; *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220.

Fourth. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States. *Delaware Railroad Tax*, 18 Wall. 206, 232; *Postal Tel. Cable Company* v. *Adams*, 155 U. S. 688, 696; *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431, 437; *Central Pacific Railroad* v. *California*, 162 U. S. 91; *Western Union Telegraph Company* v. *Taggart*, 163 U. S. 1, 18; *Western Union Telegraph Co.* v. *Missouri ex rel. Gottleib*, *post*, 163.

Fifth. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. *Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Huse* v. *Glover*, 119 U. S. 543; *Ouachita Packet Company* v. *Aiken*, 121 U. S. 444; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92; *St. Louis* v. *Western Union Telegraph Company*, 149 U. S. 465; *Postal Tel. Cable Company* v. *Baltimore*, 156 U. S. 210; *Richmond* v. *Southern Bell Telephone Company*, 174 U. S. 761, 771.

The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision, such as was presented in *Western Union Telegraph Company* v. *New Hope*, 187 U. S. 419, where we said (p. 427):

"This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on."

Following that decision, we hold that the city of Philadelphia had power to pass such an ordinance as this, requiring the company to pay a reasonable license fee for the enforcement of local governmental supervision. In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.

But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purposes of revenue. When it is authorized only in support of police supervision the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost that would be the limit of the tax. In the nature of things that, however, is ordinarily impossible, and so the municipality is at liberty to make the charge large enough to cover any reasonable antici-

pated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost.

Now, the license in question is, as stated, confessedly not for the purpose of raising revenue. Indeed, if it were, as it appears by the affidavit of defence that the company had paid all taxes charged upon its property as property, it might be obnoxious to a complaint of double taxation. It is not like the tax in *Postal Cable Telegraph Company* v. *Adams*, 155 U. S. 688, which, although called a privilege tax, was in fact a property tax, and the only property tax upon the company, in respect to which we said (p. 696):

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We pass, therefore, to consider the question of the reasonableness of this license charge. *Prima facie*, it was reasonable. *Western Union Telegraph Company* v. *New Hope*, *supra*. It devolved upon the company to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed. In support of this action it is contended that the question of reasonableness was one to be determined by the court and not by the jury, and further

that there was no testimony from which either a court or jury could find that the charge was unreasonable.

It may be conceded that, generally speaking, whether an ordinance be reasonable, is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations, 4th ed. vol. 1, sec. 327: "Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible." While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony. As said by Mr. Justice Shiras, when presiding in the Court of Appeals in the Third Circuit, in a similar case, *City of Philadelphia* v. *Western Union Telegraph Company*, 89 Fed. Rep. 454, 461:

"When it is said, in some of the cases, that such a question is for the determination of the court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observations is that courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and amount of the charges. . . . Regarding, then, the issue to be tried as one of fact, we think it is one which, from its nature, is eminently fit for the determination of a jury. The expenses attending direct regulation and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a court; but we think that the rule laid down in Cooley Const. Lim. (ed. 1886) p. 242, may be safely adopted: 'A municipal corporation may impose under the police power such a charge for the license as will cover the necessary ex-

penses of issuing it, and the additional labor of officers and other expenses thereby incurred.'"

It is urged by the city that inasmuch as the license fees here charged are the same as those charged by the borough of New Hope, the validity of which was sustained in *Western Union Telegraph Company* v. *New Hope*, *supra*, it necessarily follows that the charges here imposed are reasonable. But this is a mistake. What is reasonable in one municipality may be oppressive and unreasonable in another. "In determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country." 1 Dillon's Municipal Corporations, 4th ed. sec. 327.

The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of the jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the court might be justified in directing a verdict. After a careful review of the evidence we are constrained to believe that it was not such as to exclude any other conclusion than that directed by the court. We do not hold that it was not sufficient to sustain a finding by the jury to that effect, but simply that there were matters presented from which a jury might rightfully conclude that the ordinance and license charges were unreasonable. Without noticing all the evidence, we content ourselves with these matters. On January 6, 1881, an ordinance was passed by the city council imposing a license fee of one dollar for each and every telegraph pole erected or maintained in the city. Another ordinance of date March 30, 1883, regulating underground conduits, wires and cables, and providing for license charges for underground and overhead wires, imposed an annual license charge of two dollars and fifty cents per mile of wire for overhead telegraph wires, and one dollar per mile for underground wires. Upon these ordinances the claim was made against the company. On August 5, 1886, a further ordinance was passed, removing all charges upon underground

wires. The chief of the electrical bureau of the city, without objection, testified that the removal of all charges on underground wires in 1886, was "as an inducement to have the wires placed underground, and the only requirement was that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charge connected with it. It was to remove all license charges, to have them place their wires underground." There was evidence of the expenses of the electrical bureau for the years in question, and that such electrical bureau supervised all electrical work upon the streets, but there was no testimony definitely disclosing how much of the labor of that bureau was in respect to telegraph wires and poles, and how much in respect to electric light wires and poles, although there was evidence of the general manner in which the electrical bureau conducted its work of supervision and the matters which came within the scope of its attention. On the other hand, the company showed the extent of its own supervision and the cost of repair, maintenance and supervision, which for the years from 1885 to 1891, inclusive, amounted to only $\$1.60\frac{3}{7}$ per mile. There was also proof of the number of electric light lamps, poles and miles of wire within the city, and other kindred facts.

Now the comparison of all this evidence, the determination of its weight and effect, and whether the charge made by the city for supervision was reasonable or not, should have been left to the jury. As there was testimony that the actual cost of maintenance, repair and supervision by the company was during the years in question less than one half that charged by the city for supervision alone, and as it appeared that at first the license fee per mile of overhead wire was two dollars and fifty cents, and of underground wire one dollar, and that within three years thereafter all charges in respect to underground wire were taken away, and, as the head of the electrical department declared, so taken away for the purpose of inducing the removal of overhead wires and placing them all underground, a jury might have found that the ordinance was unreasonable. It might have come to the conclusion that the charge was not made simply to meet the ex-

penses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and put them in conduits. We do not say that a city has not, by virtue of its police powers, authority directly to compel the removal of wires from poles to conduits, but it may be questionable whether a city can seek the same results by an excessive and unreasonable charge upon overhead wires. We think, therefore, the court erred in withdrawing the case from the jury.

Before concluding we repeat that we are not intending to express any opinion as to the effect of the testimony as a whole, or to intimate what the verdict of a jury ought to be, nor do we mean to imply that there must be satisfactory evidence of the actual cost of supervision. All we mean to decide is that there was sufficient testimony to go to the jury and obtain its judgment whether the ordinance passed by the city and the charges imposed thereby were, considering all the circumstances of the case, reasonable or oppressive.

The judgment is reversed and the case remanded with instructions to set aside the verdict and grant a new trial.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA concurred in the judgment.

PATTERSON *v.* BARK EUDORA.

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

No. 278. Argued May 1, 1903.—Decided June 1, 1903.

The title is no part of a statute. Where a statute declares that it shall apply to foreign vessels as well as vessels of the United States, the fact that its title states that it relates to American seamen cannot be used to set at naught the obvious meaning of the statute itself.

Contracts for seamen's wages are exceptional in character and may be subjected to special restrictions, and whenever they relate to commerce not wholly within a State, legislation enforcing such restrictions comes

within the domain of Congress under the commerce clause of the Constitution, and such legislation is not contrary to the Fourteenth or Thirteenth Amendment.

When Congress prescribes such restrictions, no one within the jurisdiction of the United States can escape liability for a violation thereof on a plea that he is a foreign citizen or an officer of a foreign merchant vessel. The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which such vessels belong respectively may be withdrawn, and it is within the power of Congress to protect all sailors shipping within our ports on vessels engaged in foreign or interstate commerce, whether foreign or belonging to citizens of this country.

Under the act of Congress of December 21, 1898, prohibiting the payment of seamen's wages in advance, seamen shipped on a foreign vessel from an American port to a foreign port and return to an American port who have received a part of their wages in advance may, after the completion of the voyage, recover by libel filed against the vessel the full amount of their wages including the advance payments, although such payments are not due either under the terms of the contract or under the law of the country to which the vessel belongs.

On December 21, 1898, 30 Stat. 755, 763, Congress passed an act entitled "An act to amend the laws relating to American seamen, for the protection of such seamen and to promote commerce." The material portion thereof is found in section 24, which amends section 10 of chapter 121 of the laws of 1884, so as to read:

"Sec. 10. (*a*) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. Any person paying such advance wages shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. If any person shall demand or receive, either directly

or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offence be liable to a penalty of not more than one hundred dollars."

"(*f*) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation: *Provided*, That treaties in force between the United States and foreign nations do not conflict."

The appellants were seamen on board the British bark Eudora, and filed this libel for wages in the District Court of the United States for the Eastern District of Pennsylvania. By an agreed statement of facts it appears that on January 22, 1900, they shipped on board such bark to serve as seamen for and during a voyage from Portland, Maine, to Rio and other points, not to exceed twelve months, the final port of discharge to be in the United States or Canada, with pay at the rate of one shilling for forty-five days and twenty dollars per month thereafter. At the time of shipment twenty dollars was paid on account of each of them, and with their consent, to the shipping agent through whom they were employed. On the completion of the voyage they, having performed their duties as seamen, demanded wages for the full term of service, ignoring the payment made at their instance to the shipping agent. The advanced payment and contract of shipment were not contrary to or prohibited by the laws of Great Britain. It was contended, however, that they were prohibited by the act of Congress, above quoted, and that such act was applicable. The District Court entered a decree dismissing the libel. 110 Fed. Rep. 430. On appeal to the Circuit Court of Appeals for the Third Circuit that court certified the following questions to this court:

"First. Is the act of Congress of December 21, 1898, properly applicable to the contract in this case?

"Second. Under the agreed statement of facts above set

forth, upon a libel filed by said seamen, after the completion of the voyage, against the British vessel, to recover wages which were not due to them under the terms of their contract or under the law of Great Britain, were the libellants entitled to a decree against the vessel?"

Mr. Joseph Hill Brinton for appellants.

Mr. Horace L. Cheyney for appellee. *Mr. John F. Lewis* was on the brief.

On motion of *Mr. Solicitor General Hoyt* a brief on which was *Mr. Assistant Attorney General Beck* was filed on behalf of the United States.

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

Applying the ordinary rules of construction, it does not seem to us doubtful that the act of Congress, if within its power, is applicable in this case. The act makes it unlawful to pay any seaman wages in advance, makes such payment a misdemeanor, and in terms provides that such payment shall not absolve the vessel or its master or owner for full payment of wages after the same shall have been actually earned. And further, it declares that the section making these provisions shall apply as well to foreign vessels as to vessels of the United States, provided that treaties in force between the United States and foreign nations do not conflict. It is true that the title of the act of 1898 is "An act to amend the laws relating to American seamen," but it has been held that the title is no part of a statute, and cannot be used to set at naught its obvious meaning. The extent to which it can be used is thus stated by Chief Justice Marshall in *United States* v. *Fisher*, 2 Cranch, 358, 386:

"Neither party contends, that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to con-

struction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case, the title claims a degree of notice, and will have its due share of consideration."

See also *Yazoo Railroad* v. *Thomas*, 132 U. S. 174, 188; *United States* v. *Oregon &c. Railroad*, 164 U. S. 526, 541; *Price* v. *Forrest*, 173 U. S. 410, 427; Endlich on Interpretation of Statutes, secs. 58, 59. When, as here, the statute declares in plain words its intent in reference to a prepayment of seamen's wages, and follows that declaration with a further statement that the rule thus announced shall apply to foreign vessels as well as to vessels of the United States, it would do violence to language to say that it was not applicable to a foreign vessel.

But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the Fourteenth Amendment to the Federal Constitution, and reference is made to *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, in which we said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Further, that even if the contract be one subject to restraint under the police power, that power is vested in the States and not in the general government, and any restraint, if exercised at all, can only be exercised by the State in which the contract is entered into; that the only jurisdiction possessed by Congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; that the regulation of commerce does not carry with it the power of controlling contracts

of employment by those engaged in such service, any more than it includes the power to regulate contracts for service on interstate railroads, or for the manufacture of goods which may be intended for interstate or foreign commerce; and, finally, that the validity of a contract is to be determined by the law of the place of performance, and not by that of the place of the contract; that the contract in this case was one entered into in the United States, to be performed on board a British vessel, which is undoubtedly British territory, and therefore its validity is to be determined by British law, and that, as conceded in the question, sustains its validity.

We are unable to yield our assent to this contention. That there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment, may be conceded, yet such liberty does not extend to all contracts. As said in *Frisbie* v. *United States*, 157 U. S. 160, 165:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

And that the contract of a sailor for his services is subject to some restrictions was settled in *Robertson* v. *Baldwin*, 165 U. S. 275, in which sections 4598 and 4599, Rev. Stat., in so far as they require seamen to carry out the contracts contained in their shipping articles, were held not to be in conflict with the Thirteenth Amendment, and in which a deprivation of personal

liberty not warranted in respect to other employés was sustained as to sailors. We quote the following from the opinion (p. 282):

"From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it, 'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles."

If the necessities of the public justify the enforcement of a sailor's contract by exceptional means, justice requires that the rights of the sailor be in like manner protected. The story of the wrongs done to sailors in the larger ports, not merely of this nation but of the world, is an oft-told tale, and many have been the efforts to protect them against such wrongs. One of the most common means of doing these wrongs is the advancement of wages. Bad men lure them into haunts of vice, advance a little money to continue their dissipation, and, having thus acquired a partial control and by liquor dulled their faculties, place them on board the vessel just ready to sail and most ready to return the advances. When once on shipboard and the ship at sea the sailor is powerless and no relief is availing. It was in order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed. And while in some cases it may operate harshly, no one can doubt that the best interests of seamen as a class are preserved by such legislation.

Neither do we think there is in it any trespass on the rights

of the States. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the State. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a State, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single State and in an ocean voyage. Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the State, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce.

Finally, while it has often been stated that the law of the place of performance determines the validity of a contract, *London Assurance* v. *Companhia de Moagens*, 167 U. S. 149, 160, yet that doctrine does not control this case. It may be remarked in passing that it does not appear that the contract of shipment or the advance payment were made on board the vessel. On the contrary, the stipulated fact is that the "seamen were engaged in the presence of the British vice consul at the port of New York." The wrongful acts were, therefore, done on the territory and within the jurisdiction of the United States. It is undoubtedly true that for some purposes a foreign ship is to be treated as foreign territory. As said by Mr. Justice Blackburn, in *Queen* v. *Anderson*, L. R. 1 Crown Cases Reserved, 161, "A ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island." Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country. In *Schooner Exchange* v. *McFadden*, 7 Cranch, 116, 136, 146, this court held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of our tribunals while within a port of the United

States. In the opinion by Chief Justice Marshall, it was said that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." And, again, after holding it "to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction," he added: "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals."

Again, in *Wildenhus's Case*, 120 U. S. 1, in which the jurisdiction of a state court over one charged with murder, committed on board a foreign merchant vessel in a harbor of the State, was sustained, it was said by Mr. Chief Justice Waite (pp. 11, 12):

"It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement. . . . From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized na-

tions that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."

It follows from these decisions that it is within the power of Congress to prescribe the penal provisions of section 10, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. It is not pretended that this government can control the action of foreign tribunals. In any case presented to them they will be guided by their own views of the law and its scope and effect, but the courts of the United States are bound to accept this legislation and enforce it whenever its provisions are violated. The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign as well as to domestic vessels. Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this. It is well said by

counsel for the government in the brief which he was given leave to file:

"Moreover, as ninety per cent of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seamen. To the average sailor it is a consideration while in port to have his wages in part prepaid, and if in a large port like New York ninety per cent of the vessels are permitted to prepay such seamen as ship upon them, and the other ten per cent, being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to Congress and fully justified the provision herein contained."

We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation, and that our courts are bound to enforce those provisions in respect to foreign equally with domestic vessels.

The questions, therefore, certified by the Court of Appeals will each be answered in the affirmative.

MR. JUSTICE HARLAN concurred in the judgment.

JOHANSON v. WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 282. Argued May 1, 1903.—Decided June 1, 1903.

Whether one assuming to act for a State or Territory in selecting school lands in lieu of sections 16 and 36 had the authority to do so is a State and not a Federal question. The policy of the Government in respect to grants for school purposes has been a generous one, and acts making such grants are to be so construed as to carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instrument of private conveyance.

While ordinarily a special law is not repealed by a subsequent general statute, unless the intent so to do is obvious, yet the latter act may apply to cases not provided for by the former. The general act of Congress of 1859 as to selection of school lands in lieu of sections 16 and 36 is applicable to Washington although a special statute was passed as to it in 1853. The act of 1902 confirming selections approved by the Secretary of the Interior referred to past as well as future approvals.

The general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and, unless Congress clearly designates some other officer to act in respect to such matters, it will be assumed that he is the officer to represent the Government. His approval of a selection made by one claiming to represent a State or Territory of lands in lieu of school sections 16 and 36 under the acts of 1853 and 1859, is, at least, a withdrawal of the selected land from private entry which continues until the selection is set aside, and if such person was authorized to act, the approval of the selection so made is, unless some direction of Congress was violated, conclusive upon the transfer of title of the selected lands.

THIS was an action of ejectment brought in the Superior Court of King County, Washington. The case was tried by the court without a jury. An agreed statement of facts was submitted, upon which the court found the following facts and conclusions of law:

"1. That the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east, is of the value of twenty thousand dollars, and was selected by Phillip H. Lewis, as agent for King County, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection at the land office at Olympia, Washington Territory, May 24, 1870, under an act of Congress approved March 2, 1853, and an act of Congress approved February 26, 1859, which said selection was approved by Secretary C. Delano, January 27, 1872.

"2. March 13, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land; his application was rejected by the local land office, and subsequently appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior, who,

on December 18, 1895, decided adversely to Anton Johanson."

From the foregoing facts the court finds as conclusions of law:

"1. That the plaintiff was on the 13th day of March, 1893, seized in fee and possessed and entitled to the possession to said north half of the southwest quarter and the northwest quarter of the southeast quarter, section 3, township 25 north, range 4 east.

"2. That on the said 13th day of March, 1893, defendant unlawfully entered said premises and ejected the plaintiff therefrom, and unlawfully retains possession thereof."

The judgment of the Superior Court having been affirmed by the Supreme Court of the State, 26 Washington, 668, the case was brought here on error.

Mr. C. W. Corliss for plaintiff in error. *Mr. O. C. McGilvra*, *Mr. Henry W. Lung* and *Mr. John F. Main* were on the brief.

Mr. W. B. Stratton, attorney general of the State of Washington, for defendant in error.

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

Under the statutes of Washington an action in form similar to the old action of ejectment may be maintained in favor of one who has a superior title, whether legal or equitable. Ballinger's Code, secs. 5500, 5508. No patent is shown to have been issued by the General Government, and the question, therefore, is whether the State obtained an equitable title by virtue of the selection and approval disclosed in the findings of fact.

The first contention of plaintiff in error is that no authority is shown for Phillip H. Lewis to act as agent for King County or the Territory of Washington in making the selection. We pass the assertion that in the brief of counsel for plaintiff in error in the state court the right of Lewis to act for the county

was conceded. It is enough that Lewis, assuming to act as agent, made the selection, and that his selection was approved by the Secretary of the Interior, for the State, the successor of the Territory, by commencing this action and claiming the benefit of his act as agent, ratified and confirmed what he did as agent. Besides, whether he had authority to so act is not a Federal question, but one whose decision by the state court is final.

Coming now to the Federal question, the approval by the Secretary of the Interior of a selection made by one claiming to be the agent of a Territory or State of land in lieu of school sections 16 and 36 is, if nothing more, in effect a withdrawal from private entry of the selected land, and such withdrawal continues until the approval of the selection is itself set aside. Whether such selection, so approved, shall afterwards ripen into a full legal title or not, is immaterial so far as the question of withdrawal is concerned. In the case at bar, at the time of the selection and approval, there was no settlement, no private right, nothing to interfere between the United States and the Territory of Washington, or prevent a selection of this tract in lieu of an ordinary school section. When, therefore, the Secretary of the Interior approved the selection, it at least operated to withdraw the land from private entry. A claim in behalf of the Territory had been presented, and that claim had been approved by the proper officer of the United States. While the land remained subject to such claim and approval, no individual could come in and question its validity. Johanson's attempt to make a homestead was wrongful and gave him no rights whatever in the land.

But, further, the title of the State is good. For the material parts of the statutes bearing upon this question see note at foot of this page.[1]

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[1] Act of March 2, 1853, establishing the Territory of Washington, 10 Stat. 179, sec. 20; sec. 1947, Rev. Stat.:

"Sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied

Now we remark that from the legislation of Congress nothing is clearer than that the policy of the Government has been a generous one in respect to grants for school purposes. *Cooper* v. *Roberts*, 18 How. 173; *Minnesota* v. *Hitchcock*, 185 U. S. 373,

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by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied."

Act of February 26, 1859, 11 Stat. 385:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where settlements, with a view to preëmption, have been *been* made before the survey of the lands in the field which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the preëmption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by preëmptors; and other lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever: *Provided*, That the lands by this section appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May twentieth, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for.'"

Section 2 of the act of Congress approved May 20, 1826, 4 Stat. 179:

"SEC. 2. *And be it further enacted*, That the aforesaid tracts of land shall be selected by the Secretary of the Treasury, out of any unappropriated public land within the land district where the township for which any tract is selected may be situated; and when so selected, shall be held by the same tenure, and upon the same terms, for the support of schools, in such township, as section number sixteen is, or may be held, in the State where such township shall be situated."

Section 10 of the act of February 22, 1889, for the admission of Washington and other Territories into the Union, 25 Stat. 679:

"That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of

and cases cited in the opinion. And, as was said by Mr. Justice Field, in *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 625, acts making grants "are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

Tested by this rule, it is obvious that Congress intended that Washington should receive full sections 16 and 36, or, in case of a failure by reason of prior settlement or from natural causes, the equivalent of such sections, and designated the Secretary

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common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior."

32 Stat. 756. December 18, 1902.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where sections sixteen and thirty-six, or either or any of them, or any portion thereof, have been occupied by actual settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated, have, under said act of Congress of March second, eighteen hundred and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within their respective counties, in lieu of said section so occupied as aforesaid, the lands so located or selected, when the same shall have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State by said act of February twenty-second, eighteen hundred and eighty-nine, and the title of said State thereto is hereby confirmed.

"SEC. 2. That where any lands appropriated by Congress to said Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause whatever, or where section sixteen or thirty-six were patented by preëmptors, have been selected and appropriated as provided in said act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the lands so selected and appropriated, when the same shall have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State of Washington by the said act of February twenty-second, eighteen hundred and eighty-nine, and the title thereto confirmed."

of the Interior as the officer to approve any selections made by the Territory. The act of 1859 is as applicable to Washington as to any other Territory, notwithstanding that there was a special statute passed in 1853 in respect to it. While ordinarily a special law is not repealed by a subsequent general statute, unless the intent so to do is obvious, yet there is no rule which prevents the latter from applying to cases not provided for by the former. It is true the act of 1859 refers to the act of 1826 in reference to selections, and the act of 1826 designated the Secretary of the Treasury as the officer to select. At that time the Land Department was under the supervision of the Secretary of the Treasury. But by the act of March 3, 1849, 9 Stat. 395, the Interior Department was created, and the supervising powers of the Secretary of the Treasury in respect to public lands were transferred to the Secretary of the Interior. The act of 1859 is to be taken, not as specially designating the Secretary of the Treasury as the officer to make the selections, but simply as describing the general mode of procedure in respect thereto. This is obvious from its language, which is that the selection and appropriation shall be "in accordance with the principles of adjustment and the provisions of the act of Congress, May 20, 1826."

Further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government. *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155. If some one authorized to represent the Territory of Washington made a selection, and it was approved by the Secretary of the Interior, such action, being that of the officer charged with the supervision of the landed interests of the United States, it should, unless some direction of Congress has manifestly been violated, be held to be conclusive upon the transfer of title.

But still further, it appearing that some question had been mooted as to the intent of Congress in respect to these matters the confirmatory statute of 1902 was enacted, and that obviously removes all doubt. It confirms the title to selected lands

"when the same shall have been approved by the Secretary of the Interior." This does not refer alone to future action by the Secretary, but ratifies that which he has already done. He has approved this selection, and the act of 1902 places the title of the State beyond controversy.

For these reasons we think the judgment of the Supreme Court of Washington is right, and it is

Affirmed.

OREGON AND CALIFORNIA RAILROAD COMPANY *v.* UNITED STATES. No. 3.

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

No. 188. Argued March 4, 1903.—Decided May 4, 1903.

While a railway grant does not attach to lands which, at the time of the definite location of the line, have been sold, preëmpted, reserved or otherwise disposed of by the United States, this rule does not apply to a claim which has been cancelled or abandoned before the attachment of the railroad grant, either by the definite location of the line or by the selection of the lands as lieu lands within the indemnity limits. Where, therefore, a notification had been filed under the Oregon Donation Acts of September 27, 1850, and February 14, 1853, to land within the indemnity limits of a railroad land grant, but the person filing the same did not comply with the conditions of the statutes, the land continued to be the property of the United States to which the railroad grant subsequently attached, and the grant was not defeated by the fact that the donation notification remained of record in the office of the surveyor general.

If any presumption was created by the existence of the donation certificate to the effect that the land was reserved, the railroad may defeat the presumption by showing the actual facts in the same manner as an individual might who desired to enter the land on his own account. *Oregon & Cal. R. R.* v. *United States*, *No. 1*, 189 U. S. 103, and *Same* v. *Same*, *No. 2*, 189 U. S. 116, distinguished.

THIS was a bill in equity filed by the United States, in the Circuit Court for the District of Oregon, to compel a reconvey-

ance by the railroad company, as the successor and assignee of the Oregon Central Railroad Company, of certain lands within the indemnity limits of the land grant to such company of July 25, 1866, 14 Stat. 239, for which land one John W. Hines, on November 22, 1853, seventeen years before the definite location of the line of the road, had filed a donation notification under the Oregon Donation Act of September 27, 1850, 9 Stat. 496, and the act of February 14, 1853, 10 Stat. 158, amendatory thereof. These lands the President of the United States on July 12, 1871, patented to the railroad company by an alleged mistake and without the knowledge of the adverse claim of Hines. By reason of this prior donation the patent was averred to be void, and its cancellation was prayed under the act of March 3, 1887, 24 Stat. 556, authorizing the Attorney General to institute necessary proceedings to cancel patents erroneously issued to railroad companies.

The defendant in its plea averred an approval of its map of definite location January 29, 1870, a selection of the lands prior to July 12, 1871, and the further facts that Hines abandoned the land without having paid for it, or resided thereon four years, and that he was not residing thereon at the time the defendant selected the same.

The Circuit Court decreed the cancellation of the patent, and the Court of Appeals affirmed the decree.

Mr. Maxwell Evarts for appellant.

Mr. Special Assistant Attorney General Russell for appellee.

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

This case is similar to two recent cases bearing the same title, in the first one of which, 189 U. S. 103, a patent of certain lands within the indemnity limits of the same road, dated February 20, 1893, was cancelled in favor of certain entrymen under the homestead laws of the United States, who had settled upon these lands at sundry dates from 1869 to

1890, and before the defendant company had selected the lands in question as indemnity lands or had received a patent. The court found that "when the company's lists were approved neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the settlers to the lands upon which they respectively resided;" and held that the land department had no authority, simply upon the definite location of the road, to withdraw from the operation of the preemption and homestead laws lands within *its indemnity* limits, and that such order did not prevent an occupancy by homestead settlers *within such limits* up to the time of the approval of the selection made by the railroad company of lieu lands, and that, as it appeared the lands were actually occupied by homestead settlers at the time they were selected by the railroad company, such lands were not open to selection, although such selection was prior to the application of the settlers for entry under the homestead laws. It appeared in the case that the settlers had moved with due diligence to perfect and protect the right acquired by their occupancy of the lands, but were unable to obtain formal entry of the same, because the lands had not been surveyed. "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."

The second case was like unto the first, except that there had been a long delay by the land department in having the land surveyed. It was held that the land department had acted "with all convenient speed" within the meaning of the act of 1870, 16 Stat. 94, sec. 2, making the land grant. 189 U. S. 116.

In both of these cases, however, the lands were in actual occupation of settlers under the homestead laws at the time selection was made by the railroad company and the patents issued.

In this case the settlement was made under the Oregon Donation Act, 9 Stat. 496, the fourth section of which enacts that "there shall be, and hereby is, granted to every white

settler or occupant of the public lands, . . . who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land," etc.; and by the first section of the amendatory act of 1853, 10 Stat. 158, it was provided that settlers under the former act, in lieu of the term of continued occupation after settlement, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the surveyor general of said Territory at the rate of $1.25 per acre of the land so claimed. The plea alleges that Hines abandoned the land without having paid for it under the act of 1853, or residing on it for four years under the original act; and the case turns upon the question whether, by the mere filing of the donation notification in 1853, and the subsequent abandonment of the lands, they fall within the category of those which had been "granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of," within the meaning of the act of July 25, 1866, granting lands for the construction of this road. Clearly the lands do not fall literally within either of the above designations, and unless a claim existing of record to the lands—which claim had in fact been abandoned for fifteen years—operates to prevent the selection of such lands by the railroad company, such company takes a good title to them.

That a railway grant does not attach to lands which at the time of the definite location of the line have been sold, preempted, reserved or otherwise disposed of by the United States for any purpose, has been so often decided by this court as to be no longer open to question. *Leavenworth &c. R. R. Co.* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *Doolan* v. *Carr*, 125 U. S. 618; *United States* v. *McLaughlin*, 127 U. S. 428; *Cameron* v. *United States*, 148 U. S. 301; *Carr* v. *Quigley*, 149 U. S. 652. These cases, however, merely apply the language of the statutes to variant circumstances. Neither of them turns upon the effect of a claim which has been cancelled or abandoned before or after the attachment of the railroad grant, either by the definite location of the line or by

the selection of the lands as lieu lands within the indemnity limits.

That question was first considered in *Kansas Pacific R. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639, which involved the title to part of an odd-numbered section within the place limits of the Union Pacific Railroad Company's grants of 1862, 1864 and 1866. The facts were that one Miller made a homestead entry upon this section July 20, 1856, which was valid if the land was then public land. The line of definite location was filed September 21, 1866, so that the entry of Miller brought the land within the exception in the grant as land to which the homestead claim attached at the time the line of the road was definitely fixed. It was argued by the company that, although the homestead entry had attached to the land, and Miller had entered upon it within the time prescribed by law, erected a house upon it, and brought his family to live upon it, and made the tract his home until the spring of 1870, yet that he afterwards abandoned his homestead claim, bought the land from the railroad company, and paid for it, and sold the land to Dunmeyer, who had obtained a conveyance from the company. From this it was argued that the exception no longer operated and the land had reverted to the company. But it was held that, as Miller's claim was an existing one of public record when the railroad map was filed, it was excepted from the land grant, notwithstanding the subsequent abandonment. The case is readily distinguishable from the one under consideration in the fact that Miller had not only entered upon the land, but was in actual possession of it at the time of the definite location of the road, and that he did not abandon his entry until nearly four years after the line of definite location was filed.

A case not dissimilar is that of *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535. That case arose from a land grant to the Northern Pacific Company of July 2, 1864, 13 Stat. 365, under which act the company proceeded to designate the general route of its road, and afterwards to have its line definitely fixed. The date when the line was definitely fixed is not stated in the report, and is not treated as material, but it appears that on September 12, 1855, one Robinson settled upon the land, filed

his declaration under the preëmption laws, but died without filing proof or paying the government for the land. On August 5, 1865, this preëmption claim was cancelled for alleged failure to furnish proof of continuous residence prior to July 30, 1857. It was held that, as it appeared the premises had been taken up on the preëmption claim of Robinson before the railroad grant took effect, and that the cancellation had not then been made, nor for more than a year afterwards, such cancellation of the preëmption entry did not restore it to the public domain so as to bring it under the operation of previous legislation which applied to land *then* public.

In the consideration of the present case we are not embarrassed by either of these adjudications, since in one case the lands were not only actually occupied by the homestead claimant at the time the railroad grant took effect, but in both cases the proof of such occupation was of record in the proper office, and the lands were abandoned in one case, and the certificate cancelled in the other after that date, while in this case the land was abandoned fifteen years before the lands were selected by the company, and nothing remained to indicate that the land was reserved, except the donation notification in the office of the surveyor general.

Two other cases are more directly in point. In *Hastings &c. R. R. Co.* v. *Whitney*, 132 U. S. 357, the grant was made to the railroad July 4, 1866, and the line definitely located March 7, 1867. In May, 1865, one Turner applied, through his attorney, to enter the land in question as a homestead. The affidavit did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement thereon, and, as a matter of fact, no member of his family was residing, or ever did reside, on said land, and no improvement was made thereon by any one. The entry was allowed and stood upon the records of the land office uncancelled until September 30, 1872, when the entry was cancelled. The land was subsequently, in 1877, entered by Whitney as a homestead and a patent delivered. It was held that the homestead entry of Turner excepted it from the operation of the land grant, notwithstanding the entry was invalid on its face. "So long as it

remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

In *Whitney* v. *Taylor*, 158 U. S. 85, one Jones, in May, 1854, settled upon a quarter section of public land in California, and as soon as the land was surveyed (in 1857) declared his intention to claim it as a preëmption right, paid the fees required by law, and caused notice of the same to be filed in the proper government record. He occupied the tract until 1859, when he left for England and never returned. The land was found to be within the place limits of the grant to the Central Pacific Railroad Company of 1862. This company filed its map of definite location in 1864, and demanded the section in question. In 1885 the preëmption entry of Jones was cancelled. It was held that the tract, being subject to the claim of Jones at the time when the grant to the railroad company took effect, was excepted from the operation of that grant, and that after the cancellation of that entry it became part of the public domain, and that such cancellation did not enure to the benefit of the railroad company.

The latest case upon the subject, however, is that of the *Northern Pacific Railway* v. *De Lacey*, 174 U. S. 622. In that case the railroad company had filed its map of definite location March 26, 1884. On April 9, 1869, one John Flett filed a declaratory statement of his intention to purchase the land under the preëmption laws. In the fall of the same year, Flett left the land and did not thereafter reside on the same, although it appears that, in September, 1870, he went to the local land office and told the officers that he had come to prove his claim. He was told that he had lost it, as it had become railroad land. He acquiesced in this statement. In 1887, eighteen years after his original entry, Flett submitted proof in support of his preëmption claim, founded upon his declaratory statement. A hearing was had in the presence of all the parties, which finally resulted in a decision of the Secretary of the Interior, September 28, 1891, awarding the land in contro-

versy to the railroad company. Flett's declaratory statement was not formally cancelled upon the records until December 23, 1891. A suit brought in the Circuit Court by the railroad company resulted in its favor, but the decree was reversed by the Court of Appeals, and the case brought here for review.

It was contended that at the time, March 26, 1884, when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a preëmption claim, and that under the case of *Whitney* v. *Taylor*, above cited, the land described in that statement was excepted from the grant to the railroad company. The question was presented whether the proceedings in the case of Flett were of such a character as to prevent the grant to the company from taking effect at the time of filing its map of definite location, March 26, 1884. It was held that, under the second section of the act of July 14, 1870, 16 Stat. 279, claimants of preëmption rights must make proper proof and payment of the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired; that under the joint resolution of March 3, 1871, 16 Stat. 601, twelve months in addition to that provided in the first act were given to the claimants to make proof and payment; that, adding the eighteen months given by the first act to the twelve months given by the second act, all claimants of preëmption rights were given thirty months to make the proper proof and payment for the lands claimed, and that "whether such proof and payment were made would be matter of record, and if they were not so made the original claim was cancelled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and cancelled the entry just as effectually as if the fact were evidenced by an entry upon the record." The case of *Whitney* v. *Taylor* was distinguished upon the ground that, in that case, "there was no period within which a preëmptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President." It was held that, as the thirty months allowed

to Flett had expired years before the filing of the map of definite location, there was no existing claim at that time, and that the grant of the railroad company took effect. "Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed."

Recurring now to the case under consideration, it appears that by the sixth section of the Oregon Donation Act, 9 Stat. 498, it was incumbent upon the settler to notify the surveyor general, within three months from the commencement of his settlement, of the precise tract claimed by him; and by section seven, within twelve months from the time the settlement commenced, must prove to the satisfaction of the surveyor general that the settlement and cultivation required by the act had been commenced, and that at any time after the expiration of four years from such settlement he might prove the fact of continual residence and cultivation required by the fourth section, when upon such proof being made, the surveyor general issues the proper certificate, forwards the same to the Commissioner of the General Land Office, whose duty it is to issue patents for the land.

It is true that by the act of July 26, 1894, 28 Stat. 123, where proof of settlement had been made under the donation acts and notice given as required by law, but there had been a failure to execute and file in the land office proof of continued residence and cultivation of the land so settled upon, so as to entitle the donees to patents, such claimants, their heirs, devisees, assigns and grantees, were given the right until January 1, 1896, "to make and file final proofs and fully establish their rights to donations" under the aforesaid act of Congress, and upon failure to do so they were to be held to have abandoned their claims. But by section two of the same act the Commissioner of the Land Office was given the right, if such right existed, "to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when it is proven that such a claim is invalid or abandoned, from cancel-

ling the same upon the official records, and thereafter disposing of the land as a part of the public domain;" and by section three, "nothing in this act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said donation act, to or in respect of the lands in this act referred to."

It is entirely clear that the position of the government in this case is not strengthened by anything contained in this act, since it was intended only for the relief of those who had resided continuously upon and cultivated the lands specified in the original donation notification, but had through mistake or negligence omitted to make and file their final proofs and fully establish their rights to such donations. Such donees were given until January 1, 1896, to make such final proof and obtain their patents; but they were not given thereby the right to perfect their claims to lands which they had abandoned before completing a continued residence of four years thereon. This inference is rendered only the more clear by the second section, which authorizes the Commissioner, when it is proved that such claim is invalid or abandoned, to cancel the same upon the official records, and by the third section, which expressly saves adverse claims arising under any law other than the donation act.

It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act." *Hall* v. *Russell*, 101 U. S. 503; *Maynard* v. *Hill*, 125 U. S. 190. As these conditions were never complied with, the land continued to be the property of the United States, to which the railroad grant subsequently attached, unless such grant was defeated by the fact that the donation notification still remained of record in the office of the surveyor general. As the land had neither been "granted, sold . . . occupied by homestead settlers, preëmpted, or otherwise disposed of," the bill can only be sustained upon the ground that at the time land was selected it was "reserved" from sale. But for what pur-

pose was it reserved? Not for the donation settler, since he had abandoned the land fifteen years before; not for the United States, since every possible encumbrance had been removed from it, and it had lapsed into its original condition of public land, open to preëmption or sale. It is true the donation notification had not been formally cancelled, but the donation acts made no provision for such cancellation, although it may, perhaps, have been within the power of the land department to take such action even prior to the act of 1894. This, however, was not done, and the land might have remained in that condition permanently, had not some other person applied to enter or purchase it by showing that it had been abandoned by the original donee. But, if this may be done by an individual preëmptor, why may not a railroad company do the same thing by claiming the land under its grant, and showing in defence to this suit that it had actually been abandoned? It may be said that presumptively the land had been reserved, as shown by the donation notification, and for aught that appeared the donee might still be in possession, but we know of no reason why the railroad company may not show the actual facts as well as an individual who might desire to enter the land upon his own account. Even admitting that the donation notification was on file in the office of the surveyor general, there was no proof, required by section seven of the act to be filed within twelve months from the time of settlement, that the settlement and cultivation required by the act had been commenced; nor after the expiration of four years from such settlement was there any proof of continual residence or cultivation, required by the same section. The record which informed the company that the land had been settled by a donee also apprized it that the provision of the statute had not been complied with. We think that, considering the fact that fourteen years had elapsed since the original settlement, the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. Under the facts of this case we think the lands were not reserved within the meaning of the granting act.

But even if the position of the government be correct and

the patent be subject to cancellation, we see nothing to prevent the railroad company from again selecting the same land to make good its losses within the limits of its primary grant, no intermediate rights being shown to have accrued. If such be the fact, it would be useless to direct the cancellation of the patent, as it would become the duty of the land department to issue immediately a new one for the same property. *Germania Iron Company* v. *United States*, 165 U. S. 379; *United States* v. *Central Pacific Railroad Company*, 26 Fed. Rep. 479.

The decrees of the courts below are therefore reversed and the case remanded to the Circuit Court for the District of Oregon with directions to dismiss the bill.

MR. JUSTICE MCKENNA, having filed the bill in this case as Attorney General, did not participate in this decision.

HAWAII *v.* MANKICHI.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.

No. 219. Argued March 4, 5, 1903.—Decided June 1, 1903.

In interpreting a statute the intention of the lawmaking power will prevail even against the letter of the statute; a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. *Smythe* v. *Fisk*, 23 Wallace, 374. In inserting in the Resolution of July 7, 1898, annexing Hawaii, a provision that municipal legislation not inconsistent with the Constitution of the United States should remain in force until Congress otherwise determined, Congress did not intend to impose upon the islands every clause of the Constitution, and to nullify convictions and verdicts which might, before the legislature could act, be rendered in accordance with existing legislation of the islands but not in accordance with the provisions of the Constitution, nor was such the intention of Hawaii in surrendering its autonomy.

The conviction of one who, between August 12, 1898, and June 14, 1900, was tried on information and convicted by a jury not unanimous, in ac-

cordance with legislation of the Republic of Hawaii existing at the time of the annexation, is legal notwithstanding it is not in compliance with the provisions of the Fifth and Sixth Amendments of the Constitution.

THIS was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a Territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the Attorney General, and endorsed "a true bill found this fourth day of May, A. D. 1899. A. Perry, first judge of the Circuit Court," etc.

From an order of the United States District Court discharging the prisoner the Attorney General of the Territory appealed to this court.

Mr. Edmund P. Dole, attorney general of the Territory of Hawaii, and *Mr. Solicitor General Richards* for appellant.

I. At the time of the cession, the Hawaiian Islands constituted a sovereign and independent nation, with a government of its own, republican in form, and a civilized system of law, civil and criminal, defining rights and affording remedies. The courts were open and due process of law provided. At the same time, as in some of our States, grand juries were not used nor unanimous verdicts required to convict. *Republic* v. *Edwards*, 11 Haw. Rep. 571, 579.

The statute which enacts that a verdict by nine jurors is sufficient was held to be constitutional in *The King* v. *Andreas Camacho*, 3 Haw. Rep. 385.

By the treaty of annexation which was formally consented to by the Republic of Hawaii and submitted to this country, a cession was proposed upon certain terms and conditions which were stated. By the passage of the resolution of annexation the offer of cession was accepted and the islands annexed "as

a part of the territory of the United States" upon the terms stated in the treaty and incorporated in such resolution. This resolution contains special provisions with respect to the public lands of Hawaii, the customs regulations and relations of the islands, the public debt of the Republic, the immigration of Chinese, and certain general and significant provisions securing the continuance of the government and laws of the Republic during the transition period and until Congress should provide a new and permanent government.

II. That Congress had power thus to provide a temporary government, not subject to all the restrictions of the Constitution, until it could frame a permanent government and incorporate the islands as a part of the United States, was held by this court in *Downes* v. *Bidwell*, 182 U. S. 244.

That the resolution of annexation did not incorporate the islands within the United States and render them subject to all the limitations of the Constitution applicable throughout the United States, was evidently the view of the justices who constituted the majority of the court in the *Downes* case.

The provision that "no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands," is totally inconsistent with the theory that Congress intended by the resolution to incorporate the islands as an integral part of the United States, or extend the Constitution over them.

III. The use of the qualifying words "not contrary to the Constitution of the United States," after the words "the municipal legislation of the Hawaiian Islands," did not carry the Constitution into the islands and render void and inoperative every provision of the law of the Hawaiian Islands contrary to any of its limitations. The Hawaiian method of indicting and convicting criminals was an integral part of the criminal law of the islands. The resolution provided that the existing "municipal legislation" should remain in force until Congress should otherwise determine. There was no provision for modifying or amending it. To strike down the law of criminal procedure was to deprive the government of Hawaii of the power to preserve order and protect persons and property. It

is not to be presumed that either party to the contract of cession intended this.

The interpretation placed by President McKinley upon the resolution of annexation appears in the instructions for the transfer of sovereignty in which he directed "that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty."

The status in the islands after the transfer of sovereignty under the resolution, is described by the Supreme Court of Hawaii in the *Edwards Case*, 11 Haw. Rep. 571, 578.

IV. If Congress had intended, by the resolution of annexation, to extend to the Hawaiian Islands our grand and petit jury system, it would have made some provision to that end. See the organic act "To provide a government for the Territory of Hawaii," passed April 30, 1900. 31 Stat. 141. In this measure Congress provided that the islands should be known as the Territory of Hawaii, sec. 2; established a territorial government, sec. 3; made all persons who were citizens of the Republic of Hawaii on August 12, 1898 (the date of the transfer of sovereignty), citizens of the United States, sec. 4; and provided that the Constitution and laws of the United States not locally inapplicable, with certain exceptions, should have the same force and effect within said Territory as elsewhere within the United States, sec. 5. The organization of the islands, their incorporation as a Territory of the United States, and the extension to them of the Constitution and laws of the United States, necessarily brought them, and for the first time, within the operation of the Fifth and Sixth Amendments, and therefore required the enactment of the law amending the law of civil and criminal procedure so as to extend our grand and petit jury system there.

If, by the resolution of annexation, the Constitution was extended to the islands, and our grand jury and petit jury system put in force there, why were these provisions *inaugurating* our grand jury and petit jury system inserted in the organic act? All these provisions look to the future. It is obvious that Congress, in making them, acted in the belief that the Ha-

waiian law with respect to indictments and verdicts had continued in force during the transition period and would remain operative until the organic act should take effect.

V. But what was the meaning and effect of the qualifying words "not contrary to the Constitution of the United States," used in the resolution? It is argued they must be held to extend the Constitution, with all its limitations, or be rejected altogether. No such alternative exists. The words had a meaning, and the meaning is plain. They were not employed to extend the Constitution. Before the islands could be incorporated and the Constitution with all its limitations extended, it was necessary that a new government should be framed and an organic act passed. But by the transfer of sovereignty, the bringing of the islands under the sovereign dominion of the United States, certain limitations of the Constitution became operative there. These qualifying words were inserted in recognition of the fact that there are certain fundamental rights which the Constitution protects wherever the sovereignty of the United States extends. *Downes* v. *Bidwell*, 182 U. S. 282.

VI. That the right to be indicted by a grand jury and be tried by a petit jury is not fundamental, that the Fifth and Sixth Amendments enforcing this right apply only to the Federal courts, and that a citizen of the United States in a criminal prosecution in a state court may be deprived of his life, liberty, or property, by due process of law, without indictment by a grand jury and without unanimity in the verdict of a petit jury, is the established doctrine of this court. *Brown* v. *New Jersey*, 175 U. S. 172; *Ex parte Reggel*, 114 U. S. 642; *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U. S. 226; *Missouri* v. *Lewis*, 101 U. S. 22; *Hurtado* v. *California*, 110 U. S. 516; *Bolln* v. *Nebraska*, 176 U. S. 83; *Maxwell* v. *Dow*, 176 U. S. 581; *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462.

VII. It thus appears that the Hawaiian Islands, in providing for indictment without a grand jury and for conviction without the unanimous verdict of a petit jury, was only doing what a State of the Union may do under the Constitution. The pro-

posed treaty of 1854 provided for the incorporation of the Hawaiian Islands into the American Union as a State. By the resolution of annexation the islands were brought under the dominion of the United States, but it was not determined in what way they should be incorporated. Had Congress admitted the Hawaiian Islands into the Union as a State it could have been done without changing in any respect the law of the islands regulating criminal procedure, and as a State the government of the islands could have continued, under the Constitution, to indict criminals without a grand jury and convict them without the unanimous verdict of a petit jury. It cannot be reasonably contended that Congress could not permit the government of Hawaii to continue to administer its own law of criminal procedure, until it should be determined in what way the islands should be incorporated into the United States.

VIII. The Fifth and Sixth Amendments apply only to the courts of the United States. The courts of Hawaii during the transition period were not such courts but were the courts of the Republic of Hawaii, continued of necessity until Congress could organize the islands and establish Federal courts. The judicial powers which were to be exercised during the transition period were the existing judicial powers of the Hawaiian courts, which did not include the power to impanel grand juries or to *subpœna* witnesses before grand juries, or to try criminals by a petit jury after the manner required in Federal courts. There was no Hawaiian law for this, and therefore no judicial power. The judicial power which was continued was to accuse and try and convict in the manner provided by the Hawaiian law; and there was no authority to change or modify it, for the resolution expressly provided that the municipal legislation of the islands should remain in force until Congress should otherwise determine.

Among the judicial powers exercised under the Republic of Hawaii and to be exercised during the transition period, was that of the Supreme Court of the islands to pass finally upon all disputed questions of criminal procedure, and this court alone could do so. The question raised in is this case was unanimously

determined by it in favor of the government. While this decision may not be binding upon this court, under the peculiar circumstances, weight ought to be given to the views of the Supreme Court of Hawaii upon the matter.

Mr. Frederic R. Coudert, Jr., and *Mr. Paul Fuller*, with whom *Mr. Charles Fred Adams*, *Mr. George A. Davis* and *Mr. F. M. Brooks* were on the brief, for appellee.

The proposition upon which appellee relies, and the soundness of which is determinative of this case, is that from the moment the annexation of the Hawaiian Islands became complete and they passed under the sovereignty and jurisdiction of the United States by virtue of the act of Congress of July 7, 1898, no citizen or inhabitant thereof could "be held for a capital or otherwise infamous crime unless on presentment of a grand jury," nor be convicted for such crime without a unanimous verdict of a petit jury.

a. As Hawaii was annexed by act of Congress and not by treaty, the judicial discussions contained in the opinions in the *Insular Cases* have little or no relevancy to Hawaii. It is not disputed that Congress has full power to acquire and annex foreign territories, and to provide for the government thereof, or that it is competent for Congress to extend to the inhabitants of the territories annexed the privileges and protection of the Constitution of the United States. *Shively* v. *Bowlby*, 152 U. S. 1, 48; *Mormon Church Case*, 136 U. S. 44; Butler's Treaty Making Power; *Downes* v. *Bidwell*, 182 U. S. 287, *et seq.*; Rev. Stat. sec. 1851. This intention is manifest both from the language of the act of Congress (Newlands resolution) extending the Constitution to Hawaii, and also from the history of the islands which shows them to have been American in institutions, law and government, since 1847, at which time the government of the United States was prevented by mere accident from admitting Hawaii into the Union as a State. *Downes* v. *Bidwell*, *supra*, p. 395; Hawaiian Civil Laws, § 1109.

b. Congress having full power to annex did so, and the conditions of the annexation must be sought in the law annexing the islands. The question is thus one involving the construc-

tion of a municipal statute, and has no relation to questions arising between two sovereign States under a treaty, nor is it affected by any rules of the "law of nations." The Newlands resolution, not only annexed the islands, but provided a code of municipal legislation by which the islands should be governed "until the Congress of the United States should otherwise determine." It also abrogated at once all treaties of the Hawaiian Islands with foreign nations, and all municipal legislation enacted for the fulfillment of such treaties, and all legislation which was "contrary to the Constitution of the United States," or to any existing treaty of the United States; but with these exceptions all other municipal legislation of the Hawaiian Islands, the act declared, "shall remain in force until Congress shall otherwise determine." Thus this act extended the full operation of the Constitution to Hawaii.

c. The opinions of the majority of the court in the *Insular Cases* fully support the proposition that the action of Congress in extending the full operation of the Constitution to that territory made it unlawful to conduct criminal trials save as prescribed by Article III and by the Fifth and Sixth Amendments to the Constitution of the United States. Conformity to these constitutional requirements was readily attainable under then existing Hawaiian law. *Downes* v. *Bidwell*, 182 U. S. 271, 276, 277, 286; *Springville* v. *Thomas*, 166 U. S. 177; *American Pub. Co.* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 343; *Hess* v. *White*, 9 Utah, 61.

This proposition cannot be reconciled with the view of the Solicitor General that the words "nor contrary to the Constitution" contained in the act annexing the islands are merely declaratory of rights which would exist in any event without any extension by Congress. Cases holding that the States may dispense with trial by jury or indictment can have no relevancy to this case. The first eight amendments are admittedly applicable to the Federal government, and its agencies alone. The state governments are the ultimate protectors of the liberties of the citizen, and with the exception of a few instances, mainly provided for in the last three amendments, the United States courts cannot interfere. Burgess Political Science and

Constitutional Law, vol. 1, p. 516; *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 584; *Thompson* v. *Utah*, 170 U. S. 343.

Upon the theory set forth in the concurring opinion in *Downes* v. *Bidwell*, the Fifth and Sixth Amendments would equally apply, because the extension of the Constitution to Hawaii by the language of the Newlands resolution is evidence of an intention on the part of Congress to incorporate those islands. If the proposed treaty upon which counsel for Hawaii lay such stress is to be examined with a view to throwing any light upon the interpretation to be given to the language of the Newlands resolution in this respect, the intention of Congress becomes even clearer. The preamble of the treaty states that "the United States and the Republic of Hawaii, in view . . . of the expressed desire of the government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof, and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare."

See also to the same effect: Butler's Treaty Making Power, vol. 1, p. 72; Treaty with the Republic of Hawaii, June, 1897; Sen. Rep. No. 681, 55th Cong. 2d Sess. 16 March, 1898; Secretary Sherman's Report to President McKinley, accompanying the proposed treaty of Annexation, 1898, pp. 96–97; Message of President McKinley, June 16, 1897, accompanying proposed treaty (Sen. Doc. last cited); Treaty of 1893 with Hawaii, Secretary Foster's report thereon, Sen. Doc. No. 76, 52d Cong. 2d Sess. 1893; Report of Hawaiian Commission, 1898; *Ex parte Bain*, 121 U. S. 1; *Thompson* v. *Utah*; *Springville* v. *Thomas*, *supra*; joint resolution, July 7, 1898, 30 Stat. 750; Secretary Day's instructions, July 8, 1898; Minister Sewell's report to Secretary Day, August 12, 1898; Report of Commission on Territories, H. R. February 12, 1900; Instructions of the Secretary of State, July 8, 1898.

d. The proposition (relied upon by the Solicitor General) that the language of the act does not change or affect the legal situation, but leaves it just where it would have been had Congress been silent on the subject, is fallacious both in its prem-

ises and conclusion. The plain language of the Newlands act was to put in operation in the Hawaiian Islands all the provisions of the Constitution enforceable anywhere in the United States.

e. The argument *ab inconvenienti* can have no application here. The criminal courts in Hawaii have had criminal law jurisdiction for more than half a century; they had power to empanel a grand jury and to instruct the petit jury of twelve men before whom this case was tried that conviction could only be had by unanimous verdict. Constitution, art. I, sec. 3; *Ex parte Edwards*, 13 Hawaii, 47; Broome Legal Maxims, 7th Am. ed. p. 625; Comyn's Digest, Grant, E. 14, S. 5; *Palmer* v. *Moxon*, 2 M. & S. 50; Civil Laws of Hawaii, sec. 1109; *United States* v. *Hill*, 1 Brock. 156, 159; *United States* v. *Clawson*, 114 U. S. 486. Congress knew this and must have intended to make trials there conform to those conducted elsewhere under Federal authority.

The argument for Hawaii is that the Newlands act conferred no constitutional rights which the islands would not have possessed in any event as a result of simple annexation by treaty or otherwise. We contend that this argument is untenable for the following reasons: The plain intention of the Newlands act was to give to Hawaii every benefit which could be enjoyed by any territory under the sovereignty of the United States save that already enjoying actual Statehood. Assuming, however, that the words "nor contrary to the Constitution" are to be construed by this court as a mere rhetorical flourish—*vox et præterea nihil*—a mere *bonne bouche* for use in debate, nevertheless there is no such distinction between natural and artificial or remedial rights in the Constitution as contended for. The positive prohibitions against certain actions on the part of the government of the United States are equally imperative whatever view the court may take of the relative importance of the various provisions in question.

The prohibitions against the establishment of a religion, the infliction of cruel or unusual punishment, the taking of property without due process of law, and trials without a jury are equally plain and imperative. They must be given equally positive

force. To justify an overriding of the plain language of the amendments by an appeal to the philosophy of natural rights is altogether inadmissible. *Callan* v. *Wilson*, 127 U. S. 549; President McKinley's instructions to Philippine Commission, April 7, 1900; *Downes* v. *Bidwell*, 182 U. S. 282; Solicitor General's Argument in *De Lima* v. *Bidwell*, 182 U. S. at pp. 155, 156; Northwest Ordinance, 1787, Arts. I and II; *Minor* v. *Happersett*, 21 Wall. 162; Ritchie on Natural Rights.

The position of the Solictor General when analyzed must be based upon one of two alternative theories: (1) Either the natural rights referred to exist of themselves and wholly apart from the Constitution, deriving their sanction from a supposed law of nature and not from that instrument; (2) or, the language of the Constitution itself protecting those rights is so broad and imperative as to be of universal application to governmental action everywhere, Hawaii included.

If the former be the proper interpretation of this interesting theory of the counsel for Hawaii, the question which would arise would not present problems of constitutional law at all, but questions of abstract philosophy. If there are certain rights, which are protected because they are assumed to belong to the category of "natural rights," the question in each case would be as to whether such rights were "natural" or not. If they were they would be protected because of their inherent character, and if they were not, they would either have to rely upon positive man-made law for their sanction, or else in its absence be unprotected by any law. *Downes* v. *Bidwell*, 182 U. S. 276, 277, 282, 294.

If the court should believe that there exists a distinction in the Constitution between the prohibitions in favor of natural rights and those in favor of artificial rights, consistency necessarily dictates that all the artificial rights may equally be denied by Congress to the inhabitants of new territory to which the Constitution has not been either expressly extended or which has not been incorporated into the United States. Taking, therefore, these rights *seriatim*, our opponent must admit that if the language, "No persons shall be held to answer for a capital or otherwise infamous crime unless on a presentment or

indictment of the grand jury," is compatible with a trial on information in Hawaii, then it must also be admitted that "any person (in such territory may) be subject for the same offence, to be twice put in jeopardy of life or limb" or may be "compelled in any criminal case to be a witness against himself;" or may "be deprived of life, liberty or property without due process of law;" and that private property may be "taken for public use without just compensation."

The Sixth Amendment like the Fifth is devoted to consecrating the peculiar forms and procedure long deemed necessary to the maintenance of English liberty, and if jury trial belongs to the category of the artificial or remedial rights these rights likewise belong to the same category; and if the court adopt the view of our learned opponents, it must hold that the laws of Hawaii, without violation of the Constitution, might have deprived persons in criminal prosecution of the right "to a speedy and public trial;" "to be informed of the nature and cause of the accusation;" "to be confronted with the witnesses against him;" to have compulsory process for obtaining witnesses in his favor; and "to have assistance of counsel for his defence"— rights which were not protected against the action of the government in the Roman Law countries at the time of the adoption of the Constitution, and are clearly common law rights in their genesis and development.

It is impossible to hold that the appellee might lawfully have been convicted without the intervention of a grand jury and the unanimous verdict of a petit jury without at the same time holding that he might have been deprived of these other constitutional immunities.

Can such a doctrine obtain the sanction of this court? There can be no reversal of this decision unless the court be prepared to go to that length.

In conclusion, the appellee submits that

(1) By the act of Congress annexing the Hawaiian Islands, its legislation was intended to be made to conform to the requirements of the Fifth and Sixth Amendments, as is the case in other Territories of the United States. This is the plain meaning of the language employed.

(2) The situation of Hawaii was such that Congress evidently considered its institutions assimilable to those of the United States, and that to give any other interpretation to the language of Congress would be a plain violation of the spirit as well as of the letter of the joint resolution.

(3) To argue that the words "nor contrary to the Constitution" mean nothing, but were employed to show that Congress understood the Constitution to carry some vague kind of humanitarianism based upon a supposed "law of nature" into Hawaii is unsound and fanciful.

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

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898, 30 Stat. 750, known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are printed in the margin.[1] Though the resolution was passed July 7, the

[1] Joint resolution to provide for annexing the Hawaiian Islands to the United States. 30 Stat. 750.

Whereas the government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipment, and all

formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution the Hawaiian Islands remained under

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other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

* * * * * * * *

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

* * * * * * * *

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." 31 Stat. 141. By this act the Constitution was formally extended to these islands, sec. 5, and special provisions made for empanelling grand juries and for unanimous verdicts of petty juries. Sec. 83.

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit jury, which had been held applicable to other organized Territories, *Webster* v. *Reid*, 11 How. 437; *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 343, though we have also held that the States, when once admitted as such, may dispense with grand juries, *Hurtado* v. *California*, 110 U. S. 516; and perhaps allow verdicts to be rendered by less than a unanimous vote. *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 343.

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modelled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted

upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires, Amendment 5, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and, Amendment 6, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske*, 23 Wall. 374, 380: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York, (subsequently Mr. Justice Thompson of this court,) in *People* v. *Utica Ins. Co.*, 15 Johns. 358, 381: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the

doctrine more broadly stated than in *United States* v. *Kirby*, 7 Wall. 482, in which an act of Congress, providing for the punishment of any person who "shall knowingly and wilfully obstruct or retard the passage of the mail, or any driver or carrier," was held not to apply to a state officer who had a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. "All laws," said the court, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute, which punished a prisoner as a felon who broke prison, did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Similar language to that in *Kirby's* case was used in *Carlisle* v. *United States*, 16 Wall. 147, 153.

In *Atkins* v. *Disintegrating Co.*, 18 Wall. 272, it was held that a suit *in personam* in admiralty was not a "civil suit" within the eleventh section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *In re Louisville Underwriters*, 134 U. S. 488. So in *Heydenfeldt* v. *Daney Gold &c. Co.*, 93 U. S. 634, 638, it was said by Mr. Justice Davis: "If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment." To the same effect are the *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, in which many cases are cited and reviewed, and

Lau Ow Bew v. *United States*, 144 U. S. 47, 59. In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of "every Chinese person other than a laborer, who may be entitled by treaty or act of Congress to come within the United States," did not apply to "Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to reënter it on their return to their business and their homes." Said the Chief Justice: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Two recent English cases are instructive in this connection: In *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. D. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended." See also *Ex parte Walton*, L. R. 17 Ch. D. 746.

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the United States and subject to the sovereign dominion thereof;" 2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not

inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that until further legislation the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, it was provided, sec. 5, that only "the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. *Indianapolis &c. R. R. Co.* v. *Horst*, 93 U. S. 291, 299. The fact already mentioned that Congress in this organic act inserted a provision for the empanelling of grand juries and for the unanimity of verdicts indicates an understanding that the previous practice had been pursued up to that time, and that a change in the existing law was contemplated.

Of course, under the Newlands resolution, any new legislation must conform to the Constitution of the United States, but how far the exceptions to the existing municipal legislation were intended to abolish existing laws, must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as impos-

ing upon the islands every provision of a Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offence between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.

The language of Mr. Buchanan, then Secretary of State, in holding that the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government, is peculiarly applicable to this case. "The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." 16 How. 184.

It is insisted, however, that as the common law of England had been adopted in Hawaii by the Code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by unanimous verdict. The suggestion is rather fanciful than real, since section 1109 of the Code of 1897, adopting the common law of England, contained a proviso that "no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly, sec. 616, Penal Laws of 1897, as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the Republic was, whether he was bound to summon a grand jury under the Newlands resolution, when no provision existed by law for empanelling the same or their payment, and when in so doing he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Con-

stitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.

Inasmuch as we are of opinion that the *status* of the islands and the powers of their provisional government were measured by the Newlands resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the *Insular Tariff* cases regarding the power of Congress to annex territory without at the same time extending the Constitution over it. Of course, for the reasons already stated, the questions involved in this case could arise only from such as occurred between the taking effect of the joint resolution of July 7, 1898, and the act of April 30, 1900, establishing the territorial government.

The decree of the District Court for the Territory of Hawaii must be reversed, and the case remanded to that court with instructions to dismiss the petition.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, concurring.

The court in its opinion disposes of the case solely by a construction of the act of Congress. Conceding, *arguendo*, that such view is wholly adequate to decide the cause, I concur in the meaning of the act as expounded in the opinion of the court, and in the main with the reasoning by which that interpretation is elucidated. I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to be more fundamental. That ground is this: That as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amend-

ments of the Constitution concerning grand and petit juries were not applicable to that territory, because, whilst the effect of the resolution of annexation was to acquire the islands and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes* v. *Bidwell*, 182 U. S. 244.

The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti*, but on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the Government of the United States to await the subsequent determination of Congress. By the resolution the islands were annexed, not absolutely, but merely "as a part of the territory of the United States," and were simply declared to be subject to its sovereignty. The minutest examination of the resolution fails to disclose any provision declaring that the islands are incorporated and made a part of the United States or endowing them with the rights which would arise from such relation. On the contrary, the resolution repels the conclusion of incorporation. Thus it provided for the government of the islands by a commission, to be appointed by the President until Congress should have opportunity to create the government which would be deemed best. Further, it stipulated "until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." And, if possible, to make the purpose of Congress yet clearer, the act provided that "the President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper." All these provisions, in my opinion, clearly point out that, whilst the purpose was to acquire

and extend the sovereignty of the United States over the islands, it was proposed only to provide by the resolution of annexation a provisional government until Congress should become possessed of the information necessary to enable it to determine what should be the permanent status of the annexed territory. And the meaning of the resolution of annexation thus indicated by its terms is reflexly demonstrated by the act "to provide a government for the Territory of Hawaii," approved April 30, 1900, by which the islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government. When the two acts are put in contrast and the declarations in the later act are considered, which were not found in the earlier act, and which it is to be presumed were intentionally omitted from the resolution providing for annexation, I can see no reason for holding that the mere act of annexation accomplished the result which was brought about by the subsequent law containing the more comprehensive provisions.

The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them. *Hurtado* v. *California*, 110 U. S. 516; *Ross's case*, 140 U. S. 453, 473; *Bolln* v. *Nebraska*, 176 U. S. 83, and cases cited on page 86; *Maxwell* v. *Dow*, 176 U. S. 581, 584; and *Downes* v. *Bidwell*, *supra*.

Nor is there anything in the provision in the act of annexation relating to the operation of the Constitution in the annexed territory which militates against the conclusions previously expressed. The text of the resolution on this subject is as follows:

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

Now, in so far as the Constitution is concerned, the clause subjecting the existing legislation which was provisionally con-

tinued to the control of the Constitution, clearly referred only to the provisions of the Constitution which were applicable and not to those which were inapplicable. In other words, having by the resolution itself created a condition of things absolutely incompatible with immediate incorporation, Congress, mindful that the Constitution was the supreme law, and that its applicable provisions were operative at all times everywhere and upon every condition and persons, declared that nothing in the joint resolution continuing the customs legislation and local law should be considered as perpetuating such laws, where they were inconsistent with those fundamental provisions of the Constitution, which were by their own force applicable to the territory with which Congress was dealing.

To say the contrary would be but to declare that Congress had provided for the continuance of the tariff and other legislation, whilst at the same time it had enacted that that result should not be brought about. It would, moreover, lead to the assumption that provisions of the Constitution which were inapplicable to the particular situation should yet govern and control that condition.

MR. JUSTICE MCKENNA authorizes me to say that he also concurs in the result for the foregoing reasons.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM, dissenting.

In my opinion the final order of the District Court should be affirmed.

Mankichi was tried on an information filed May 4, 1899, charging him with the commission of the crime of murder on March 26 of that year, and was found guilty of manslaughter in the first degree by the verdict of nine jurors. The statutes of Hawaii prior to July 7, 1898, provided for such trial and conviction.

July 7, 1898, the "joint resolution to provide for annexing the Hawaiian Islands to the United States" was approved.

30 Stat. 750. Surrender of sovereignty and possession was effected August 12, 1898.

The act "To provide a government for the Territory of Hawaii" was approved April 30, 1900. 31 Stat. 141.

If Articles of Amendment V and VI were applicable to the Territory of Hawaii after August 12, 1898, the district judge was right, and Mankichi was entitled to be discharged.

The annexation resolution contained three sections, and, omitting the second and third as not material here, is given in the margin.[1]

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[1] "Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may ex-

By the specific language of this resolution no legislation which was contrary to the Constitution of the United States remained in force.

The language is plain and unambiguous, and resort to construction or interpretation is absolutely uncalled for. To tamper with the words is to eliminate them.

This is not one of those rare cases where adherence to the letter leads to manifest absurdity as in *United States* v. *Kirby*, 7 Wall. 482, and the illustrations there drawn by Mr. Justice Field from Puffendorf and Plowden.

The argument *ab inconvenienti*, without more, is an unsafe guide, and departure from the plain meaning tends to usurp legislative functions. Besides, that argument has no application here. Courts in Hawaii have had criminal law jurisdiction for more than half a century; and they had power to empanel a

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ist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."

grand jury, *United States* v. *Hill*, 1 Brock. 156, 159, and to direct the petit jury of twelve that conviction could only be had by a unanimous verdict.

In giving the instructions which accompanied the joint resolution, Mr. Justice Day, then Secretary of State, under date of July 8, 1898, said: "These recitals, it will be observed, are made in the language of the treaty of annexation, concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated into the joint resolution, because they embodied the terms of cession, which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii."

The reference is to a proposed treaty signed by Secretary Sherman on the part of the United States, and by three commissioners on the part of Hawaii, to which the advice and consent of the Senate was not given.

The preamble to this treaty expressed the "desire of the Government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof and under its sovereignty," and that the two Governments "have determined to accomplish by treaty an object so important to their mutual and permanent welfare."

The language of the remainder of the treaty is reproduced in the joint resolution, including the provision that the municipal legislation of Hawaii should remain in force when not inconsistent with the resolution or any existing treaty of the United States nor contrary to the Constitution of the United States.

By the resolution Congress provided for the government of Hawaii under the authority of the United States. All the civil, judicial and military powers exercised by the officers in the islands were vested in the appointees of the President, and were to be exercised "in such manner as the President of the United States shall direct." The President prorogued the legislature; reappointed the officers "of the Republic of Hawaii as it existed just prior to the transfer of sovereignty; required such officers to take an oath of allegiance to the United

States; and required all bonded officers to renew their bonds to the Government of the United States."

All existing treaties of Hawaii were abrogated; further immigration of the Chinese was prohibited except as allowed "by the laws of the United States;" the customs laws of Hawaii, and its municipal legislation not contrary to the Constitution of the United States, were continued in force until Congress should otherwise determine.

Commissioners were to be and were appointed to recommend to Congress such legislation as they might "deem necessary and proper."

The act of April 30, 1900, was the result of their report, and provided further government, dealing with details, and permanent instead of temporary. But while temporary under the resolution, it was nevertheless a system of government, and the territory was under the sovereignty of the United States and governed by its agencies.

By the resolution the annexation of the Hawaiian Islands became complete, and the object of the proposed treaty, that "those islands should be incorporated into the United States as an integral part thereof, and under its sovereignty," was accomplished.

The exceptions in respect of customs relations and the prohibition of the immigration of the Chinese, embodied in the treaty agreement and in the resolution, could not destroy the effect of incorporation or of the extension of the Constitution. If this were possible, the act of April 30, 1900, would be open to the same objection.

It was said at the bar that the words "contrary to the Constitution of the United States" were inserted as a declaration that certain "fundamental rights and principles, the basis of all free government, which cannot with impunity be transcended," were to be protected in Hawaii; that certain limitations of the Constitution applied "wherever the jurisdiction of the United States extends." But in that view the insertion of the phrase was superfluous and accomplished nothing.

Nor were we informed what those fundamental rights are. This is not a question of natural rights, on the one hand, and

artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that Government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury, and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve.

In *Callan* v. *Wilson*, 127 U. S. 540, 549, it was said by Mr. Justice Harlan, speaking for the court: "And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, *and so far as the agencies of the General Government were concerned*, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

Common law rights are described in the Ordinance of 1787 as "fundamental principles of civil and religious liberty," and the amendments embodying common law rights were demanded, as the preamble of the act of Congress proposing them declares, "in order to prevent misconstruction or abuse" of the powers of the General Government.

Assuming, solely for the sake of argument, that the mere fact of annexation might not in itself have at once extended to the inhabitants of Hawaii all the rights, privileges and immunities guaranteed by the Constitution, and that Congress had the power to impose limitations in that regard, I think not only that Congress did not do so in the particulars in question, but that in reënacting existing legislation, Congress, by the terms of the resolution, intentionally invalidated so much thereof as in these particulars was inconsistent with the Constitution. The presumptions are all opposed to any capitulation in the matter of common law institutions.

MR. JUSTICE HARLAN dissenting.

This case is of such exceptional importance in respect of the

principles announced by my brethren of the majority, that I deem it not inappropriate to state my views in a separate opinion.

I entirely concur with the Chief Justice in holding that the accused was properly discharged from custody. Whether the legality of his detention be tested by the Constitution, or alone by the Joint Resolution of Congress, approved July 7, 1898, providing "for annexing the Hawaiian Islands to the United States," his imprisonment was, in my judgment, wholly unauthorized.

What, at the time of the arrest and trial of the accused, were the relations existing between the United States and Hawaii? By what law were the personal rights of the people of Hawaii then determinable? The decision of the case depends upon the answer to these questions.

In 1897 a Treaty between the United States and the Republic of Hawaii was signed by Secretary Sherman on behalf of the United States and by three Commissioners on the part of Hawaii. Senate Report No. 681, 55th Congress, 2d Sess. March 16, 1898.

The Preamble to that Treaty expressed the "desire of the Government of the Republic of Hawaii that those Islands shall be *incorporated* into the United States *as an integral part thereof and under its sovereignty.*" It also recited the determination of the two Governments "to accomplish by treaty an object so important to their mutual and permanent welfare."

The Treaty stipulated that until Congress provided for the government of such Islands, all the civil, judicial and military powers exercised by the officers of the existing government in the Island should be vested in such person or persons, and be exercised in such manner, as the President of the United States directed, and that the President should have power to remove said officers and fill the vacancies so occasioned; also that the municipal legislation of the Hawaiian Islands "not inconsistent with this treaty *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The Treaty was not formally ratified, but its object was accomplished by the passage of the Joint Resolution of July 7, 1898. 30 Stat. 750.

In order that the full scope of that Resolution may be seen, it is here given in full:

"Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America *all rights of sovereignty of whatsoever kind* in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed *as a part of the territory of the United States* and are subject to the *sovereign dominion thereof*, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other puplic purposes.

"Until Congress shall provide for the government of such Islands all the civil, judicial, and military powers exercised by the officers of the existing government in said Islands shall be vested

in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

"The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

"Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

"The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this Joint Resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

"There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

"The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, *recommend* to *Congress* such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

"§ 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

"§ 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this Joint Resolution into effect." 30 Stat. 750.

Under date of July 8, 1898, the Secretary of State transmitted a copy of this Joint Resolution to the United States Envoy Extraordinary and Minister Plenipotentiary accredited to Hawaii, with instructions as to his duty in the premises.

Referring to the Preamble of that Resolution, the Secretary, in his letter of instructions, said: "These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated in the Joint Resolution, because they embody the terms of cession which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii. The Joint Resolution therefore accepts, ratifies and confirms on the part of the United States the cession formally agreed to and approved by the Republic of Hawaii. As by the adoption of the Joint Resolution the cession of the Hawaiian Islands and their dependencies to the United States is thus concluded, it is assumed that no further action will be necessary on the part of the Hawaiian Government beyond the formalities of transfer. Should that Government, however, desire to take any further action, formally confirmatory of what has been done, no objection will be interposed on the part of the United States. When all preliminaries shall have been settled, you are instructed to accept, in the name of the United States, the formal transfer of the sovereignty and property of the Hawaiian Government, and to raise the American flag, with such suitable ceremonies as may be agreed on for the occasion. It may be advisable

for the Hawaiian Government to deliver to you an inventory of the public property transferred to the United States. There are several provisions of the Joint Resolution to which it is deemed proper specially to refer. Until Congress shall provide for the government of Hawaii, 'all the civil, judicial and military powers exercised by the officers of the existing Government' are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct. In the exercise of the power thus conferred upon him by the Joint Resolution, the President hereby directs that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath of *allegiance to the United States*, and all the military forces will be required to take a similar oath; and all bonded officers will be required *to renew their bonds to the Government of the United States.* The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease, so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers. The municipal legislation of Hawaii, except such as was enacted for the fulfillment of the treaties between that country and foreign nations, and except such as is inconsistent with the Joint Resolution, or *contrary to the Constitution of the United States*, or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall otherwise determine. The existing customs relations of Hawaii with the United States and with other countries are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the Islands. Under these various provisions, the Government of the Islands will proceed without interruption. Upon the completion of the formalities of the transfer, your functions as Envoy Extraordinary and Minister Plenipotentiary to Hawaii will necessarily cease. . . . These instructions will be borne to you by Rear Admiral Joseph N. Miller, U. S. Navy, who will proceed to

Honolulu in the U. S. S. Philadelphia, and who, together with the commander of the United States military forces present, will act with you in the ceremonies attending the formal transfer of the Islands to the United States."

So that the Secretary of State gave the representative of the United States to understand that the Joint Resolution and the Treaty had the same object in view, namely, to incorporate Hawaii into the United States "as an integral part thereof and under its sovereignty."

Proceeding in our examination of the history of annexation, we find that under date of August 15, 1898, the United States Minister made his official report as to what was done in execution of the Joint Resolution annexing Hawaii to the United States. That report contains the details of the ceremonies attending the formal transfer of the sovereignty and property of the Hawaiian Government to the United States. From it the following extract is made:

"At a quarter before 12 [on August 12, 1898,] the ceremonies opened with prayer, at the conclusion of which I [the United States Minister] arose, and, addressing President Dole, said: 'Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7, 1898, entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States." This Joint Resolution accepts, ratifies, and confirms on the part of the United States the cession formally consented to and approved by the Republic of Hawaii.' . . . President Dole, taking the copy of the resolutions, said: 'A treaty of political union having been made, and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America, I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you, as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands;' and, waving his hand to his chief of staff, the Hawaiian flag was saluted by the battery of the Hawaiian National Guard, in which salute our ships in the harbor joined. Then the Hawaiian band played

Hawaii Ponoi for the last time, taps were sounded, and the Hawaiian flag came down, and was taken possession of by the Hawaiian corporal of the guard. Then, replying to President Dole, I said: 'Mr. President, in the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government. The admiral commanding the United States naval forces in these waters will proceed to perform the duty intrusted to him.' Thereupon the American flag was raised as the band played the Star Spangled Banner, and saluted."

The United States Minister then congratulated "his *fellow-countrymen*," on "the inevitable consummation of the national policies and the natural relations between the two countries *now formally and indissolubly united.*" He urged the Hawaiians not to rest content in the enjoyment of free institutions, but "to help maintain them in the spirit they will be extended to you, in the spirit you have sought them, in the spirit of fraternity and equality, in the spirit of the Constitution itself, *now the supreme law of the land.*" The oath of allegiance was thereupon administered by the Chief Justice of Hawaii to the officers of that country, each one swearing that he would "support and defend the Constitution of the United States of America against all enemies, foreign and domestic."

It is thus perceived that the Republic of Hawaii ceded, absolutely and without reserve, to the United States of America, all rights and sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, as well as the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; that the cession was accepted, ratified and confirmed by Congress, and that the Hawaiian Islands and their dependencies were "annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof;" and, what is of vital moment in this case, that such municipal legislation of the Islands as was not "*contrary to the Constitution of the*

United States,"—and therefore *only* such legislation as was consistent with that instrument—was to remain in force until Congress otherwise determined. Necessarily, therefore, if regard be had merely to the action of Congress, all local legislation inconsistent with the Constitution ceased to have any force in Hawaii after that country thus passed under the sovereign dominion of the United States.

After the passage of the Joint Resolution, and after the formal transfer of Hawaii to the United States, namely, in 1899, Osaki Mankichi, a subject of Japan, was tried in one of the courts of Hawaii for the alleged crime of murder. He was convicted of the crime of manslaughter in the first degree, and sentenced to imprisonment for twenty years at hard labor. Although the crime was of an infamous nature, there was no presentment or indictment of a grand jury, and the verdict was rendered by only nine of the twelve persons composing the petit jury.

Having been placed in prison pursuant to the verdict and sentence, the accused, in 1901, sued out a writ of *habeas corpus* from the District Court of the United States for the Territory of Hawaii, and was discharged upon the ground that his trial, conviction, sentence and imprisonment were in violation of the Constitution of the United States, in that he was not proceeded against upon the presentment or indictment of a grand jury, nor found guilty by the unanimous verdict of the petit jury, but only by a majority of the jurors. Hence this appeal.

It should be here stated that by the act of Congress of April 30, 1900, c. 339, a territorial government was organized over the Islands which had been acquired under the Joint Resolution of 1898, and those Islands were designated as the Territory of Hawaii. In that act provision was made for grand juries, and also for petit juries in criminal cases, to be composed, as at common law, of twelve persons. It was also declared that "no person should be convicted in any criminal case except by unanimous verdict of the jury." 31 Stat. 141, 157. It is not contended that that act can have any effect upon the decision of the present case, because the trial, conviction, sentence and imprison-

ment of the accused all occurred after the formal transfer to the United States pursuant to the Joint Resolution of 1898, and before the passage of the above act of 1900. We must consequently determine the legality of the proceedings against Mankichi by the law as it was between the date of the acquisition of sovereignty over the Islands by the United States and the date of the passage of the act of 1900. To that question I now address myself.

It must be assumed that the trial of the accused was in accordance with the municipal law of Hawaii as it existed prior to the approval of the Joint Resolution of 1898. The contrary is not asserted by the accused. But it is conceded by the court that if the words "contrary to the Constitution of the United States" in that Resolution are interpreted according to their usual, ordinary meaning, and if the validity of the trial be tested by the provisions of that instrument, then the prisoner is entitled to his discharge. Nevertheless, it is now held that although the United States acquired, on the passage of that Resolution, "all rights of sovereignty of whatsoever kind" in and over the Hawaiian Islands and their dependencies; although Hawaii then became "an integral part" of the United States and subject to its "sovereign dominion;" although the United States obtained the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipments and all other public property belonging to Hawaii; although all its officers took an oath of allegiance to the United States; yet, persons there charged with infamous crimes could not, as of right, before the passage of the act of 1900, invoke for their protection, when prosecuted for crime, the guarantees relating to grand and petit juries found in the Constitution of the United States—the supremacy of which instrument was, in effect, declared by the Joint Resolution when existing municipal legislation contrary to its provisions was superseded.

Practically, under the view taken by the court, and so far as those guarantees were concerned, if Congress had not chosen to provide a system of criminal procedure—as it did by the act of 1900—for the government, tribunals and people of Hawaii,

then, for an indefinite time, it may have been for a century, the courts in Hawaii, although acting under and by the authority of the United States, might have tried persons there for capital or infamous crimes in a mode confessedly "contrary to the Constitution of the United States." The Constitution, speaking with commanding authority to all who exercise power under its sanction, declares that "*no* person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury;" and it as clearly forbids a conviction in any criminal prosecution except *upon the unanimous verdict of a petit jury*. In other words, neither the life nor the liberty of any person can be taken, under the authority of the United States, except in the mode thus prescribed. Yet the present holding is that these constitutional requirements need not have been regarded in Hawaii at any time prior to the act of 1900, although that country was an integral part of the United States, and, with its inhabitants, was subject, in all respects, to our sovereign dominion. It follows, under the view of the court, that Congress, by non-action simply, could have kept in force even such municipal legislation of the Hawaiian Islands relating to criminal trials as was in palpable conflict with the Constitution of the United States.

I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States Minister, have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment, neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States. If the accused had committed the crime of murder in the Territory of Arizona; if he had been convicted in any

court in that Territory, except under a presentment or indictment of a grand jury and by the unanimous verdict of a petit jury; and if he had been then sentenced to be hanged, and was hanged, the judge of the court pronouncing the sentence would have been guilty of judicial murder. Of that the decisions of this court leave no room to doubt; for it has been adjudged repeatedly that the people of the organized Territories, as well as the people of the District of Columbia, are entitled, by force of the Constitution alone, to the guarantees of life, liberty and property found in the Constitution. And yet the result of the present judgment is that the hanging of the accused in Hawaii, an integral part of the United States, after a trial for murder committed there, but not upon indictment of a grand jury or on a verdict concurred in by all of the petit jury, could be sustained as legal if the case had arisen at any time prior to the act of 1900. This result has been achieved by the easy method of declaring that when Congress provided that only the municipal legislation of Hawaii not contrary to the Constitution should remain in force, it did not mean what its express words implied according to their ordinary signification; that Congress had no reference to the provisions of the Constitution relating to criminal prosecutions, but intended that the modes of criminal procedure in operation in Hawaii should remain in force until Congress otherwise provided, even if they were, as they are admitted to be, contrary to the Constitution—thus conceding to Congress the power of suspending the constitutional guarantees of life and liberty among a people undeniably subject to the authority and jurisdiction of the United States as completely as are the people of our organized Territories.

Three members of the court, constituting the majority who concurred in the *judgment* in *Downes* v. *Bidwell*, 182 U. S. 244, 288, 289, 291, 292, distinctly held that "the Government of the United States was born of the Constitution," and that all the powers enjoyed by it or which it may exercise must be derived either expressly or by implication from that instrument; that that instrument, in respect of every function of the Government, "is everywhere and at all times potential in so far as its provisions are applicable;" that wherever a power is given by the

Constitution and a limitation imposed upon its exercise, "such restriction operates upon and confines every action on the subject within its constitutional limits;" that, "as Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject;" that "every provision of the Constitution which is applicable to the territories is also controlling therein;" and that "in the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." In these views the minority in *Downes* v. *Bidwell*, constituting four other members of this court, substantially concurred.

The petit jury system existed in Hawaii long before the passage of the Joint Resolution. But it was inconsistent with the Constitution of the United States, in that it allowed a verdict of guilty in a criminal case by a majority of the jurors. Where was the difficulty in applying in Hawaii the constitutional provision forbidding such a verdict? To have applied that provision to Hawaii would not, in any essential sense, have imposed upon that country a new system for the trial of crimes. It would have only enforced the existing mode of trial so as to conform to the constitutional requirement in respect of petit juries. It would have left untouched the petit jury system in Hawaii, except as it was contrary to the Constitution. Whatever may be said as to the absence of a grand jury system, in Hawaii, it cannot, I think, be said, with any show of reason, that the constitutional provision relating to petit juries was inapplicable in Hawaii after its annexation to this country. Nothing stood in the way of the court instructing the jury in a criminal case, arising after annexation, that unanimity among the jurors as to the verdict was essential under the Constitution.

In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian

Islands, and without any act of Congress formally extending the Constitution to those Islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the Government of Hawaii accepted the Joint Resolution of 1898, by a formal transfer of its sovereignty to the United States—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States—every human being in Hawaii, charged with the commission of crime there, could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process, or as the result of any mode of procedure, that was inconsistent with the Constitution of the United States. Can it be that the Constitution is the supreme law in the States of the Union, in the organized Territories of the United States, between the Atlantic and Pacific Oceans, and in the District of Columbia, and yet was not, prior to the act of 1900, the supreme law in territories and among peoples situated as were the territory and people of Hawaii, and over which the United States had acquired all rights of sovereignty of whatsoever kind? A negative answer to this question, and a recognition of the principle that such an answer involves, would place Congress above the Constitution. It would mean that the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. It would mean that the will of Congress, not the Constitution, is the supreme law of the land only for certain peoples and territories under our jurisdiction. It would mean that the United States may acquire territory by cession, conquest or treaty, and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution, and under regulations that could not be applied to the organized Territories of the United States and their inhabitants. It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in follow-

ing which the American people will lose sight of or become indifferent to principles which had been supposed to be essential to real liberty. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish. Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a *colonial* system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States, one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law to be declared from time to time by Congress, which is itself only a creature of that instrument.

I stand by the doctrine that the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction. I could not otherwise hold without conceding the power of Congress, the creature of the Constitution, by mere non-action, to withhold vital constitutional guarantees from the inhabitants of a territory governed by the authority, and only by the authority, of the United States. Such a doctrine would admit of the exercise of absolute, arbitrary legislative power under a written Constitution, full of restrictions upon Congress, and designed to limit the separate departments of

Government to the exercise of only expressly enumerated powers and such other powers as may be implied therefrom—each department always acting in subordination to that instrument as the supreme law of the land. Indeed, it has been announced by some statesmen that the Constitution should be interpreted to mean not what its words naturally, or usually, or even plainly, import, but what the apparent necessities of the hour, or the apparent majority of the people, at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution. Nor can I approve the suggestion that the status of Hawaii and the powers of its local government are to be "measured" by the Resolution of 1898, without reference to the Constitution. It is impossible for me to grasp the thought that that which is admittedly contrary to the supreme law can be sustained as valid.

I have so far considered the case principally in the light of the results that must, as I think, follow from the interpretation placed by the majority on the Joint Resolution of 1898. But in my judgment Congress should not be held to have intended to do what is now attributed to it. When it declared that the municipal legislation of Hawaii *not* "contrary to the Constitution of the United States" should remain in force, it meant that legislation contrary to that instrument should not remain in force after annexation. Those words were inserted out of abundant caution, to make it certain that no municipal legislation of Hawaii contrary to the Constitution should thereafter be regarded as in force. If they were not intended to have that effect, for what purpose were they inserted? What local legislation was declared to be abrogated, if not that which was "contrary to the Constitution?" Under the view taken by the court, those words in the Joint Resolution are made wholly inoperative.

It is said to be evident from the terms of the Joint Resolution that Congress intended it to be merely temporary and provisional. Of course, some further legislation by Congress was contemplated in order to provide a complete territorial government for Hawaii. But in language perfectly direct and explicit, Congress said that *in the meantime* no municipal legis-

lation of Hawaii should be enforced that was "contrary to the Constitution of the United States." And yet a trial conducted in a mode forbidden by that instrument is now sustained as legal.

It is also said that "the *laws* of the United States" were not extended over the Islands until the organic act of April 30, 1900, was passed. But, by the Joint Resolution of 1898 Congress—assuming that action upon its part to that end was necessary—did extend the *Constitution* over the Hawaiian Islands when it declared that the municipal legislation of Hawaii "not contrary to the Constitution of the United States" should remain in force. And yet the court decides that although the trial of Mankichi, if tested by the Constitution, was illegal, it must be sustained from the necessities of the case.

Again, it is said that the words "contrary to the Constitution" in the Joint Resolution referred only to such provisions of that instrument as were *applicable* to Hawaii; and in support of that view, reference is made to that part of the Resolution which keeps alive existing customs regulations between Hawaii and the United States and other countries. It seems to me that the argument based on that clause of the Resolution is misleading and fallacious. Customs regulations are not determined by the Constitution. The authority to make them is given by that instrument to Congress; and it was for Congress to say what should be the nature of the customs regulations to be observed in Hawaii. Its direction that existing Hawaiian regulations of customs duties should remain in force, until otherwise ordered, was, in legal effect, an adoption of them by Congress for the time being. Now, the provisions as to grand and petit juries are in the Constitution, and could not be altered by Congress under any power it possessed. Their applicability, before civil tribunals, in a territory of the United States, was determinable by the Constitution itself. In other words, if the Constitution was in force at all in Hawaii, prior to the act of 1900, it was in force there for all it ordained, in respect, at least, of the guarantees of life and liberty. To sustain the prosecution of Mankichi upon the ground that Congress did not intend to supersede the local law permitting a

verdict in criminal cases by a majority of the petit jury, but did intend to keep such law in force until altered or abrogated by Congress, is, in effect, to say that, if Congress so ordered, persons charged with crime in Hawaii could, consistently with the Constitution, be tried before a single judge. It is not perceived why the argument based upon the provision as to customs regulations does not lead, logically, to such a result, nor how that provision can have any bearing upon the present case, unless it be that the power of Congress over criminal proceedings in Hawaii, involving the life and liberty of a freeman, is as full, comprehensive and complete as it is over mere customs regulations. I cannot go that far in upholding the power of Congress over, what some are pleased to call, our "dependencies" or "outlying possessions," and the "subjects" therein residing.

It is again said that the annexation of Hawaii and the transfer of its sovereignty, of whatsoever kind, to the United States did not so *incorporate* it into the United States as to make the Constitution supreme, in *all* respects, in that newly acquired territory. As the two countries desired that Hawaii, upon annexation, should become "an integral part" of the United States; as all the civil, military and judicial officers of Hawaii were required to take and did take an oath of allegiance to the United States; as Hawaii passed under the "sovereign dominion" of the United States and became subject to all valid laws, civil and criminal, that Congress might enact; as its people may be subjected to punishment for any crime or offence, committed against the United States; as by the authority of Hawaii the Hawaiian flag has come down, and in its place that of the United States substituted; and as Hawaiians cannot rightfully invoke for their protection the authority of any government except that of the United States—in view of these relations between the two countries, it is, to my mind, inconceivable that Hawaii was not so far incorporated into the United States that the Constitution was in force there, after the passage of the Joint Resolution of 1898, in respect, at least, of those personal rights which that instrument expressly guarded against in-

fringement by any tribunal deriving authority from its provisions.

It is further said that under the Joint Resolution of 1898 any *new* legislation must conform to the Constitution of the United States. This must mean that after the passage of that Resolution the Constitution was operative in Hawaii to prevent new legislation inconsistent with its provisions, but was not operative there so as to prevent the enforcement of local enactments or regulations that were confessedly in violation of that instrument. I cannot forbear saying that this view of the Constitution is most extraordinary. It does not commend itself to my judgment. I had supposed that when the Constitution came into operation in any country or over any people, all local laws, customs, or usages, within the same jurisdiction, that were inconsistent with its provisions, necessarily ceased to have any legal force whatever; otherwise, the declaration of the Constitution, that it was the supreme law of the land, would be meaningless.

But it is said that while *most, if not all*, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply "*from the moment of annexation*," yet the two rights created by the constitutional provisions as to grand and petit jurors "are not fundamental in their nature, but concern merely a method of procedure."

It is a new doctrine, I take leave to say, in our constitutional jurisprudence, that the framers of the Constitution of the United States did not regard those provisions, and the rights secured by them, as fundamental in their nature. It is an indisputable fact in the history of the Constitution that that instrument would not have been accepted by the required number of States, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement, by any *Federal* tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to universal belief at that time, were those secured by the provisions relating to grand and petit juries. Whatever may be the power of the

States in respect of grand and petit juries, it is firmly settled that the Constitution absolutely forbids the trial and conviction, in a *Federal* civil tribunal, of any one charged with crime, otherwise than upon the presentment or indictment of a grand jury, and the unanimous verdict of a petit jury, composed, as at common law, of twelve jurors.

In *Ex parte Milligan*, 4 Wall. 2, 120, 121, the accused, not in the army of the United States, was tried by a Federal military court-martial for a crime against the United States, alleged to have been committed in a State that adhered to the Union; and he was denied the right to a trial by jury. This court, referring to the provisions of the Federal Constitution relating to criminal offences and proceedings, said: "These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. . . . Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

In *Ex parte Bain*, 121 U. S. 1, 12, 13, the court, referring to the constitutional provision relating to grand juries, said: "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances

where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did . . . in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was *indispensable to the power of the court* to try the petitioner for the crime with which he was charged."

In *Thompson* v. *Utah*, 170 U. S. 343, 349, 350, 351, which was a case arising in an organized Territory, the question was whether the jury referred to in the original Constitution of the United States, and in the Sixth Amendment, was a jury constituted as it was at common law of twelve persons, neither more nor less. This court said: "When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. . . . When Thompson committed the offence of grand larceny in the Territory of Utah—which was *under the complete jurisdiction of the United States for all purposes of government and legislation*—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. . . . When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."

Nevertheless, it is contended that the constitutional provisions in question are not fundamental in their nature; that whether a person, charged, for instance, with murder, shall be convicted and hung, pursuant to a verdict rendered by a majority of the petit jury, rather than by all the jurors, is only "a method of procedure." My judgment refuses assent to this doctrine. I believe it to be most mischievous in every aspect. The provisions as to grand and petit juries are in the Constitution, and

the mandatory character of that instrument ought not to be disregarded. What tribunal, deriving its authority from the United States, can rightfully hold them to be immaterial? Whether those provisions are fundamental in their nature or not, no Federal civil tribunal, existing under the Constitution, and under a solemn obligation to maintain and defend it, can properly or safely ignore them. If the local law, under which Mankichi was tried and convicted, was contrary to any provision of the Constitution, that instrument should have been respected, whatever the nature of such provision.

The opinion of the court contains observations to the effect that some persons, heretofore convicted of crime in the Hawaiian courts, will escape punishment if the Joint Resolution of 1898 is so interpreted as to make Congress mean what, it is conceded, the words "contrary to the Constitution of the United States" naturally import. In the eye of the law, that is of no consequence. The cases cited by the court fall far short of sustaining the proposition that the court may reject the plain, obvious meaning of the words of a statute in order to remedy what it deems an omission by Congress. The consequences of a particular construction may be taken into account only when the words to be construed are ambiguous. If, after the passage of the Joint Resolution, the local authorities proceeded in the prosecution of crimes under municipal laws palpably contrary to the Constitution, the fault was theirs. They were informed by the Joint Resolution of 1898, by the Secretary of State, as well as by the Proclamation of President McKinley announcing the annexation of Hawaii to the United States, that only local legislation not contrary to the Constitution should remain in force. Their fault cannot justify the court in disregarding the express command of Congress that only municipal legislation that was consistent with the Constitution should remain in force in Hawaii. If the accused is held in palpable violation of that instrument, we cannot shrink from discharging him because of its effect upon convictions in other cases. We must interpret the law as it is written. As just stated, the doctrine is well settled that when the meaning of a statute is plain, there is no room for interpretation. The

consequences are for the lawmaking power. If the intention of the legislature "is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on considerations of policy or hardship, to depart from the words of the statute; they have no right to make exceptions, or insert qualifications, however abstract justice or the justice of the particular case may seem to require it." Sedgwick on Constr. of Stat. & Const. Law, 253, 328. "We are bound to take the act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws." *Jones* v. *Smart*, 1 T. R. 44, 52. "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, *ita lex scripta est*, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice, than mere policy and convenience." Story on Const. vol. 1, sec. 426. "I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute, when free from ambiguity and doubt; without indulging a speculation, either upon the impolicy or the hardship of the law." Mr. Justice Chase in *Priestman* v. *United States*, 4 Dall. 30, note. When therefore Congress, in words perfectly clear and free from doubt, declared that the municipal legislation of Hawaii, not contrary to the Constitution, should remain in force, does not the court usurp the function of making laws when it rules that certain municipal legislation of Hawaii was in force, although it was manifestly contrary to the Constitution? Can it depart from the plain, distinct words of the statute upon any ground of policy or to remedy an omission by Congress?

I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury.

2. That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated or forbade the enforcement of any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the Resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law.

The judgment of the District Court of the United States for Hawaii discharging the accused should be affirmed.

SNYDER *v.* BETTMAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 230. Argued April 7, 8, 1903.—Decided June 1, 1903.

This court has determined that Congress has power to tax successions; that the States have the same power, and that such power of the States extends to bequests to the United States; it follows that Congress has the same power to tax the transmission of property by legacy to States or to their municipalities.

The exercise of that power in neither case conflicts with the proposition that neither the Federal nor a state government can tax the property or agencies of the other, as the taxes are not imposed upon the property itself but upon the right to succeed thereto.

THIS was an action brought by the executor of David L. Snyder against the collector of internal revenue to recover $22,000, succession tax upon a legacy of $220,000, bequeathed to the city of Springfield, Ohio, in trust to expend the income in the maintenance, improvement and beautifying of a public park of the city, known as Snyder Park, including any extension thereof which said city might acquire. Such tax having been paid under protest, this action was brought to secure a refunding of the same.

A demurrer to the petition having been overruled by the Circuit Court, and final judgment entered, the case was brought here by writ of error.

Mr. J. E. Bowman for plaintiff in error.

Mr. Assistant Attorney General Beck for defendant in error.

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

This case involves the single question whether it is within the power of the Federal government, and within the spirit of the act of Congress of June 13, 1898, 30 Stat. 448, as amended March 2, 1901, 31 Stat. 946, to impose a succession tax upon a bequest to a municipal corporation of a State for a corporate and public purpose.

The case is to a certain extent the converse of those of the *United States* v. *Perkins*, 163 U. S. 625, and *Plummer* v. *Coler*, 178 U. S. 115. In the first of these we held it to be within the competency of the State of New York to impose a similar tax upon a bequest to the Federal government, incidentally deciding (1) that the inheritance tax of the State was "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage for the public use;" and (2) that the tax was not a tax upon the property itself, but upon its transmission by will or descent. In *Plummer* v. *Coler* we held the incidental fact that the property bequeathed is composed in whole or in part of Federal securities, did not invalidate the state tax or the law under which it was imposed, although it was accepted as undeniable that the State could not, in the exercise of the power of taxation, tax obligations of the United States, and, correlatively, that bonds issued by a State, or under its authority by its municipal bodies, were not taxable by the United States.

It is insisted, however, that the case under consideration is distinguished from those above cited, in the fact that the inheritance tax of New York was but a condition annexed to the power of a testator to dispose of his property by will, and

that such power, being purely statutory, the State has the right to annex such conditions to it as it pleases. The case, then, really resolves itself into the question whether the authority to lay a succession tax arises solely from the power to regulate the descent of property, or, as well from the independent general power to tax, or, as expressed in the Constitution, art. I, sec. 8, "to lay and collect taxes, duties, imposts and excises." The difficulty with this proposition of the plaintiff is that it proves too much. If it be true that the right to impose such taxes arises solely from the right to regulate successions, then a denial of such right goes to the whole power of the government to impose a succession tax, irrespective of the question whether the legacy is made to a private individual or to an agent of the State, and the cases in this court upholding the power of the Federal government to lay such tax were wrongly decided.

That question was exhaustively considered by this court in *Knowlton* v. *Moore*, 178 U. S. 41, in which the constitutionality of this law was attacked upon four grounds: (1) That the taxes imposed were direct taxes, and not apportioned according to the population; (2) if not direct, they were levied on rights created solely by a state law, depending for their continued existence on the consent of the several States; (3) because they were not uniform throughout the United States; (4) that the rate of tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares. It was held, following the cases of *United States* v. *Perkins*, 163 U. S. 625, and *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, that an inheritance tax was not one upon property but upon the succession. The question involved here, as to the power of Congress to levy a succession tax, was considered, and it was said by Mr. Justice White (p. 56): "The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the national gov-

ernment with a matter which falls alone within the reach of state legislation." This proposition was pronounced a fallacy (p. 59): "In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate." In this connection was cited the power of the States to tax imported goods after they had been commingled with the general property of the State, as well as vehicles engaged in interstate commerce.

Continuing, it was further said (page 60): "It cannot be doubted that the argument when reduced to its essence, demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. . . . Under our constitutional system both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States.

The principles laid down in *Knowlton* v. *Moore* were reiterated in *Murdock* v. *Ward*, 178 U. S. 139, although the case was decided upon the authority of *Plummer* v. *Coler*.

If it be true that it is beyond the power of Congress to im-

pose an inheritance tax because the descent of property is regulated by state statutes, it would be difficult to support its power to impose stamp taxes upon commercial and legal instruments, since the conveyance, regulation and transmission of all property is governed by the laws of the several States. Particularly would this be so with reference to stamp duties imposed upon documents connected with the devolution of the property of a deceased person. And yet, as stated in *Knowlton* v. *Moore*, (page 50,) Congress, as early as 1797, imposed a stamp duty, not only upon receipts or other discharges for or on account of any legacy, or for a share of personal estate divided under the statute of distributions, proportioned to the amount of the legacy or such distributive share, but in the internal revenue act of 1862, 12 Stat. 432, 483, a tax was imposed upon the probate of wills and letters of administration, proportioned to the value of the estate. Not only this, but the same statute imposed a tax upon writs, or other original process, by which suits are commenced in any court of record, exempting only processes issued by justices of the peace, or in suits begun by the United States, or any State. This act was treated as applicable to the state courts, although its constitutionality may well be doubted.

Referable to the same principle is the power of Congress to tax occupations which can only be carried on by permission of the state authorities and under conditions prescribed by its laws —such, for instance, as the profession of a lawyer or physician, or the business of dealing in spirituous liquors, for which licenses are required under the laws of nearly all the States. While the power of Congress to impose such taxes may never have been expressly affirmed by this court, it does not seem to have been seriously questioned, and is a legitimate inference from *McGuire* v. *The Commonwealth*, 3 Wall. 387 ; *The License Tax Cases*, 5 Wall. 462; *Pervear* v. *The Commonwealth*, 5 Wall. 475, and *Royall* v. *Virginia*, 116 U. S. 572, 580. See also *Ould* v. *City of Richmond*, 23 Gratt. 464 ; *Humphreys* v. *City of Norfolk*, 25 Gratt. 97.

Conceding fully that Congress has no power to impose a burden upon a State or its municipal corporations, the question

in each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. Thus in *Van Allen* v. *The Assessors*, 3 Wall. 573, we held it to be within the power of the States to tax the shares of national banks, though a part or the whole of the capital of such bank were invested in national securities exempt from taxation, upon the ground that the taxation of the shares was not a taxation of the capital. So a tax upon deposits was upheld, though such deposits were invested in United States securities. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632. The same principle was extended to a statute of New York, imposing a tax upon corporations measured by its dividends, though such dividends were derived from interest upon government bonds. *Home Ins. Co.* v. *New York*, 134 U. S. 594. As the tax in the case under consideration is collected from the property while in the hands of the executor (sec. 30), who is required to liquidate it "before payment and distribution to the legatees," we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the tax. Such incidental effects are common to many, if not all, forms of taxation—indeed it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed.

Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property.

If the position of the plaintiff be sound, it will come to pass

that, with the same power to tax the subject matter, *i. e.*, the transmission of the property, the States are competent to limit the amount of bequests to the Federal government by requiring the prepayment of a succession tax as a condition precedent to the transmission of the property, while Congress is impotent to accomplish the same result with respect to legacies to States or their agents. We are reluctant to admit the inferiority of Congress in that particular.

The judgment of the Circuit Court is therefore,

Affirmed.

MR. JUSTICE WHITE, with whom concur MR. CHIEF JUSTICE FULLER and MR. JUSTICE PECKHAM, dissenting.

It is conceded in the opinion of the court that the bequest upon which it is sought to levy the United States inheritance tax was made to a municipal corporation for a public, that is, a governmental purpose. This being the admitted premise, I cannot give my assent to the proposition that the tax can be imposed. Nothing is better settled than that the United States has no power to tax the governmental attributes of the States, and that municipal corporations are agencies of the States and not subject, as to their public rights and duties, to direct or indirect taxation by the United States. The doctrine has nowhere been more clearly stated than in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 583–584. In that case, despite the division of opinion on other questions, the court was unanimous in holding that, in any event, income subject to taxation by the United States could not include interest derived from municipal bonds, because to include such interest in income subject to taxation would amount at least to an indirect charge upon a state governmental agency. Speaking through Mr. Chief Justice Fuller, the court said:

"The Constitution contemplates the independent exercise by the nation and the State, severally, of their constitutional powers.

"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they em-

ploy to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

"A municipal corporation is the representative of the State and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Company*, 17 Wall. 322, 332."

It is true that in *United States* v. *Perkins*, 163 U. S. 625, and *Plummer* v. *Coler*, 178 U. S. 115, it was held in the one case that an inheritance tax of the State of New York could be taken out of a bequest to the United States, and in the other that a bequest of bonds of the United States was subject to a state inheritance tax. It is also true that in *Knowlton* v. *Moore*, 178 U. S. 41, it was decided that the United States had the power to impose an inheritance tax. But the ruling in none of these cases, in my opinion, sustains the decision now made. The power of the State of New York, which was upheld in both the *Perkins* and *Coler* cases, rested not simply on the authority of that State to impose an inheritance tax, but upon its admitted right to regulate the transmission or receipt of property by death. On the other hand, the right of the United States to levy an inheritance tax, which was upheld in *Knowlton* v. *Moore*, was based solely upon the power of the United States to tax, and that case therefore conveys no intimation that there is authority in the United States to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two, that is, between the broader power of a State resulting from its authority not only to tax but also to regulate the transmission or receipt of property by death, and the narrower power, that is, of taxation alone vested in the government of the United States, was explicitly pointed out in *Knowlton* v. *Moore*, *supra*, at page 57. Moreover, attention was specially directed to the obvious distinction between the two on page 58, where it was said:

"Of course, in considering the power of Congress to impose

death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress."

So also the difference between the two had been previously accentuated in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 287, 288. There is no confusion between the two classes of cases, and no room in reason seems to me to exist for the assumption that things which are different are nevertheless one and the same. On the contrary, to my mind it appears that misconception will necessarily be caused by confounding wholly different powers and from supposing that because a particular result is justified where a specified power exists, the same consequence must obtain where the power upon which it depends is wanting. Certainly, I assume, it cannot be said because a State has the right to regulate successions and, therefore, to prevent property from passing by death to the United States, hence also the United States must have power by regulating successions to prevent property from passing by death to a State or its governmental agencies. And yet, in my opinion, this is the logical consequence of the doctrine that because the States may in virtue of an authority belonging to them accomplish a particular result as regards the United States, therefore the United States must have the right to bring about the same thing as to the States. The United States not possessing, as the States do, the right to regulate successions, when the United States calls into play its taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the Constitution. When, on the contrary, the State imposes a burden upon the passage or receipt of property by death, its right to do so, if not sustainable by the exercise of the taxing power, finds adequate support in the authority vested in it to regulate the transmission or receipt of property on the occasion of death. This was clearly pointed out in *United States* v. *Perkins*, *supra*, 630, where it was said: "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is

only upon this condition that the legislature assents to a bequest of it." Nor do I see the force of the suggestion that as the tax in question is imposed upon the property in the hands of the executor before payment and distribution to the legatees, it, therefore, cannot be regarded as tax upon the right of the municipality to receive the legacy. It was held, after great deliberation, in *Knowlton* v. *Moore*, 178 U. S. 41, that the inheritance taxes levied by the act of Congress were not imposed on the estate of the decedent but were laid on the passing of the legacies, and on nothing else. It cannot be the intention now to bring about the confusion which must arise from overthrowing this settled doctrine, since it is conceded that the only question for decision is the right of Congress to impose a succession tax *upon the bequest to a municipal corporation for a public purpose.* It being admitted that such is the question for decision, I do not perceive how that question can be solved by saying that the tax is not on the passing of the bequest to the municipality, but is imposed on the estate in the hands of the executor before the municipality receives its legacy. It was not only directly held in *Knowlton* v. *Moore* that the tax was on the transmission or the receipt of the legacy occasioned by death, and was therefore not on the property, not on the estate, not on the executor, but it was also held to be a burden imposed on the recipient. The court said (p. 60):

"Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but *this is a burden cast upon the recipient* and not upon the power of the State to regulate."

This conclusion was absolutely essential to the construction of the statute which was sustained in *Knowlton* v. *Moore.* I do not perceive how it can be now held that the tax is valid because it is on the estate in the hands of the executor and not a burden on the recipient, when the case of *Knowlton* v. *Moore*, which explicitly holds to the contrary, is expressly approved. It is, however, suggested that the tax is only incidentally on the right of the corporation to receive, and therefore is valid. If "incidentally" is intended to refer to the subject upon which the tax is levied, then the proposition, in my

opinion, only reiterates the misconception to which attention has been previously called, and it besides conflicts with the conceded premise that the question for decision is whether a tax can be validly imposed on the right of a municipal corporation to take a legacy. Such cannot be the question if there is no such question in the case. If the term "incidentally" conveys the thought that the tax is only indirectly on the corporation's right to take the bequest, and therefore it may be lawfully imposed, the doctrine overthrows the rule announced by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, and reiterated in numberless cases since that decision, to the effect that where there is a want of constitutional power to tax a particular object neither a direct nor an indirect tax can be imposed, since the power to tax is the power to destroy. It to me seems that the tax here in question bears more directly upon the right of the corporation to take the bequest than did the tax which was condemned in *McCulloch* v. *Maryland*. Assuredly, the inclusion in income subject to taxation of an amount derived from interest on municipal bonds is less directly on the bonds than is the tax in this case, on the right of the municipality to take, and yet, as I have said in *Pollock* v. *Farmers' Loan & Trust Company*, the tax on an income made up in part of interest on a municipal bond was declared to be void, because, even if indirect, it could not be levied where there was no power to tax at all. The distinction was pointed out in *Knowlton* v. *Moore*, where, in referring to the statement of Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, that the power to tax involves the power to destroy, it was said (p. 60):

"This principle is pertinent only when there is no power to tax a particular subject. . . . In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."

To my mind no doctrine more dangerous and more subversive of a long line of settled authority in this court could be

announced than the statement that, although there is no power whatever to tax a particular object, the courts will nevertheless maintain a tax if it only indirectly puts a burden on the forbidden object or that the tax may be sustained because in the judgment of a court the degree in which the Constitution has been violated is not great. Constitutional restrictions are in my opinion imperative, and ought not to be disregarded because in a particular case it may be the judgment of a court that the violation is not a very grievous one.

Testing the validity of the tax in this case solely by the extent of the power to tax conferred on the government of the United States by the Constitution, it follows, as the United States has no right to directly or indirectly burden a state governmental agency, that the tax here in question, in my opinion, cannot be sustained.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE PECKHAM concur in this dissent.

MIFFLIN *v.* R. H. WHITE COMPANY.

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

No. 268. Argued April 30, May 1, 1903.—Decided June 1, 1903.

The serial publication of an author's work in a magazine with his consent and before any steps are taken to secure a copyright is such a publication as vitiates, under § 4 of the act of 1831, the copyright afterwards attemped to be taken out. *Holmes* v. *Hurst*, 174 U. S. 82. Where there is no evidence that the publishers were the assignees or acted as the agents of the author for the purpose of taking out copyright, the copyright entry of a magazine, made by them under the act of 1831, and under the title of the magazine, will not validate the copyright entry subsequently made under a different title by the author of a portion of the contents of the magazine. And see *Mifflin* v. *Dutton*, *post*, p. 265.

THIS was a bill in equity by the firm of Houghton, Mifflin & Co., as assignees of the late Oliver Wendell Holmes, against

the R. H. White Company, for a violation of the copyright upon the "Professor at the Breakfast Table." The work was published serially during the year 1859, in the Atlantic Monthly Magazine, at first by Phillips, Sampson & Co., and later by the firm of Ticknor & Fields. The first ten parts were published from January to October, 1859, by Phillips, Sampson & Co. without copyright protection. The remaining two numbers for the months of November and December, 1859, were entered for copyright by Ticknor & Fields, whose copyright purported to cover the entire magazine. After its publication serially had been completed Dr. Holmes published the entire work in one volume, containing a proper notice of copyright.

Upon this state of facts the Circuit Court dismissed the bill, 107 Fed. Rep. 708, and upon appeal to the Circuit Court of Appeals that court affirmed the decree. 112 Fed. Rep. 1004.

Mr. Samuel J. Elder and *Mr. Edmund A. Whitman* for appellants.

Mr. Andrew Gilhooly for appellee.

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

That the copyright taken out by the author after the serial publication of his work in the Atlantic Monthly did not prevent the republication of so much of such serial as had appeared in the magazine prior to December, 1859, and before any steps taken to obtain a copyright, was settled by this court in *Holmes* v. *Hurst*, 174 U. S. 82, wherein we held that the appearance of a work in a magazine, by consent of the author, was such a publication as vitiated the copyright under section four of the copyright act of 1831. 4 Stat. 436.

The question presented by this case is whether entering for copyright the last two parts of the "Professor at the Breakfast Table" in the December number of 1859 of the Atlantic Monthly by Ticknor & Fields, proprietors of the magazine, was sufficient to save the rights of the author, the plaintiff

having purchased such rights from the executor of the late Dr. Holmes.

By section one of the act of February, 1831, "the author or authors of any book or books . . . not printed and published, . . . and the executors, administrators, or *legal assigns* of such person or persons, shall have the sole right and liberty of printing," etc. By section four, "no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book . . . in the clerk's office of the District Court of the district wherein the author or *proprietor* shall reside," when the clerk is directed to make a record of the same, in a form prescribed, wherein is stated the date, the name of the author or proprietor, etc.; and by section five, the person entitled to the benefit of the act shall give information of his copyright, by giving notice on the title page, or page immediately following, in a prescribed form. Construing these statutes together, it would seem that the word "proprietor," in the fourth section, must practically have the same meaning as "legal assigns" in the first section, and was designed to give to the legal assignee of any author or authors the right to take out the copyright in his own name.

There is no evidence in this case, however, that Dr. Holmes, the author of the "Professor at the Breakfast Table," ever assigned to either of the proprietors of the magazine the authority to copyright his work. While there is an allegation in the bill, upon information and belief, that the work—the first ten parts of which were published by Phillips, Sampson & Co.—was printed, published and sold by said Phillips, Sampson & Co. "by and with the consent and authority of the said Oliver Wendell Holmes, and in accordance with an agreement" made with him by the said firm, whereby he granted to them the right to print, publish and sell his work in the said magazine, there is no allegation that either Phillips, Sampson & Co. or their successors, Ticknor & Fields, were authorized to enter "The Professor at the Breakfast Table" for copyright, either in their own names, or in the name of the author; nor does there appear to be any connection whatever between the copyright taken out by Ticknor & Fields and that subsequently taken out by Dr. Holmes.

The entry of the Atlantic Monthly by Ticknor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the Atlantic Monthly. While, without further explanation, it might, perhaps, be inferred that the author of a book who places it in the hands of publishers for publication, might be presumed to intend to authorize them to obtain a copyright in their own names, *Pulte* v. *Derby*, 5 McLean, 328; *Belford* v. *Scribner*, 144 U. S. 488, 504, it is apparent that there was no such intention in this case, inasmuch as almost immediately after the publication of the December number of the magazine, Dr. Holmes himself entered the book under its correct title for copyright. That right was never assigned until 1895, when it was turned over to the plaintiffs by the executor of the author. Had the copyright been entered by Ticknor & Fields, as agents of Dr. Holmes, it is possible it might have been sustained, but there is nothing to indicate that Ticknor & Fields were acting for any one else than themselves; and there is nothing to show that Dr. Holmes ever assented to their copyrighting his work. It is impossible to see how the copyright subsequently obtained by Dr. Holmes can derive any additional support from the fact that Ticknor & Fields chose to copyright the final chapters of the work in the Atlantic Monthly, since there is nothing to indicate that he even knew that any such proceeding was contemplated, much less that he authorized it.

But, even assuming that it was done by his authority, there is an additional question whether the entry of a book called the "Atlantic Monthly Magazine," in the name of Ticknor & Fields, is equivalent to entering a book called "The Professor at the Breakfast Table," by Oliver Wendell Holmes. The two entries were in the following form:

1. Entry of "the Atlantic Monthly" for the month of December, 1859. "Entered according to act of Congress in the year 1859, by Ticknor & Fields, in the clerk's office of the District Court of the District of Massachusetts."

2. Entry of "The Professor at the Breakfast Table." "Entered according to act of Congress in the year 1859, by Oliver

Wendell Holmes, in the clerk's office of the District Court of the District of Massachusetts."

The object of the notice being to warn the public against the republication of a certain book by a certain author or proprietor, it is difficult to see how a person reading these notices would understand that they were intended for the protection of the same work. On their face they would seem to be designed for entirely different purposes. While owing to the great reputation of the work and the fame of its author, we might infer in this particular case that no publisher was actually led to believe that the book copyrighted by Dr. Holmes was not the same work which had appeared in the Atlantic Monthly, that would be an unsafe criterion to apply to a work of less celebrity. It might well be that a book not copyrighted or insufficiently copyrighted by the author might be republished by another in total ignorance of the fact that it had previously appeared serially in a copyrighted magazine. It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it. *Thompson* v. *Hubbard*, 131 U. S. 123. In determining whether a notice of copyright is misleading we are not bound to look beyond the face of the notice, and inquire whether under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled.

With the utmost desire to give a construction to the statute most liberal to the author, we find it impossible to say that the entry of a book under one title by the publishers can validate the entry of another book of a different title by another person.

The decree of the Court of Appeals was correct, and it is therefore

Affirmed.

MIFFLIN *v.* DUTTON.

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

No. 267. Argued April 30, May 1, 1903.—Decided June 1, 1903.

The preceding case, *Mifflin* v. *R. H. White Co.*, *ante*, p. 260, followed, and *held*, that under the copyright act of 1831 the authorized appearance of an author's work in a magazine without the statutory notice of copyright specially applicable thereto makes it public property and vitiates the copyright previously taken out by the author; and that the copyright of the magazine under its own title by the publisher is not a compliance, so far as the authors are concerned, with the statutory requirements as to notice of copyright in the several copies of each and every edition published.

THIS was a bill in equity by the firm of Houghton, Mifflin & Co., assignees of the late Harriet Beecher Stowe, against the firm of Houghton & Dutton, for a violation of the copyright of the "Minister's Wooing," by Mrs. Stowe.

The "Minister's Wooing" appeared serially in the Atlantic Monthly during the year 1859. The contract between Mrs. Stowe and her publishers, Phillips, Sampson & Co., after reciting that Mrs. Stowe was the author and owned the copyright of and right to publish the book, gave to Phillips, Sampson & Co. "the sole and exclusive right to publish the same in this country." After the first twenty-nine chapters had appeared in the first ten numbers of the Atlantic Monthly for the year 1859, the author published the whole work in book form on October 15, 1859, and took proper steps to secure the copyright, notice of which was given in the name of Harriet Beecher Stowe. At the date of this publication the last thirteen chapters had not been elsewhere published, but subsequently appeared in the November and December numbers, which were copyrighted by Ticknor & Fields, to whom the Atlantic Monthly had been sold, and in accordance with an arrangement with Mrs. Stowe, by which the contract between her and Phillips, Sampson & Co. was assigned to Ticknor & Fields.

Upon this state of facts the Circuit Court dismissed the bill,

and upon appeal to the Circuit Court of Appeals that court affirmed the decree. Both this and the preceding case were covered by the same opinion.

Mr. Samuel J. Elder and *Mr. Edmund A. Whitman* for appellants.

Mr. Andrew Gilhooly for appellee.

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

As the first twenty-nine chapters of "The Minister's Wooing" appeared in the Atlantic Monthly before any steps whatever were taken, either by the publishers or by Mrs. Stowe, to obtain a copyright, it follows that they, at least, became public property.

Mrs. Stowe's copyright of the last thirteen chapters would doubtless have been valid but for the fact that they subsequently appeared in the November and December numbers of the Atlantic Monthly without notice of such copyright. As we have already held that the copyright of the Atlantic Monthly by Ticknor & Fields did not operate as notice of the rights of the author to any article therein appearing, it follows from the case just decided that the appearance of the last thirteen chapters in the Atlantic Monthly vitiated the copyright under section five, which provides that no person shall be entitled to the benefit of the act unless he shall give information of his copyright by causing to be inserted in the several copies of each and every edition published during the term secured a notice of such copyright.

It is exceedingly unfortunate that, with the pains taken by the authors of these works to protect themselves against republication, they should have failed in accomplishing their object; but the right being purely statutory, we see no escape from the conclusion that, unless the substance as well as the form of the statute be disregarded, the right has been lost in both of these cases.

The decree in this case is also

Affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* TOWNSEND.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 160. Submitted January 30, 1903.—Decided May 4, 1903.

Where the United States grants a right of way by statute to a railroad company which files a map of definite location, and the road is constructed, the land forming the right of way is taken out of the category of public land subject to preëmption and sale, and the land department is without authority to convey rights therein. Homesteaders filing entries thereafter can acquire no interest in land within the right of way on the ground that the grants to them were of full legal subdivisions the descriptions whereof include part of the right of way.

Although a right of way granted by the United States through public domain within a State may be amenable to the police power of that State, an individual cannot for private purposes acquire by adverse possession under a statute of limitations of that State any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions as the right of way was granted to the Northern Pacific Railroad Company.

THIS controversy concerns the validity of an asserted title, by adverse possession, to a portion of the right of way in Wadena County, Minnesota, granted to the Northern Pacific Railroad Company, its successors and assigns, by the second section of the act of Congress, approved July 2, 1864. 13 Stat. 365. The plaintiff in error, the Northern Pacific Railway Company, a corporation of the State of Wisconsin, acquired the railroad and property of the former named company on or about August 31, 1896, by purchase at a sale under foreclosure of certain mortgages.

By the first section of the act of 1864, the Northern Pacific Railroad Company was created a corporation, and was empowered to construct and maintain a continuous railroad and telegraph line from a point on Lake Superior to some point on Puget Sound. In the second section of the act it was provided, among other things, as follows:

"*And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. . . ."

Section 3 created a large land grant to secure the construction and continuous maintenance of the road. Construction was to be supervised by commissioners appointed by the President. (Sec. 4.) Section 5 provided how the road must be built, and that the company should not charge the government higher rates than individuals. The right of eminent domain was conferred by section 7. In section 8 conditions of the grant in respect to the commencement and completion of the construction of the road were enumerated. Section 9 reserved the right to Congress to complete the road. Section 10 secured to all the people of the United States the right to subscribe for its stock. Section 11 made it a post road subject to the use of the United States for government service, and subject to such regulations as Congress might impose respecting charges for government transportation. The remaining provisions of the act dealt with the mode of acceptance of the grant, the powers and duties of the board of directors and other officers of the company, the payments of cash assessments and other subjects. We need only further particularly refer, however, to section 18, wherein it was provided that the railroad company, previous to commencing the construction of its road, should obtain the consent of the legislature of any State through which any portion of its line might pass. Such consent was duly given by the State of Minnesota.

The company signified its acceptance in writing, as provided in the act. In November, 1871, the line of road was definitely located and a duly approved map was filed showing said definite location. This line crossed the northwest quarter of section 24, township 134 north, of range 35, west of the fifth principal meridian, Minnesota. At that time, as well as prior thereto, said quarter section was public land, to which the United States had full title, and the same was not reserved or otherwise appropriated, nor had any entries or filings or applications to make entry or filing thereon been made. During the years 1870 and 1871 the railroad was duly constructed through the section referred to, and the portion of the road thus constructed was thereafter duly accepted by the President.

In December, 1878, and February, 1882, homestead entries were initiated on said northwest quarter of section 24, and on November 30, 1885, and July 24, 1889, patents, which purported to convey the whole of each forty-acre subdivision, were issued to Abner Townsend and George H. Brown, respectively. Subsequently, in 1886 and 1888, the title to said northwest quarter was conveyed to the defendant in error, Minerva Townsend. During the occupancy of the homesteaders they cultivated up to the line of the ordinary and snow fences of the railroad, situated respectively fifty and one hundred feet from the center of the track, and such occupancy continued a sufficient length of time to constitute a title by adverse possession under the limitation statutes of Minnesota. Demand was made by the railroad company for possession of that portion of the quarter section which was within the granted right of way, and upon non-compliance an action of ejectment was brought in a court of the State of Minnesota to recover possession of the disputed ground. The case was tried by the court without a jury. Lengthy findings of fact were made, and as a conclusion of law the court found that the railroad company was entitled to the possession of the premises described, and entered judgment accordingly.

On appeal, the Supreme Court of Minnesota reversed the judgment of the trial court. 84 Minnesota, 152. The cause was then brought to this court.

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

Mr. A. G. Broker, *Mr. F. F. Post* and *Mr. Harold Preston* for defendant in error.

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

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preëmption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

Conceding the adverse possession and its efficacy under the state law as against the railroad right of way, to be as found by the state court, the sole question which arises then for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a Federal question.

In determining whether an individual, for private purposes may, by adverse possession, under a state statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad, we must be guided by the doctrine enunciated in *Packer* v. *Bird*, 137 U. S. 661, 669, and approvingly referred to in *Shively* v. *Bowlby*, 152 U. S. 1, 44, viz.: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the owner-

ship of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 181; *St. Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426, it must be held that the fee passed by the grant made in section 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin* case) "to those necessarily implied, such as that the road shall be . . . used for the purposes designed." Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in *Grand Trunk Railroad* v. *Richardson*, 91 U. S. 454, 468, "a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers con-

ferred by Congress, for, as said in *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 261, 275, speaking of the very grant under consideration: "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.

As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to review the cases which have been called to our attention supporting on the one hand or denying on the other the broad conten-

tion that title by adverse possession, under state statutes of limitation, may be acquired by individuals to land within the right of way of a railroad. None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case. As here we find that the nature of the duties imposed by Congress upon the railroad company and the character of the title conferred by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress, the cases in question are inapposite.

The judgment of the Supreme Court of Minnesota must be *Reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.*

MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissent.

INTERSTATE COMMERCE COMMISSION *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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

No. 214. Argued April 13, 1903.—Decided May 18, 1903.

1. When competition which controls rates prevails at a given point a dissimilarity of circumstances and conditions is created justifying a carrier in charging a lesser rate to such point, it being the longer distance, than it exacts to a shorter distance and non-competitive point on the same line.
2. A nearer and non-competitive point on the same line is not entitled to lower rates prevailing at a longer distance and competitive place on the theory that it could also be made a competitive point if designated lines of railway carriers by combinations between themselves agreed to that end. The competition necessary to produce a dissimilarily of conditions must be real and controlling and not merely conjectural or possible.
3. Where a charge of a lesser rate for a longer than a shorter haul over the same line is lawful because of the existence of controlling competition at the longer distance place the mere fact that the less charge is made for the longer distance does not alone suffice to cause the lesser rate for the longer distance to be unduly discriminatory.

4. The Commission having found a rate to be unreasonable solely because it was violative of the act which forbids a greater charge for a lesser than for a longer distance under stated conditions and which prohibits undue discrimination, *held* that as the grounds upon which such holding was based resulted from an error of law it was proper not to conclude the question of the inherent unreasonableness of the rates, but to leave it open for further action by the Commission to be considered free from the errors of law which had previously influenced the Commission.
5. A carrier, in order to give particular places the benefit of their proximity to a competitive point and thereby afford them a lower rate than they would otherwise enjoy, may take into consideration the rate to the point of competition and make it the basis of rates to the points in question. To give a lower rate as the result of competition does not violate the provisions of the act to regulate commerce.
6. *Held*, that where a rate was based on an error of fact, which was not complained of before, or acted on by, the Commission, and had been corrected by the carriers long before the decision below, and the corrected rate had been in force for a long period, it was not necessary to revise the decree of the court below, which was in all other respects correct, so as to secure a continuance of the corrected rate.

THE connecting roads of the appellees form the short line—496 miles in length—between New Orleans and Atlanta. The through line consists of the Louisville and Nashville Railroad from New Orleans to Montgomery, the Western Railway of Alabama between Montgomery and West Point, and the Atlanta and West Point Railroad from West Point to Atlanta.

LaGrange is on the Western Railway of Alabama, 104 miles from Montgomery. Opelika lies between Montgomery and LaGrange, 38 miles distant from the latter. LaGrange and the following stations between it and Atlanta are distant from Atlanta, as follows: LaGrange, 71 miles; Hogansville, 58 miles; Newnan, 30 miles; Palmetto, 25 miles; and Fairburn, 18 miles.

Pursuant to § 13 of the act to regulate commerce, Fuller E. Calloway, a merchant of LaGrange, filed a complaint against the appellees with the Interstate Commerce Commission. We take from the opinion rendered by the Commission the following synopsis of the averments of the complaint and answer:

"The complaint alleges, in substance, that defendants are subject to the provisions of the act to regulate commerce; that rates charged by them for the transportation by continuous carriage or shipment of freights, wholly by railroad, from New Orleans, La., to LaGrange, Ga., are unjust and unreason-

able in themselves, and relatively unjust and unreasonable as compared with lower rates charged by defendants for carrying the same commodities over longer distances from New Orleans through LaGrange to Hogansville, Newnan, Palmetto and Fairburn, Ga., and other localities; that defendants' said rates from New Orleans to LaGrange and said longer-distance points and other localities unjustly discriminate against complainant and others, the city of LaGrange and vicinity and traffic carried thereto, and subject merchants and dealers therein to undue and unreasonable prejudice and disadvantage, and give undue and unreasonable preference and advantage to merchants and dealers at Hogansville, Newnan, Palmetto, Fairburn and other localities and traffic consigned thereto; that defendants' said rates from New Orleans to LaGrange, Hogansville, Newnan, Palmetto and Fairburn give them greater aggregate compensation for the transportation of like kind of property, under substantially similar circumstances and conditions, for the shorter distance from New Orleans to LaGrange than for the longer distance over the same line, in the same direction, from New Orleans to Hogansville, Newnan, Palmetto or Fairburn; that the rates charged by defendants as aforesaid are in violation of sections 1, 2, 3 and 4 of the act to regulate commerce. The rates and distances involved are set forth in the complaint, and it is further alleged therein that the lowest rate charged by defendants from New Orleans to LaGrange yields them over $1\frac{1}{3}$ cents per ton for each mile of haul, and that their highest rate between said points affords them nearly $6\frac{3}{4}$ cents revenue per ton per mile.

"The defendants filed a joint answer, in which they admit that the rates charged are substantially as alleged in the complaint; that their rates to LaGrange amount for each mile to 1.36 cents per ton on the lowest class of frieght (D), and to 6.71 cents per ton on the highest class (1), and that the rates for the shorter distance from New Orleans to LaGrange are more than they charge for the longer distances in the same direction from New Orleans to Hogansville, Newnan, Palmetto and Fairburn; but they deny that the transportation to LaGrange, Hogansville and other points mentioned is conducted under substantially

similar circumstances and conditions, and thereupon further deny that their said rates are in violation of section 4 of the statute. The defendants also deny the unreasonableness, injustice, wrongful discrimination and undue and unreasonable prejudice and preference, advantage and disadvantage, alleged by complainaint under the first, second and third sections of the act. The answer contains statements of rates from New Orleans to the points in question, and to and from Montgomery, Ala., and Atlanta, Ga., showing also that the through rates to LaGrange, Hogansville and other points mentioned are made by combination of rates to Atlanta with local rates back over the same line to Fairburn, Palmetto, Newnan, Hogansville and LaGrange; and it is further averred that the disparities in rates complained of are caused by a competitive situation at Atlanta which compels low rates to that point from New Orleans. The competitive circumstances and conditions at Atlanta are stated in the answer to be the competition of such supply markets as New Orleans, Baltimore and other northeastern cities, Cincinnati, Louisville and other Ohio River cities, and the competition of carriers from such markets to Atlanta, and to have resulted, after frequent and disastrous rate wars, in the establishment of certain relative rates from these various market cities to Atlanta, a disturbance of which would immediately lead to a repetition of such wars. Similar competitive conditions are claimed by the defendants to exist at Montgomery, Ala., through which freight passes over defendants' through line to LaGrange and the other points mentioned or referred to in the complaint, and they further assert that the present relation of rates to Montgomery and Atlanta must also, under existing circumstances, be maintained. The following extract from the answer seems to succinctly set out the defendants' position in this case:

"The rates from Atlanta to those stations, respectively, LaGrange, Hogansville, Newnan, Palmetto and Fairburn, are fixed by the Georgia Railroad Commission, and are just and reasonable. The rates from New Orleans to Atlanta are fixed by the competition between markets, and the competition between carriers, as explained above, and are just and reasonable. The rates charged by respondents are the sum of those rates,

and, therefore, respondents' rates themselves are just and reasonable. The reason that Fairburn, Palmetto, Newnan and Hogansville have lower rates than LaGrange is due alone to the fact that they are nearer to Atlanta, and not to any favoritism or discrimination on the part of the respondents."

The evidence introduced at the hearing before the Commission, in support of the complaint, consisted solely of the testimony of the complainant, which dealt merely with the discrimination alleged to exist against LaGrange in the lesser rates accorded to greater distance points from New Orleans beyond LaGrange towards Atlanta, viz., Hogansville, Newnan, Palmetto and Fairburn. Much evidence—both oral and documentary—was introduced on behalf of the railroads in support of the averments of the answer.

The various contentions contained in the complaint were sustained by the Commission, which made voluminous findings, and issued an order requiring the railroads in general terms to "wholly cease and desist from each and every of the violations of law" found and set forth in its report and opinion. The remaining clauses of the order are set out in the margin.[1]

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[1] Portion of order of Commission.

It is further ordered and adjudged that said defendants, The Louisville and Nashville Railroad Company, The Western Railway of Alabama and The Atlanta and West Point Railroad Company, do more particularly cease and desist from violations of the law, so found and set forth in said report and opinion as follows, to wit:

1. That said defendants and each of them cease and desist from charging, demanding, collecting or receiving rates for the transportation of the several kinds or classes of freight from New Orleans, La., to LaGrange, Ga., which, as a whole or upon any article of merchandise, are in any respect unreasonable or unjust.

2. That said defendants and each of them cease and desist from charging, demanding, collecting or receiving the following unreasonable, unjust and unlawful rates for the transportation from New Orleans, La., to LaGrange, Ga., of articles embraced in the various classes of their freight classification, that is to say:

Classes; rates in cents per 100 pounds.												*Per barrel.*
1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	H.	F.
143	124	109	93	74	59	41	48	33	1–229	66	74	59

The railroads not having obeyed the order, the Commission instituted the present proceeding in equity, in the Circuit Court of the United States for the Southern District of Alabama. That court sustained the order of the Commission. 102 Fed.

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3. That said defendants and each of them cease and desist from charging, demanding, collecting or receiving rates or charges for the transportation of freight articles from New Orleans, La., to LaGrange, Ga., which are equal to rates or charges contemporaneously in force over their railroads on like traffic carried from New Orleans through LaGrange to Atlanta, Ga.; added to local rates in force on such traffic for local service over the Atlanta and West Point Railroad back from Atlanta to LaGrange, such combined rates having been found and held in and by said report and opinion of the Commission herein to be unreasonable, unjust, unduly prejudicial and unlawful, and so unreasonable, unjust, unduly prejudicial and unlawful to the extent of such added local charges of the defendant the Atlanta and West Point Railroad Company.

4. That said defendants, and each of them, cease and desist from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transporting of freight articles from New Orleans, La., for the shorter distance to LaGrange, Ga., than they contemporaneously charge, demand, collect or receive for transporting the like kind of freight traffic from New Orleans for the longer distance over the same line in the same direction to Hogansville, or Newnan, or Palmetto, or Fairburn, Ga., the shorter being included within the longer distance.

5. That said defendants, and each of them, cease and desist from charging, demanding, collecting or receiving unreasonable, unjust, unduly prejudicial and unlawful rates for the transportation of freight articles from New Orleans to LaGrange, which are higher than aggregate rates contemporaneously charged, demanded, collected or received by them, or either of them, for the transportation of like kind of freight from New Orleans to Hogansville, or from New Orleans to Newnan, or from New Orleans to Palmetto, or from New Orleans to Fairburn.

6. That said defendants, and each of them, in the transportation of freight articles from New Orleans, cease and desist from charging and collecting rates or compensation which subject complainant and other dealers and consignees at LaGrange, Ga., their traffic, or the city of LaGrange itself, to undue and unreasonable prejudice or disadvantage in any respect whatsoever, and also cease and desist from giving any undue or unreasonable preference or advantage to merchants, dealers and consignees at Atlanta, Fairburn, Palmetto, Newnan or Hogansville, or to their traffic or to either of such cities or localities, namely, Atlanta, Fairburn, Palmetto, Newnan, or Hogansville, as against complainant and said other dealers and consignees at LaGrange, or the city of LaGrange itself.

And it is further ordered and adjudged that said defendants be, and they severally are hereby, recommended to so revise their schedules of

Rep. 709. The Circuit Court of Appeals reversed the decree of the Circuit Court and remanded the cause, but "without prejudice to the right of the Commission to proceed, upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law." 112 Fed. Rep. 988.

The cause was thereupon appealed to this court.

Mr. L. A. Shaver for appellant.

Mr. Ed. Baxter for appellees.

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

The Circuit Court concurred in the finding of the Commission, that by the exaction of the rates to LaGrange complained of, the third and fourth sections of the act to regulate commerce were violated, and, being unable to say that error clearly appeared in the finding that the first section of the act was also violated, refused to overrule the action of the Commission in any particular.

Whilst the Circuit Court of Appeals announced its con-

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rates and charges that the aggregate compensation charged and collected by them for the transportation from New Orleans to LaGrange of freight articles embraced in the several freight classes shall not exceed reasonable, just and lawful class rates in cents per hundred pounds and per barrel on Class F as follows, to wit:

Class....	1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	H.	F.
Rates....	103	88	77	64	52	42	24	31	24	20	44	49	40

and that they make corresponding reductions or relatively reasonable and just charges in commodity rates, otherwise known as exceptions to class rates, from New Orleans to LaGrange, aforesaid.

And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the commission herein, in conformity with the fifteenth section of the act to regulate commerce.

clusions in a *per curiam* opinion, it is fairly inferable from the authorities which are cited in that opinion that the court concluded that the rates charged to LaGrange did not constitute a violation of the third and fourth sections of the act, prohibiting undue discrimination and a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. It is also inferable from the argument at bar that the appellate court, so far as the reasonableness *per se* of the rates was concerned, ordered the case to be dismissed, without prejudice to further proceedings, because it was of opinion that in the consideration of this question the Commission had been in effect controlled by its finding, held to have been erroneous, that there had been violations of the third and fourth sections of the act. It was, therefore, deemed that the controversy, in so far as the intrinsic reasonableness of the rates was concerned, should not be foreclosed, but should be left for further consideration and decision upon the evidence already introduced and such additional evidence as might be taken on a further hearing before the Commission if such new hearing was desired.

Whether or not the Circuit Court of Appeals was correct in the conclusions reached by it as above stated, is the question now for decision.

The record convinces us that the appellate court correctly decided that there was no legal foundation for the contention that the third and fourth sections of the act to regulate commerce had been violated. It was and is conceded that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta, and that there was hence such a dissimilarity of circumstances and conditions as justified the lesser charge for the carriage of freight from New Orleans to Atlanta, the longer distance point, than was exacted for the haul from New Orleans to LaGrange, the shorter distance point.

The sum of the rate to LaGrange was arrived at by charging the low rate produced by competition at Atlanta, and adding thereto the sum of the local rate back from Atlanta to LaGrange. The same rule was applied to the stations between

LaGrange and Atlanta, each of those stations receiving, therefore, a somewhat lower rate than LaGrange, although they were located a greater distance from New Orleans and nearer Atlanta. The sum by which the rates from New Orleans to these respective stations between LaGrange and Atlanta were lower than the LaGrange rate, was dependent upon the distance these respective stations were from Atlanta. It was shown, however, and is unquestioned, that, except in a particular to which we shall have occasion hereafter to refer, if the charge had been based on the nearest competitive point south of LaGrange—that is, Montgomery—and there had been added to the competitive rate to Montgomery the local rate from Montgomery to LaGrange and the other stations beyond, the freight rates on shipments from New Orleans to LaGrange would have been much greater than the rates now complained of as excessive. In other words, the railroads, instead of putting out of view the competition prevailing at Atlanta, when they fixed the rates to the non-competitive points, took the low rates prevailing at Atlanta as a basis and added thereto the local rate from Atlanta, the result being that the places in question were given the advantage resulting from their proximity to Atlanta, the competitive point, in proportion to the degree of such proximity.

When the situation just stated is comprehended it results that the complaint in effect was that a method of rate-making had been resorted to which gave to the places referred to a lower rate than they otherwise would have enjoyed. In this situation of affairs, we fail to see how there was any just cause of complaint. Clearly, if, disregarding the competition at Atlanta, the higher rate had been established from New Orleans to the non-competitive points within the designated radius from Atlanta, the inevitable result would have been to cause the traffic to move from New Orleans to the competitive point (Atlanta), and thence to the places in question, thus bringing about the same rates now complained of. It having been established that competition affecting rates existing at a particular point (Atlanta) produced the dissimilarity of circumstances and conditions contemplated by the fourth section of the act, we

think it inevitably followed that the railway companies had a right to take the lower rate prevailing at Atlanta as a basis for the charge made to places in territory contiguous to Atlanta, and to ask in addition to the low competitive rate the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view. That is to say, it seems incontrovertible that in making the rate, as the railroads had a right to meet the competition, they were authorized to give the shippers the benefit of it by according to them a lower rate than would otherwise have been afforded. True it is, that by this method a lower rate from New Orleans than was exacted at LaGrange obtained at the longer distance places lying between LaGrange and Atlanta, but this was only the result of their proximity to the competitive point, and they hence obtained only the advantage resulting from their situation. It could be no legal disadvantage to LaGrange, since if the low competitive rate prevailing at Atlanta had been disregarded, and the rate had been fixed with reference to Montgomery, and the local rate from thence on, the sole result would have been, as we have previously said, to cause the traffic to move along the line of least resistance to Atlanta, and thence to the places named, leaving LaGrange in the exact position in which it was placed by the rates now complained of.

It is to be observed that it is shown that the local charges on freight moved between Atlanta and LaGrange and the stations intermediate—all of the points being in the State of Georgia—conformed to the requirements of the Georgia State Railroad Commission.

In the report of the Commission a suggestion is found that LaGrange should be entitled to the same rate as Atlanta, because if the carriers concerned in this case in connection with other carriers reaching LaGrange chose to do so, they might bring about competition by the way of a line between Macon and LaGrange which would be equivalent to the competitive conditions existing at Atlanta. We are unable, however, to follow the suggestion. To adopt it would amount to this: that the substantial dissimilarity of circumstances and conditions

provided by the act to regulate commerce would depend, not as has been repeatedly held, upon a real and substantial competition at a particular point affecting rates, but upon the mere possibility of the arising of such competition. This would destroy the whole effect of the act and cause every case where competition was involved to depend, not upon the fact of its existence as affecting rates, but upon the possibility of its arising. What the fourth section of the act to regulate commerce has reference to is an actual dissimilarity of circumstances and conditions, not a conjectural one. Of course, if by agreements or combinations among carriers it were found that at a particular point rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates at such possible competitive points. As, however, the finding of the Commission concerning unjust discrimination was predicated solely upon the conclusion that the fourth section of the act had been violated, we may put that subject out of view. So far as the reasonableness *per se* of the rate is concerned, we come now to its consideration.

Whilst there was nothing in the evidence taken before the Commission to lend support to the finding that the rates to LaGrange were intrinsically unreasonable, in the report of the Commission considerable reference was made to facts and circumstances which it is to be presumed were upon the files of the Commission and which were deemed to conduce to the conclusion that the rates to LaGrange were unreasonable *per se*. But when the statements on this subject made in the report are considered in connection with the report as a whole and the subjects to which no reference is made in the report are recalled, we think it clearly results that every conclusion reached by the Commission concerning the unreasonableness *per se* of the rates to LaGrange rested wholly upon the error of law committed by the Commission when it decided that the railroad companies were powerless to consider the competitive rates prevailing at Atlanta and to use those rates as a basis for the charges to points within the competitive area in order thereby to give a lower rate to such points than they otherwise would

have enjoyed. Thus, it was held in effect that because the competitive rate to Atlanta was not unduly low, therefore any higher charge to LaGrange, the shorter distance, was unreasonable. And the same misconception was manifested by the reasoning adopted concerning the rates to Hogansville and the other stations between LaGrange and Atlanta, since it was held that because the charges to these points were lower than to LaGrange, therefore the rates to the last named point were unreasonable *per se*. Both of these conclusions, however, but held that if the carriers elected to meet the competitive rate at Atlanta they must at once correspondingly reduce their rates to all shorter distance and non-competitive points. But such a ruling was equivalent to overthrowing the settled construction of the Interstate Commerce Act allowing carriers to charge the lesser rate for the longer than for the shorter distance, if at the futher point the lesser rate was justified by a substantial dissimilarity of circumstances and conditions there prevailing, consequent upon real competition. A clause in the order of the Commission makes it clear that no independent finding as to the unreasonableness of the rates was made, since it allows the carriers to continue to charge the rates complained of to LaGrange, provided no higher rates were charged to the more distant points between there and Atlanta. The inconsistency between such order and the conclusion that the rates to the shorter distance point were unreasonable *per se* was pointed out in *East Tennessee, Virginia & Georgia Railway Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, where it was said (p. 23):

"A decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul, would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point."

And when, in connection with the matters just stated, it is observed that the report of the Commission makes no reference whatever to any intrinsic disparity between the LaGrange

rates and those prevailing at other non-competitive points between New Orleans and LaGrange, no room in reason is left to sustain the view that the Commission could have held that the rates to LaGrange were in and of themselves unreasonable, irrespective of the competitive condition prevailing at Atlanta, and the arrangement of rates which arose from it which formed the main subject of the complaint.

We conclude that, under the circumstances disclosed by the record, the Circuit Court of Appeals committed no error in refusing to enforce the order of the Commission and in remanding the case to that body for such independent consideration of the question of the reasonableness *per se* of the rates as the ends of justice might require.

It remains only to consider a special question concerning the third and fourth sections of the act, which was passed over in an earlier part of this opinion. As has been said, the complaint made before the Commission alleged a disparity and discrimination alone because of the difference of rates between LaGrange and the points beyond to Atlanta, and the report of the Commission in effect dealt only with such alleged grievances. However, in the course of its report, it was remarked by the Commission that Opelika, which was 38 miles south of LaGrange, was a competitive point, and that if Opelika was used as the basis for calculating the rate to LaGrange, a slightly lesser rate on some articles would be enjoyed by LaGrange than was the case by basing the rate on Atlanta as the nearest competitive point. The Commission, however, would seem to have attached no great importance to the matter which it thus noticed, since nothing in the order entered by it was responsive to the suggestion. It was stated, however, at bar that in the argument of the case in the Circuit Court of Appeals that court directed the attention of the counsel of the railroads to the fact that, even if their theories of the case were sound and were approved, there was a suggestion in the report of the Commission which indicated that Opelika and not Atlanta was the proper basing point for fixing the rates to LaGrange, as thereby LaGrange would enjoy on some classes of freight a slightly lower rate than resulted from using Atlanta as the

basic point. It was also conceded at bar by counsel for all parties that when this suggestion was made the counsel for the railroad companies immediately declared that such fact had escaped attention, that it would at once be brought to the notice of the railroad companies, and a change of rates would be immediately put into effect upon that basis. And the brief of counsel for the Commission states that a modified tariff, based on Opelika, was put into operation by the railroad companies in May, 1900, immediately after the argument of the case in the Circuit Court of Appeals, and has been continued in force from that time to this, the decree below having been entered more than one year after the submission of the cause. It is, however, now insisted that the change made by the railway companies to conform to the development as to Opelika is a confession that there was error in the action of the Circuit Court of Appeals, and therefore requires that the decree of that court should be at least in part reversed. It would be, it is said, indeed dangerous to allow a railway company to exact illegal rates, and persist in doing so even after the order of the Commission had been issued, and then escape the consequences of its wrongdoing by at the last hour changing its rates in order to prevent the entry of a decree against it. The reasoning has abstract force, but its application to the case in hand is devoid of merit, since neither in the complaint made before the Commission nor in the evidence introduced for the complainant was any claim made that wrong had been done because of a combination of rates based on Atlanta instead of Opelika. Indeed, the relief sought by the complaint and that accorded by the Commission was inconsistent with the theory that the rates should be based on either Opelika or Atlanta. As the altered tariff based on Opelika had been in force more than one year prior to the entry of the decree below, the court doubtless considered it unnecessary to provide for its continuance. The record does not disclose, nor was it suggested, that any application was made to the Circuit Court of Appeals to modify its decree so as to direct the continuance of such new tariff, both parties evidently acting on the reasonable assumption that it was an accomplished fact. Under these circum-

stances, we do not think a formal modification of the decree of the Circuit Court of Appeals is required; and that decree is therefore

Affirmed.

MR. JUSTICE HARLAN dissents.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* WATSON.

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

No. 223. Argued and submitted March 20, 1903.—Decided May 4, 1903.

In an action to recover value of cotton burned while stored on a platform near a railroad track *held*, there was no error in admitting evidence:

1. That about the time of the fire and the passing of the locomotive which it was charged occasioned the fire, other fires were observed near the track and the cotton. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454.
2. In view of the condition of the record, that certain witnesses did not know of, and saw, no opportunity for the cotton to have caught fire except from the locomotive in question.
3. In answer to a hypothetical question to a witness duly qualified as an expert, as to whether the number of fires indicated the condition of the locomotive and the spark arresters.
4. By reading the deposition of a witness who was in court, but who it appeared was afterwards called by the defendant and testified as to the evidence in the deposition, the error if any not being sufficiently grave to require a reversal of the case. Also *held*:
5. That on the evidence as it appeared on the record, it was properly left to the jury to determine if the company used the best spark arrester and the plaintiff was free from contributory negligence, the jury being also instructed that the verdict must be for the company if it did use the best spark arrester, at the time in good condition, and operated the locomotive with ordinary prudence.
6. That it was not necessary to charge the jury that in placing the cotton on the platform the plaintiff assumed risks which were to be anticipated from engines properly equipped and operated, as that was to be deduced from the charge as made.
7. That the plaintiff was not bound by stipulations in the lease of the platform from the railroad company to the lessee, it appearing that the plaintiff was not in privity with the lessee and had no knowledge of such stipulations.

THIS action was originally commenced in a Texas state court by the appellee Watson, to recover the value of sixty-four bales of cotton, less insurance thereon. The cotton was alleged to have been destroyed by fire on January 3, 1896, while stored upon what was known as the O'Neil cotton platform near the depot of the railway company at Clarksville, Red River County, Texas. The fire was averred to have been occasioned by the negligence of the railway company in the use of a defectively constructed locomotive and in the careless operation thereof while passing said platform. Subsequently the insurance company was joined as plaintiff and recovery was asked of the full value of the cotton. Upon application of the defendant, based upon the fact that it was incorporated under the laws of the United States, the cause was removed to the United States Circuit Court for the Eastern District of Texas. In the latter court an amended answer was filed. This pleading contained general and special demurrers, a general denial and a special answer setting up various defences. The general and special demurrers were subsequently overruled, and defendant excepted. A trial was had, and it was shown by the evidence that at the point where the fire in question occurred the track of the railway company ran east and west, and the train which it was asserted caused the fire in question was moving eastward, and a strong wind was blowing from the north. A verdict was rendered in favor of the plaintiff Watson and against the railroad and against the plaintiff insurance company in favor of the railroad. Judgment was entered on the verdict; the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 112 Fed. Rep. 402, and the cause was then brought to this court by writ of error.

Argued by *Mr. David D. Duncan* for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* were on the brief.

Submitted by *Mr. J. W. Bailey*, *Mr. E. S. Chambers* and *Mr. Amos L. Beaty*.

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

The various assignments of error relied upon in the brief of counsel for plaintiff in error will be disposed of in the order therein discussed.

First. In several assignments it is claimed that the Circuit Court of Appeals erred in holding that the trial court properly admitted the evidence of witnesses to the effect that at or about the time of the fire complained of, and about the time of the passing of the locomotive which it was charged occasioned the fire, the witnesses observed other fires at various points not far removed from the place where the cotton was burned and south of and near to the railway track. In the light of the decision of this court in *Grand Trunk Railroad Co.* v. *Richardson*, 91 U. S. 454, 470, we think this evidence was competent as having a tendency to establish that the destruction of the property of the plaintiff was caused by the locomotive in question, and as tending to show negligence in its construction or operation.

Second. In an assignment of error it was contended that the appellate court erred in holding that the trial court properly admitted testimony to the effect that certain witnesses did not know of and saw no opportunity for the cotton to have caught fire except from the locomotive in question. The evidence in the record is in narrative form, and that portion relating to the criticized testimony merely recites that at the time said evidence was offered from each witness "defendant then and there objected, because the evidence was of a negative character and would not be relevant, and further because it was in the nature of a conclusion of the witness to the effect that the fire had originated from the engine." Whether the question which elicited the testimony complained of was objectionable cannot be determined from the record, nor does the objection seem to have been addressed to an omission to state the facts which induced the belief that no other opportunity existed for the cotton to have caught fire than was afforded by the operation of the locomotive. Evidence of the surrounding circumstances

and conditions which by a process of exclusion would have tended to establish that the burning of the cotton could not have been caused other than by the locomotive in question would, we think, have been clearly relevant. As the record stands we think the assignment in question was without merit.

Third. A further contention is that the appellate court erred in permitting a question to be answered despite the objection that "the evidence sought to be elicted was not such as was the subject of expert testimony, but the endeavor was to substitute a conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question, such as this and the answer thereto, to prove the bad equipment of the engine in the face of the actual testimony that the equipment was all in good order." The following is the question referred to:

"Suppose an engine should come along, and in the course of four miles and a quarter should set out say, eight fires, should set fire to the grass in some of these places, set fire to shavings sixty feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the ground over the work benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say it was all right; and suppose, instead of being eight fires, there were five under the conditions named to you, what would you say?"

The question was proper. The witness was foreman of the boiler department at the main shops of the defendant, having to do with the building of boilers, and was in special control of the part of the shops which had to do with spark arresters. The hypothetical question was based upon evidence, and if the witness was competent—as the evidence showed he was—to testify whether or not an engine so conducting itself was or was not in good working order or properly operated, we think the jury should have had the benefit of his opinion. Inasmuch as there was evidence to the effect that it is impossible, even with the use of the most effective spark arresters, to prevent the escape of sparks, a case was presented justifying the introduction of expert testimony to aid the jury in determining the ultimate

fact whether an engine was in good repair and properly operated which conducted itself as the evidence tended to show this locomotive did. *Transportation Line* v. *Hope*, 95 U. S. 297, 298.

Fourth. It is asserted that the appellate court erred in holding that prejudicial error was not committed in permitting the deposition of a witness to be read when the witness was actually in court and his presence was known to the plaintiff. We adopt as our own the language of the Circuit Court of Appeals on this point:

"In view of the fact that the witness was called by the defendant after the deposition had been admitted over the defendant's objection, and gave fully his explanation of the deposition and his testimony as to the subject to which it related, we conclude that the error committed is not sufficiently grave in its results to require us to reverse the case."

Fifth. It is claimed that the appellate court erred in holding that the trial court rightly left it to the jury to determine that if the railway company failed to use the most approved spark arrester, and plaintiff was free from contributory negligence, he could recover. This contention is based upon the assumption that there was no evidence tending to show that the most approved spark arrester was not used. We do not pause to analyze the evidence on the subject, because we think it not necessary to do so. The proposition, considering it in the light most favorable for the plaintiff in error, is but an abstraction, and assumes that because it may be that at one time the spark arrester was of the most approved pattern it continued to be such, even although it was not in good repair at the time of the fire and such defective condition occasioned the loss complained of. The court instructed that the jury must give a verdict for the railroad if it was found that it "did use the most approved spark arrester, at the time in good condition, and that the engine was then and there operated with ordinary care and prudence;" and, in stating the converse of the proposition, said: "But if the railroad failed to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of

fire, in so far as it could consistently be done with the business" which the railroad was carrying on, a verdict should be returned against the railroad, provided it was found that the plaintiff Watson had not contributed to the injury. This charge as a whole we think is not amenable to the objection that it left to the jury to consider the original construction of the spark arrester, irrespective of its condition at the time of the fire. The expression, "as ordinarily used by properly conducted railways," of necessity implied that the apparatus must have been kept in proper condition for use. To construe to the contrary would presuppose that conflicting measures of liability were given to the jury by the court when it pointed out the opposing views which the jury were authorized to deduce from the proof. Thus rightly construing the charge, there was beyond peradventure evidence to be weighed by the jury in determining whether the spark arrester was or was not in satisfactory working order at the time the cotton was set on fire. Several witnesses testified that the engine emitted considerable fire and cinders, and the evidence upon which the hypothetical question quoted in subdivision third of this opinion was based clearly rebuts the assumption that there was not evidence of circumstances to be considered by the jury in connection with the evidence introduced by the defendant of the condition of the engine, spark arrester, etc., as disclosed by an inspection thereof. So, also, the answer to the hypothetical question clearly contained matter pertinent for the consideration of the jury in determining whether the engine was properly equipped and operated. The witness said:

"An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track a spark from the ash pan might drop among it and set fire. What you said might have occurred, but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ash pan, is the only way I could account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition."

Sixth. A further assignment of error is to the effect that the appellate court erred in holding that error was not committed in refusing to charge the jury that plaintiff in placing his cotton upon the platform assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing. But the court charged the jury that even though the cotton was set on fire by sparks communicated from the engine, yet if the defendant used the most approved spark arrester and the engine was operated with ordinary care and prudence, the plaintiff could not recover. As the court also fully instructed the jury as to what would have constituted contributory negligence on the part of Watson as respected the storing of his cotton on the platform, and informed the jury that recovery could not be had if there was such contributory negligence, it is quite clear that the jury could not have been misled by the failure of the trial court to point out the distinction between assumed risk and contributory negligence. It is not perceived, for instance, how the jury could have been aided in reaching a conclusion if, in addition to being informed that the plaintiff could not recover if the railway company was not negligent in respect to the equipment and operation of the engine, they were told that the plaintiff "assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated."

Seventh. The remaining assignment of error is to the effect that error was committed by the appellate court in affirming the judgment despite the fact that the trial court refused to admit in evidence the stipulations and exemptions from liability for loss caused by fire contained in the lease under which the lessee held possession and occupancy of the storage platform on which the cotton in question was when destroyed by fire. As Watson was not in privity with the lessee—and it is conceded he had no knowledge of such stipulations when he stored his property on the platform—there was no tenable ground on which to contend that he was in anywise bound by the stipulations in question.

Judgment affirmed.

LOCKWOOD *v.* EXCHANGE BANK.

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

No. 226. Argued April 7, 1903.—Decided June 1, 1903.

Under the bankruptcy act of 1898, the title to property of a bankrupt which is generally exempted by the law of the State in which the bankrupt resides, remains in the bankrupt and does not pass to the trustee, and the bankrupt court has no power to administer such property even if the bankrupt has, under a law of the State, waived his exemption in favor of certain of his creditors.

The fact that the act confers upon the bankruptcy court authority to control exempt property in order to set it aside does not mean that the court can administer and distribute it as an asset of the estate. The two provisions of the statute must be construed together and both be given effect.

The discharge of the bankrupt, however, can be withheld until a reasonable time has elapsed to enable creditors to assert in a state court their rights to subject exempt property in satisfaction of their claims under waivers given as security therefor by the bankrupt.

In this proceeding, upon certain questions being certified by the United States Circuit Court of Appeals for the Fifth Circuit for decision by this court, a writ of certiorari was allowed, and the entire record has been brought up for consideration.

The controversy is fully set forth in the following "statement of case," embodied in the certificate of the Circuit Court of Appeals:

"On the 23d day of November, 1900, said Joel W. Lockwood was on his application duly adjudged a bankrupt by the District Court of the United States for the Southern District of Georgia. On December 6, 1900, F. T. Rape was duly appointed trustee for said bankrupt; on the 16th day of December, 1900, the said F. T. Rape, trustee, set aside and designated as an exemption all of the property returned by the said bankrupt in his schedule of assets. On the 1st day of January, 1901, the Exchange Bank of Fort Valley, a creditor who had duly proven its debt as an unsecured claim, filed exceptions to the trus-

tee's assignment of homestead and exemption upon the following grounds:

"'(*a.*) That said creditor held a contract against the bankrupt in which said bankrupt specially waived and renounced all right to the homestead exemption allowed by the laws of Georgia or the United States. Said waiver is contained in a note constituting contract of indebtedness and was made in accordance with the provisions of the constitution and laws of said State authorizing and empowering the debtor to waive and renounce in writing his right to the benefit of the exemption provided for by the constitution and laws of said State.

"'(*b.*) That creditor's debt was unsecured save and except so far as a waiver of homestead and exemption may be construed as a security.

"'(*c.*) That the trustee has set apart all the property of said bankrupt returned by him in bankruptcy.

"'(*d.*) Under the laws of Georgia, the debtor's exemption cannot be subjected to the payment of a debt containing a waiver of homestead except by putting said debt in judgment, and afterwards causing execution to issue thereon to be levied on the exempt property in accordance with the provisions of section 2850, *et seq.*, of the Code of Georgia. If bankrupt court should approve trustee's assignment in this case without reserving to petitioner the right to sue his claim and put same in judgment, and without itself giving judgment for said debt, creditor would be left without means of enforcing his rights created and arising out of the aforesaid waiver and would be without remedy.

"'(*e.*) Creditor therefore prays equitable relief and such decree as will protect his rights, that the homestead be set aside and trustee be required to take charge of and administer the property of said bankrupt so set apart, except so much as cannot be waived for the benefit of creditors holding waiver contracts.'

"To these exceptions of the creditor the bankrupt duly filed a demurrer on the following grounds:

"'(*a.*) That said exceptions are wholly insufficient in law to defeat the report of the trustee.

"'(*b.*) That the exceptions made are not such as under the laws of Georgia will defeat the setting apart of the exemption, and furnish no reason why the trustee should not assign the exemption.

"'(*c.*) That the bankrupt court has no jurisdiction over exempted property and no authority to administer the same.

"'(*d.*) That there is no authority of law for the exceptions made, nor for the relief sought.'

"The referee, Hon. Shelby Myrick, overruled the aforesaid demurrer and directed the trustee to carve out of the said exemption of property a portion of the same, amounting to $300.00, which was to be free from the claims of all creditors. The residue of the exempted property was to be sold and the proceeds held by the trustee for the benefit of creditors holding waiver notes. The bankrupt was ordered to yield possession to the trustee for the purpose of carrying out this order. The referee, at the request of bankrupt, certified the record in said case, together with his decision thereon, to the Honorable Emory Speer, judge of the District Court of said district, for final determination. On the 30th March, 1901, said case came on regularly to be tried before said district judge, and after hearing argument of counsel, his honor Judge Emory Speer, held and decided and adjudged the aforesaid exceptions to the determinations and report of the trustee be sustained, and that the exemptions set apart by the trustee in his said report be denied and refused to the said bankrupt, save and except the item of household furniture and wearing apparel, and that the said bankrupt was not entitled to an exemption as claimed by him by reason of having waived and renounced in writing his rights thereto in accordance with the constitution and laws of the State of Georgia."

This judgment of the District Court is the one complained of, and which was sought to be revised in the Circuit Court of Appeals.

Mr. Stephen W. Parker for petitioner. *Mr. J. M. Terrell*, *Messrs. Allen Fort & Son* and *Mr. John W. Haygood* were on the brief.

Mr. Olin J. Wimberly for respondents. *Mr. John I. Hall* was on the brief.

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

The general exemption of property from levy or sale, authorized by article 9, sec. 1, par. 1, of the present constitution of the State of Georgia (that of 1877), is "realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars." By article 9, sec. 3, par. 1, of the same constitution a debtor is vested with power to waive or renounce in writing this right of exemption, "except as to wearing apparel, and not exceeding three hundred dollars worth of household and kitchen furniture, and provisions." The mode of enforcement of a waiver of exemption is provided for in section 2850 of the Code of 1895, reading as follows:

"In all cases when any defendant in execution has applied for, and had set apart a homestead of realty and personalty, or either, or where the same has been applied for and set apart out of his property, as provided for by the constitution and laws of this State, and the plaintiff in execution is seeking to proceed with the same, and there is no property except the homestead on which to levy, upon the ground that his debt falls within some one of the classes for which the homestead is bound under the constitution, it shall and may be lawful for such plaintiff, his agent or attorney, to make affidavit before any officer authorized to administer oaths, that, to the best of his knowledge and belief, the debt upon which such execution is founded is one from which the homestead is not exempt, and it shall be the duty of the officer in whose hands the execution and affidavit are placed to proceed at once to levy and sell, as though the property had never been set apart. The defendant in such execution may, if he desires to do so, deny the truth of the plaintiff's affidavit, by filing with the levying officer a counter affidavit."

The question presented on the record before us may be stated in similar language to that which was used by the district judge

—the correctness of whose decision in the case at bar is now for review—in the course of his opinion in *In re Woodruff*, 96 Fed. Rep. 317, as follows (p. 318):

"Has the bankruptcy court jurisdiction to protect or enforce against the bankrupt's exemption the rights of creditors not having a judgment or other lien, whose promissory notes or other like obligations to pay contain a written waiver of the homestead and exemption authorized and prescribed by the constitution of the State, or are such creditors to be remitted to the state courts for such relief as may be there obtained?"

The provisions of the bankruptcy act of 1898, which control the consideration of the question just propounded, are as follows: By clause 11 of section 2 courts of bankruptcy are vested with jurisdiction "to determine all claims of bankrupts to their exemptions." Section 6 provides as follows:

"SEC. 6. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

By clause 8 of section 7 the bankrupt is required to schedule all his property and to make "a claim for such exemptions as he may be entitled to." By clause 11 of section 47 it is made the duty of the trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." By section 67 it is provided, among other things, that the property of the debtor fraudulently conveyed, etc., "shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt," etc. In section 70 is enumerated the property of the bankrupt which is to vest in the trustee, as of the date of the adjudication in bankruptcy, "except in so far as it is to property which is exempt."

Under the bankruptcy act of 1867 it was held that property generally exempted by the state law from the claims of credit-

ors was not part of the assets of the bankrupt and did not pass to the assignee, but that such property must be pursued by those having special claims against it in the proper state tribunals. Thus, speaking of the act of 1867, Mr. Justice Bradley (*In re Bass*, 3 Woods, 382, 384) said:

"Not only is all property exempted by state laws, as those laws stood in 1871, expressly excepted from the operation of the conveyance to the assignee, but it is added in the section referred to, as if *ex industria*, that 'these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title.'

"In other words, it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not."

We think that the terms of the bankruptcy act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt generally exempted by state laws should remain in the bankrupt and not pass to his representative in bankruptcy, as did the provisions of the act of 1867, considered in *In re Bass*. The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or

become part of the bankuptcy assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is besides shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration. The act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen with reference to the act of 1867, on the contrary exhibits the intention to perpetuate the rule, since the provision of the statute to which we have referred in reason is consonant only with that hypothesis.

Though it be conceded that some inconvenience may arise from the construction which the text of the statute requires, the fact of such inconvenience would not justify us in disregarding both its letter and spirit. Besides, if mere arguments of inconvenience were to have weight, the fact cannot be overlooked that the contrary construction would produce a greater inconvenience. The difference, however, between the two is this, that in the latter case—that is, causing the exempt property to form a part of the bankruptcy assets—the inconvenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy, whilst in the other, the rights of creditors having no lien, as in the case at bar, but having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor.

As in the case at bar, the entire property which the bankrupt owned is within the exemption of the state law, it becomes unnecessary to consider what, if any, remedy might be available in the court of bankruptcy for the benefit of general creditors,

in order to prevent the creditor holding the waiver as to exempt property from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against exempt property.

The judgment of the District Court is reversed, and the proceeding is remanded to that court with directions to overrule the exceptions to the trustee's assignment of homestead and exemption, and to withhold the discharge of the bankrupt, if he be otherwise entitled thereto, until a reasonable time has elapsed for the excepting creditor to assert in a state tribunal his alleged right to subject the exempt property to the satisfaction of his claim.

COSMOS EXPLORATION COMPANY *v.* GRAY EAGLE OIL COMPANY.

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

No. 217. Argued March 16, 17, 1903.—Decided May 18, 1903.

The general administration of the Forest Reserve Act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for lands selected under the provisions of the act, are vested in the Land Department.

The courts cannot be called upon, in advance of, and without reference to, the action of the Land Department to determine the right and title of a person, who has surrendered lands under the act of June 4, 1897, and selected others, in the lands so selected, or to render a final decree determining the interest of the parties to the action in such lands, while the questions in relation to the title are still properly before the Land Department and have not yet been decided.

The Land Department has the statutory right to make rules and regulations, and the courts will take judicial knowledge of such rules and regulations as shall be made by it regarding the sale or exchange of public lands.

Whether it is necessary under the Forest Reserve Act for the selector, at the time of making his selection, to file in addition to his non-mineral affidavit, an affidavit that the land is not occupied in fact, is a question of law for the Land Department to determine, although such decision might not be binding on the court if such question properly arose in future liti-

gation. It is also for the Land Department to determine whether, if the land were not known to be mineral at the time of the selection, the fact that mineral in paying quantities was found thereafter would vitiate the selection.

THIS is an appeal from the decree of the Circuit Court of Appeals for the Ninth Circuit, affirming the decree of the Circuit Court for the Southern District of California, sustaining the defendants' demurrer to the bill of complainant, and dismissing the same. The questions arise under the act of June 4, 1897, making appropriations for the sundry civil expenses of the Government, etc. 30 Stat. 11, 36. The particular portion of the statute under which this litigation comes is set forth in the margin.[1]

The material facts averred in the bill are as follows: The assignor of the complainant, one C. W. Clarke, was on November 16, 1899, the owner in fee simple absolute of certain land in a forest reservation, non-mineral, and covered by a patent from the United States. On December 8, 1899, there were lands in the particular township described in the bill which for more than a year continuously theretofore had been surveyed, unappropriated and vacant public land of the United States, open to settlement, returned and characterized upon the official records of the United States as agricultural land, free and open to settlement and entry under the laws thereof. This land did not then contain any known minerals, salines, petroleum or mineral oils, nor had any minerals or petroleum or other mineral oils or mineral substances of any kind ever been discovered within the limits of such land, which was situated in the county of Kern, within the Southern District of California, and within

[1] Page 36. That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

the district of lands subject to sale and disposition by the United States land office at Visalia, California. On November 16, 1899, Clarke relinquished the land in the forest reservation to the United States by deed recorded in the office of the county in which the land was situated, and on December 8, 1899, he duly delivered to the register and receiver of the United States land office at Visalia, California, and filed in that land office his deed to the United States, endorsed as recorded in the office where the land was situated, together with his selection of the land in lieu of the land relinquished, and at the same time he filed with the register and receiver a non-mineral affidavit showing the selected tract contained no known minerals, and he also delivered to and filed with the register and receiver an abstract of his title to the relinquished tract, duly certified as such by the recorder of the county in which the tract was situated, which abstract showed him to be the owner of the land by title in fee simple absolute, free of any lien or encumbrance at the time of such relinquishment and at the time the deed to the United States was made, and showed that his conveyance to the United States vested in the Government the full, complete and perfect title thereto. On the same day (December 8, 1899) the register and receiver of the United States land office at Visalia, California, duly accepted, received and filed the deed, abstract of title, non-mineral affidavit and the selection of the land made by Clarke, and duly entered the selection upon the official records of the land office, and the register of the land office then certified that the land so selected by Clarke was free from conflict, and that there was no adverse filing, entry or claim thereto, and Clarke thereupon and thereby became vested, as complainant averred, with the complete equitable title to the land so selected, and was thereupon and thereby entitled to receive a patent for the land from the United States in pursuance of that selection, under the terms and in pursuance of the provisions of the act of Congress above referred to. Clarke thereafter assigned and transferred to the complainant an undivided three quarters interest in the land taken in lieu of the relinquished land, and by virtue of the above selection the full, complete and equitable title to the so

selected land became immediately vested in the complainant's assignor without further act upon his part, and complainant by virtue of those acts and the assignment to it is now the complete and equitable owner of a three quarters interest in the land and entitled to a patent therefor.

(Clarke did not file any affidavit of non-occupancy of the land selected, so far as the record shows.)

It is then averred that this claim of the complainant is denied by the defendants, who assert that the land remained subject to entry, exploration, selection and purchase as mineral land, until a patent shall be issued to the complainant's assignor, and the complainant avers that the defendants since the selection have entered upon the land, bored for and obtained petroleum oil and are engaged in taking it therefrom.

It is also averred that the right and title of the defendants are based upon some one or more of four certain pretended placer mining locations which the bill describes, and which cover the land claimed by complainant, and that the defendants assert title to and the right to the possession of the land described in those placer locations from some or all of the locators thereof, but complainant alleges that these placer locations are illegal and void, because they were not based upon any discovery of mineral within the boundaries thereof, or of petroleum oil within such boundaries, until after the land had been selected by complainant's assignor Clarke.

That after the land had been selected by complainant's assignor, the defendants filed in the United States land office at Visalia, California, a written verified protest against such selection, in which protest it was alleged that the land selected by Clarke was not subject to selection by him under the act of June 4, 1897, above referred to, because the same was mineral land and was included within the boundaries of a valid placer mining location. The protest asks that the Commissioner of the General Land Office should order a hearing to determine the mineral character of the land and that the selection by Clarke be rejected and disapproved, and the bill specifically avers that such protest is now pending before the Commissioner of the General Land Office.

That the protest does not show there was any known mine, or that there were any known salines or any known or existing petroleum wells or known petroleum deposits on any of the land selected by Clarke at the time the land was selected, and it is averred that the protest, failing to show such facts, is insufficient to warrant or justify a hearing being ordered by the Land Department to reëstablish or redetermine the character of the land or to change the present classification thereof as fixed by the former report of the surveyor general and the confirmation thereof by the Land Department, and that such protest is insufficient to impair or affect the validity of Clarke's selection of the land; that notice of such selection by Clarke had been given and published on the — day of January, 1900, and that by law only sixty days are allowed to any person or persons to file protests in the local land offices of the United States against any selections under the law of June 4, 1897, and that the only protest or adverse claim filed against the selection was the protest of defendants above referred to, and that such protest does not state any facts which impair or affect the right of said Clarke or of the complainant in said selected land, nor does it show any grounds why a United States patent therefor should not issue to Clarke, and that defendants are bound and estopped by their protest and the contents thereof and the facts therein stated, and that if such facts be admitted they do not show that defendants, or any of them, have any interest in the lands as against Clarke or complainant, and it is averred that upon the facts as pleaded by the protest, the Land Department of the United States cannot lawfully refuse or deny the issuance of a patent to Clarke, and that upon such facts he is entitled to the approval of his selection by the Land Department of the United States and to the issuance of a patent therefor.

Notwithstanding complainant was the complete and equitable owner of the land and entitled to the quiet and uninterrupted possession of the same, so far as regarded the three quarters interest therein, yet the defendants herein, except Clarke, did, on or about February 1, 1890, and frequently since then, by themselves and their employés, without right, title or claim, wrongfully and unlawfully, and in disregard of the right of Clarke,

enter upon the land, erect derricks and other machinery thereon, and proceed to excavate the soil thereof and bore wells and drive iron pipes therein, seeking for petroleum oil and other mineral products in the land, for the purpose of taking the same, if found, to their own use, and removing the same; that thereafter, and on or about the last day of February, 1900, the defendants discovered in the wells petroleum oil in profitable quantities, and that the defendants are now wrongfully and unlawfully in possession of the premises, and unlawfully and continuously from day to day pumping large quantities of petroleum oil from the wells, and are about to and will, unless restrained by the court, remove the same from the land and sell and dispose of and market the same, and appropriate the proceeds thereof to their own use, to complainant's great loss and damage, and will continue so to do to the great waste and irreparable injury and damage of said property and the complainant, unless restrained therefrom by the court.

It was also alleged that the defendant Clarke is the owner of an undivided one quarter interest in the selected land described, and that complainant requested him to join with it in instituting and prosecuting this suit, but he refused to join herein, and therefore complainant made him a defendant in order that all the parties interested in the premises might be before this court and their rights finally adjudicated by a decree to be entered herein.

Upon these allegations complainant prayed for a writ of injunction restraining defendants from interfering with complainant's entry upon the land and enjoining defendants, other than Clarke, from excavating or digging upon the land for the purpose of taking petroleum oil from the wells thereon or from marketing or disposing of the oil, until the further order and decree of the court in the premises, and that upon final hearing the injunction should be made perpetual by an order and decree of the court.

It was also prayed that complainant might have the judgment of the court that the full and complete equitable title to an undivided three quarters interest in the property is vested in the complainant, and an undivided one quarter interest in Clarke, and that the adverse claims of defendants thereto should be decreed to be wholly without right and unfounded, and that

complainant have judgment for the possession of the land, and that a receiver should be appointed to take possession of the land and to preserve the same and the product thereof on the premises until the further order of the court, but not to operate the wells thereon except to the extent necessary, if at all, to preserve the same from deterioration in value, nor to market or remove any oil therefrom.

Upon the filing of this bill the court granted an order to show cause why the complainant should not have a preliminary injunction as asked for in the bill. The defendants appeared and interposed a demurrer to the bill, and upon the hearing of the order to show cause they presented a large number of affidavits, which in substance averred that the complainant was guilty of fraud and bad faith in locating the claim, and that such location was a fraud upon the statute under which it was assumed to be made. Affidavits in reply were filed by the complainant.

The demurrer was argued at the same time as the argument was had upon the return of the order to show cause, and thereafter on September 24, 1900, an order was made by the Circuit Court denying the application for a receiver and for an injunction, and a decree was also made sustaining the defendants' demurrer and dismissing the bill with costs, and on September 26, 1900, such decree was entered dismissing the bill. 104 Fed. Rep. 20.

An appeal was taken from the decree sustaining the demurrer and dismissing the bill, but none from the order denying the application for a receiver and for an injunction. As the appeal to the Circuit Court of Appeals was only from the decree overruling the demurrer and dismissing the complainant's bill, that court confined its discussion to the facts alleged in the bill.

After a hearing it affirmed the decree of the Circuit Court, 112 Fed. Rep. 4, and the complainant has by appeal brought the case here.

Mr. T. C. Van Ness and *Mr. Jefferson Chandler* for appellant. *Mr. John M. Thurston*, *Mr. Shirley C. Ward*, *Mr. M. A. Ballinger*, *Mr. Horace F. Clark* and *Mr. William C. Prentiss* were on the brief.

Mr. John S. Chapman for appellees. *Mr. Frank H. Short* was on the brief.

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

An examination of the complainant's bill shows that it does not ask for an injunction until the decision of the Land Department upon the matters pending therein. The complainant ignores those proceedings so far as to claim now the final adjudication by the court, based upon its alleged equitable title to a three quarters interest in the land selected, and it avers that the Land Department cannot lawfully refuse or deny the issuance of a patent to Clarke. It avers that the protest filed by defendants is insufficient to impair or affect the validity of the selection of land made by complainant's assignor. The court is, therefore, called upon in advance of and without reference to the action of the Land Department, to determine complainant's right and title to the three quarters interest in the selected land, and a final decree is asked determining the interest of the parties in this land, while the question in relation to the title is still properly before the Land Department, and not yet decided. This we cannot do. *Marquez* v. *Frisbie*, 101 U. S. 473; *United States* v. *Schurz*, 102 U. S. 378, 395. If the Land Department has any jurisdiction over the subject matter, the question as to the sufficiency of the protest is one for the decision of that department, and its right to decide thereon is not taken from it by the averment of a legal conclusion contained in the complainant's bill that the department has no legal right to decide otherwise than in favor of the complainant upon the facts before it. But assuming that the question of issuing a patent is still and properly before the Land Department, the complainant avers that it has an equitable title to the land which will be protected by the court. Whether complainant has a full, complete and equitable title to the land is a question depending upon considerations hereinafter stated.

There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination

of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The statute of 1897 does not in terms refer any question that might arise under it to that department, but the subject matter of that act relates to the relinquishment of land in the various forest reservations to the United States, and to the selection of lands, in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the administration of the laws regarding its public lands. Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject. *Catholic Bishop* v. *Gibbons*, 158 U. S. 155, 166, 167. There is no such law, and we must hold that the Land Department has full jurisdiction over matters involving the right of parties to a patent for lands selected under that act in lieu of lands relinquished in a forest reservation. By virtue of that jurisdiction the General Land Department has power to review and set aside (though not arbitrarily) the decisions of local officers relating to those questions, where such officers have power to make those decisions in the first instance. *Orchard* v. *Alexander*, 157 U. S. 372; *Bank* v. *Bladow*, 176 U. S. 448, 451; *Hawley* v. *Diller*, 178 U. S. 476, 490.

The Land Department also has power to adopt and did adopt rules and regulations for the administration of the forest reserve act. The power existed by virtue of the provisions of the Revised Statutes, sections 441, 453 and 2478. Courts will take judicial notice of rules and regulations made by the Land Department regarding the sale or exchange of public land. *Caha* v. *United States*, 152 U. S. 211, 221. The rules and regulations promulgated by that department for the purpose of carrying out the provisions of the act of June 4, 1897, are found in 24 L. D. 589, 592, and we think the rules set forth below are reasonable and entitled to respect and obedience as valid rules and regulations.

Among the rules it is provided:

"16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a

quitclaim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for."

"18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for."

The "consideration," mentioned in rule 18, is clearly not of the character of a review of a decision already made by the local land officers, but is in the nature of an original consideration of the subject by the General Land Office, to which office the final decision belongs. The *applications* are to be forwarded, not a decision by the local land office, together with a report (not a decision) as to the status of the land. This rule makes it the duty of the local land officers merely to forward the various applications to the General Land Office, and an original decision is to be made by the latter office upon the papers transmitted to it.

It will be noticed that the bill in this case alleges the proceeding before the local land officers and also that defendants filed a protest, and that the questions raised thereby are still before the Land Department and not yet decided. The complete equitable title of the complainant is not therefore made out, and cannot exist until a favorable decision by that department has been made regarding the sufficiency of complainant's proof of his right to the selected land. That question the department is competent and it is its duty to decide. It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when the patent subsequently issues the legal title will vest from the time of selection. But before any decision is made how can there be an equitable title?

We do not think that by the act of 1883, 22 Stat. 484, the

local land officers were given any power to decide upon the sufficiency of the application in such a case as this. That act simply imposed upon them the duty of furnishing plats of townships showing what lands were vacant and what lands taken. It obviously referred to the lands that appeared vacant or appeared to have been taken on the records of their office. It did not assume to provide that no other lands could be taken than such as appeared so to be on those records.

The ground upon which complainant insists that it is the equitable owner of the land selected is that it has relinquished a title in fee in a forest reservation, and has selected in lieu thereof vacant land open to settlement, and that the local land officers duly accepted, received and filed the deed of the land relinquished, and the affidavit that the land selected was nonmineral, and that the officers duly entered such selection upon the official records of the land office, and then and there certified that the land selected was free from conflict, and that there was no adverse filing, entry or claim thereto. Complainant asserts that was all that it could reasonably do; that nothing remained on its part to do, and that when such is the case, the equitable title vests, and it is entitled to the protection of a court of equity to preserve and defend the title so acquired.

Counsel insists that the act of June 4, 1897, constitutes a standing offer on the part of the Government to exchange any of its "vacant land, open to settlement" for a similar area of patented land in a forest reservation, and that whenever a person relinquishes to the Government a tract in a forest reservation and places his deed to the Government of record as required by the Land Department rules, and selects in lieu thereof a similar area of vacant land, open to settlement, that such offer of the Government has thereupon been both accepted and fully complied with, and that a complete equitable title to the selected land is thereby vested in the selector.

But even the complete equitable title asserted by complainant must, as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action

of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself.

We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land. These assertions may or may not be true. Who is to decide? Complainant asserts that if a decision be necessary before the vesting of a complete equitable title, that in that case the local officers are to decide that question, and by accepting the deed and making the certificate already mentioned, they have decided it, and thereupon, at all events, the complete, equitable title accrued, even though such decision were subject to a review by the Commissioner of the General Land Office and thereafter by the Secretary.

But, as has already been stated, there is nothing in the statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the act, and unless those officers had that power they did not acquire it by assuming to exercise it. We do not say they did so assume. They received, accepted and filed the deed, the abstract of title, the non-mineral affidavit and the selection as

made by Clarke. They entered that selection upon the official records of the land office and they certified that it was free from conflict, and that there was no adverse filing, entry or claim thereto, but it cannot be said that they decided that the selector had complied with the provisions of the statute or that he had done all that he ought to have done in order to acquire his alleged complete, equitable title.

Their certificate that the land was free from conflict was simply a certificate as to what appeared on the books of the local office, and the same may be said of the statement that there was no adverse filing, entry or claim thereto upon such books. No affidavit of non-occupancy was filed, and they did not certify that the land so selected was in fact vacant or unoccupied, nor did they assume to certify that the selected land contained no minerals, although an affidavit to that effect was presented to them. In truth, all that these local officers did was to certify that the selector had done certain things, and that the land selected was vacant and open to settlement so far as it appeared from the books of the local land office.

Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

The protest by the defendants was duly filed within the time permitted by the regulations of the office, and the questions

arising thereunder are, as stated in the bill, still pending before the General Land Office. Whether it was necessary, at the time of making the selection, for the selector to file in addition to his non-mineral affidavit an affidavit that the land was not occupied in fact, is a question of law for the Land Department to determine among the other questions to be decided by it. Its decision of any legal question would not, of course, be binding on the courts whenever such a question might properly arise in any future litigation. It is also for the Land Department to determine whether, if the land were not known to be mineral land at the time of the selection, the fact that mineral in paying quantities has been found since that time, will vitiate that selection.

In *Kern Oil Company* v. *Clarke*, 30 L. D. 550, 567, referring to the necessity of the filing of a non-occupancy affidavit, it was said:

"That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word 'vacant,' as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, cannot be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the Land Department."

Again, in *Gray Eagle Oil Company* v. *Clarke*, 30 L. D. 570, it was also held that under the act of June 4, 1897, it must be shown that at the date of selection the selected lands were unoccupied as well as non-mineral in character, and that until that proof was submitted a selector had not done that which converts the offer of exchange into a contract fully executed on his part whereby he secures a vested right in the selected land. It is unnecessary for the court to express an opinion as to the correctness of these views of the Land Department as stated in its opinion in the above cases.

What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various

questions of law and fact have been determined by that department in favor of complainant it cannot be said that it has a complete equitable title to the land selected.

Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such question themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. *United States* v. *Schurz*, 102 U. S. 378, 395.

The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill or in the prayer for relief to consider that question.

For the reasons stated, we think the bill does not state sufficient facts upon which to base the relief asked for, and that the defendants' demurrer to the same was properly sustained. The decree of the Circuit Court of Appeals must, therefore, be

Affirmed.

Petition for modification of judgment. June 1, 1903.

Mr. Justice Peckham: *Ordered*, That the decree dismissing the bill in this case be modified by providing that the dismissal is without prejudice to such future proceedings as complainant may be advised, and as so modified, the decree is

Affirmed.

PACIFIC LAND AND IMPROVEMENT COMPANY *v.* ELWOOD OIL COMPANY.

Appeal from the Circuit Court of Appeals for the Ninth Circuit.

No. 218. This case was argued with No. 217, *ante*, p. 301, and by the same counsel.

MR. JUSTICE PECKHAM: This case is covered by the foregoing decision, and the decree of the Circuit Court of Appeals herein is, therefore,

Affirmed.

Petition for modification of judgment. June 1, 1903.

MR. JUSTICE PECKHAM: *Ordered*, That the decree dismissing the bill in this case be modified by providing that the dismissal is without prejudice to such future proceedings as complainant may be advised, and as so modified, the decree is

Affirmed.

UNITED STATES *ex rel.* RIVERSIDE OIL COMPANY *v.* HITCHCOCK.

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

No. 632. Argued March 17, 18, 1903.—Decided May 18, 1903.

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands; and neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion.

The Secretary having jurisdiction to decide at all, has necessarily jurisdiction to decide as he thinks the law is, and it is his duty so to do, and the courts have no power under those circumstances to review his determination by mandamus or injunction. The courts have no general supervisory power over the officers of the Land Department by which they can control the decisions of such officers upon questions within their jurisdiction.

The relator, plaintiff in error, filed its petition in the Supreme Court of the District of Columbia, asking for a writ of mandamus to compel the defendant, the Secretary of the Interior, to vacate a certain order made by him rejecting selections of land by one Clarke, and to compel the defendant to order such selections passed to patent and to cause to be prepared and presented for signature to the proper officers of the United States of America a patent for the selected land, or for such other relief as might be proper. The court denied the petition, and from that judgment the relator appealed to the Court of Appeals of the District, which, after a hearing, affirmed the judgment of the court below. The relator has brought the case here by writ of error.

The petition for the writ filed in the court below, in addition to various conclusions of law, made the following averments of fact:

On October 28, 1898, one C. W. Clarke was the owner in fee of certain land in the State of Oregon covered by a patent from the United States to his grantors, which is described in the petition, and the land was situated in a forest reservation in that State, designated as the Cascade Range Forest Reservation. On the day above mentioned Clarke executed a deed, which conveyed in fee and relinquished to the United States the land above described, and the deed was surrendered to the register and receiver of the proper land office and received and accepted by them. Certain land was thereupon selected by Clarke, which land had been duly surveyed and classified as agricultural land prior to the selection, and appeared on the records of the Land Department as agricultural land, subject to disposition under the act of June 4, 1897, relating to forest reserve lands. A copy of the material portion of that act is set

forth in the margin in the case immediately preceding, *Cosmos &c. Co.* v. *Gray Eagle Co.*, *ante*, p. 301.

After the selection of the land the register certified that the land thus selected in lieu of the land relinquished to the United States was free from conflict, and that there was no adverse filing, entry or claim thereto, and he thereupon entered the selected land upon the records and tract books of the land office. The Land Department thereafter required Clarke (without authority of law as averred) to publish a notice of his selection for a period of sixty days, and the register forwarded all the papers to the Commissioner of the General Land Office, together with his above-mentioned certificate, and reported to that office that publication had been ordered pursuant to the circular of the General Land Office of December 18, 1899. Clarke complied with the requirements of the department and published the notice, and on February 6, 1900, before the sixty days had expired, the Kern Oil Company filed in the local office a protest against the selection, with accompanying affidavits, which protest and affidavits were also thereupon forwarded to the General Land Office. The petitioner avers that the protest was insufficient to constitute an issue as to whether or not the land selected by Clarke was vacant land open to settlement at the time of such selection, and it was averred that the protestant, by reason of the non-discovery of mineral in the land, was wholly without standing as an adverse claimant under the law and practice of the Land Department.

On January 2, 1900, Clarke duly conveyed by deed the selected land to the petitioner, and it thereby became vested with all of Clarke's rights in and to the land, and it is still the owner thereof and entitled to demand and receive from the United States a patent therefor. The petitioner then filed in the General Land Office a motion to dismiss the protest.

It was then averred that at the time of the selection by Clarke no other person had any right, title or interest, vested or inchoate, in or to the land so selected, and that the persons mentioned in the protest and affidavits and alleged to have been upon the land as locators at or before the time of the selection by Clarke, and under whom the protestant asserted rights,

were pretended explorers for minerals who had made no discovery of minerals upon the land or any part thereof, but had merely staked off pretended mining claims for the purpose of deceiving others and discouraging and defeating them from acquiring title to such land under the land laws, and that such staking off initiated no lawful right, inchoate or vested, under such land laws.

The hearing was had before the Commissioner of the General Land Office, and a decision in the matter was given by him, by which he held that the title of the selector did not vest until approval by the Commissioner, and that the land in the selection was yet open to exploration under the mining laws, and if at the date of the decision the land is shown to be mineral it defeats the selection.

From this decision the petitioner appealed to the Secretary of the Interior, and assigned among other things that the Commissioner erred in not sustaining the motion to dismiss the protest and in not passing the land selected to patent, and that he also erred in ordering a hearing and in not holding that the showing of the tract books and land records at the date of the selection governed the character of the land for the purpose of the selection, and also in holding that a discovery of mineral upon the land selected subsequent to the selection and before approval by the Commissioner would defeat such selection; that the Commissioner also erred in calling upon the selector to demand a hearing and assume the burden of proof upon the question of the character of the land, and in directing that at such hearing, if demanded, the character of the land subsequent to the selection should be embraced in the issue.

On April 25, 1901, the defendant rendered a decision in the matter, wherein, as averred, he held that questions respecting the class and character of the selected land were to be determined by the conditions existing at the time when all requirements necessary to obtain title have been complied with by the selector; that the mere recital in one of the forms approved by the respondent, of an accompanying non-mineral and non-occupancy affidavit, constituted a regulation of the department requiring the filing of such affidavit as a condition precedent to

the vesting of selector's title; that such alleged regulation was binding upon selector's forest reserve lieu land; that the affidavits filed by the selector Clarke failed to allege non-occupancy, and therefore he had not complied with the requirements necessary to obtain title; that since the said selection by Clarke valuable deposits of mineral petroleum oil had been discovered, and that in view of the alleged admitted occupancy subsequent to the said selection and the subsequently discovered value of the land for mining purposes, it was apparent that the required proofs of the then non-mineral character and non-occupancy of the land could not then be supplied; that therefore the selections must be rejected.

The petition averred that the defendant vacated the order of the Commissioner directing a hearing, and arbitrarily, wrongfully and unlawfully attempted to reject the selections and destroy the vested rights of Clarke and his grantees.

The protest mentioned in nowise questioned the sufficiency in substance and form of the selection made by Clarke, nor was the point of the alleged insufficiency of the affidavit raised by the Commissioner of the General Land Office in his decision of December 18, 1900, and the United States has in nowise notified the selector of any defect in the exchange, and there is no issue in the record charging a failure to comply with the law.

The affidavits, though not essential to the validity of the contract of exchange tendered by Congress, and accepted and completed by the relinquishment and selection aforesaid, did in law and in fact allege the non-occupancy of the land as understood in the law and the practice of the Land Department, as they expressly negative all the elements of legal occupancy.

A motion for a review of the hearing was made and granted, and was thereafter had before the Assistant Attorney General of the United States for the Interior Department.

On April 12, 1902, the defendant rendered a decision, adhering to the ruling already given, ignoring the curative effect of supplemental affidavits of non-occupancy, and denied the motion for a review.

By this decision the Secretary of the Interior erroneously held and decided that the land selected was not "vacant land,"

though in truth and in fact unoccupied, and such vacancy and lack of occupancy was not shown by an affidavit of selector, made and filed at the time and as a part of the selection; that the defendant erroneously held and decided that, in order to be vacant land within the meaning of the act of 1897, the selected land must not only be free from the presence of any one on the land as a matter of fact, but must be shown to be free from such presence of any one on the land at the date of selection by an affidavit of selector. It was then alleged that in fact there was no person present on the selected land at the time of the selection; that the decision of the Secretary of the Interior on review turned solely on a question of law, and not on any question of fact or on any question of mixed law and fact, and that the only question of law involved is the meaning of the act of June 4, 1897, and the particular words therein, "vacant land open to settlement."

The defendant arbitrarily refused to pass the selection to patent, and has arbitrarily ordered the case of the selector dismissed from his docket solely because of the alleged absence from the record of selection of a non-occupancy affidavit, and not because of any ground or cause of objection to the selection set up in said protest.

In conclusion, the petitioner prays for a writ of mandamus to command the defendant "to forthwith recall and vacate his said order rejecting said selections of said Clarke, and if said selections have already been cancelled to vacate and recall said cancellation and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as required by law, and to order said selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America a patent or patents for the said selected lands, and that the petitioner may have such other or further relief as the premises warrant and to the court may seem meet."

To this petition the defendant made answer, admitting many averments in the petition, and setting up the facts as understood by the defendant, as follows: The defendant averred that Clarke did file his deed with the local land officers and assumed

to select other land under the act of June 4, 1897; that a form of application to select land under the act had been prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior, and was in force when the selection was made, and which form contained, among other things, the following clause:

"There are also submitted certificates from the proper officers showing that the land relinquished or surrendered is free from incumbrance of any kind, also that all taxes thereon to the present time have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

It is then averred that the allegation showing the land selected to be non-mineral in character and unoccupied was an essential averment, for the reason that, unless the lands were non-mineral in character and unoccupied, the same were not vacant lands open to settlement within the intent and meaning of the act of 1897.

The regulation was not complied with and no evidence of non-occupancy was given, and the allegation contained in the proposed form as to the non-mineral character of the land, was not complied with, as it was stated by the selector in this case that his affidavit as to the character of the lands was made "upon the evidence found upon the surface of the ground, and that the affiant does not undertake to express any opinion as to what may be under the ground."

The answer then set up the facts as to the protest of the Kern Oil Company and the various hearings and decisions of the Commissioner and the Secretary, in substance as set forth in the petition.

The defendant then averred that by the laws of the United States the duty was imposed upon him to construe the acts governing the disposition of the public lands of the United States, and in pursuance of the duties so imposed upon him he was required to construe and apply the terms of the act of Congress of June 4, 1897, and that in the exercise of his judgment and discretion in that behalf he did construe the term, "vacant land open to settlement," as meaning to exclude land in the actual occupation of any person or persons under the local cus-

toms or rules of miners which are by the statute incorporated into and have become part of the laws of the United States; that, in the exercise of his proper duty and function as Secretary of the Interior, the defendant decided that, by reason of the failure of Clarke to show in due and proper form that the lands were at the date of selection subject to selection as "vacant land open to settlement," the attempted selection thereof must be rejected, and it thereupon became and was unlawful for this respondent as such Secretary to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded.

To this answer the petitioner demurred on the ground that the same was insufficient and bad in form and substance. After the demurrer was overruled the petitioner elected to stand by it, and the court thereupon adjudged that the rule to show cause should be discharged, the prayer of petitioner denied and the petition itself dismissed.

Mr. Jefferson Chandler and *Mr. Shirley C. Ward* for plaintiff in error. *Mr. John M. Thurston*, *Mr. William C. Prentiss*, *Mr. M. A. Ballinger*, *Mr. T. C. Van Ness* and *Mr. Horace F. Clark* were on the brief.

Mr. Special Assistant John S. Chapman for defendant in error. *Mr. Assistant Attorney General Van Devanter* and *Mr. Assistant Attorney General Glassie* were on the brief.

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

We have set out in the foregoing statement of facts, at very great length, a large portion of the contents of the petition and answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted

to the Land Department, which had full and complete jurisdiction over the matters arising under the act of June 4, 1897, and it thereby became the duty of the officers of that department to decide them. As is said in *Knight* v. *United States Land Association*, 142 U. S. 161:

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez* v. *Frisbie*, 101 U. S. 473; *Gaines* v. *Thompson*, 7 Wall. 347; *United States* v. *Black*, 128 U. S. 40; *United States* v. *Windom*, 137 U. S. 636.

In *Decatur* v. *Paulding*, 14 Pet. 497, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had

necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

Neither the case of *Roberts* v. *United States*, 176 U. S. 221, nor that of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, decides anything opposing these views.

In the *Roberts* case it was simply decided that the duty of the Treasurer to pay the money in question in that case was ministerial in its nature and should have been performed by him on demand, and that, therefore, mandamus was the proper remedy for his failure to do it.

In the *McAnnulty* case it was held that the order of the Postmaster General to the postmaster in the city of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand.

We are so clearly of opinion that the decision of the defendant in this case was judicial in its nature that further argument upon the subject is needless.

The judgment of the Court of Appeals of the District of Columbia is

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* ALLISON.

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

No. 232. Argued April 8, 1903.—Decided May 18, 1903.

Although a statute of North Carolina provides that a foreign railroad company desiring to own property or carry on business, or exercise any corporate franchise within the State, must comply with certain specified provisions of the statute, and on complying therewith shall become a domestic corporation, such fact does not affect the character of the original corporation, and it does not thereby become a citizen of North Carolina so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship.

Where a corporation which has complied with such provisions is sued in the state courts of North Carolina, an order of removal made by the Circuit Court of the United States operates to withdraw from the state court the right to hear and determine the case.

THE Supreme Court of the State of North Carolina affirmed a judgment against the railway company, which was entered on a verdict of a jury upon a trial in the state court, and the railway company has brought the case here by writ of error.

The plaintiff below brought his action in the state court against the railway company to recover damages suffered by reason of the alleged negligence of the defendant. The defendant answered, and averred that it was a corporation created and organized under the laws of the State of Virginia; it denied the various allegations of the complaint as to its negligence and as to the damages suffered by the plaintiff, and also set up as a defence plaintiff's contributory negligence. After answer

and under the provisions of the second section of the act of Congress, chapter 866, approved August 13, 1888, 25 Stat. 433, the defendant, alleging that it was a corporation created under the laws of Virginia, submitted a petition to the United States Circuit Court in North Carolina, for the removal of the case from the State to the United States court, and the ground for removal, as stated in the petition, was because of "prejudice or local influence" to such an extent that it would "not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause." The petition was supported by an affidavit that set up facts from which the court might find that defendant could not obtain justice in the state court.

The Circuit Court decided that the proof submitted to it was sufficient; that defendant was a citizen of Virginia, and that it could not, on account of local prejudice and influence, obtain a fair trial in the state court, and it, therefore, ordered the removal of the cause to the United States Circuit Court for the Western District of North Carolina. The court also ordered that its clerk should certify to the state court the order of removal, "together with copies of the petition, bond and affidavit, to the end that the state court may be advised of the action of this court and of its order of removal, and to the further end that the said state court may proceed no further with the said suit or action, and to the end also that the said state court may direct the clerk of the Superior Court of the county of McDowell to make a full and complete transcript of the record of said action and to certify the same to this court for trial."

Upon the filing of this order in the state court that court declined to grant the motion to surrender jurisdiction, holding that the case could not be legally removed to the Circuit Court of the United States, and it made the following order:

"In this case it appears to the court that the Circuit Court of the United States has caused an order for the removal of the case to the Circuit Court of the United States, upon petition setting forth that the defendant is a non-resident of the State of North Carolina; and it further appearing to the court, by

the admission of defendant, through its counsel, that the defendant has complied with the terms of the act of the legislature of the State of North Carolina, being chapter 62 of the acts of the general assembly of North Carolina at its session of 1899: It is thereupon considered by the court that the defendant is a corporation of this State by virtue of said act, and that it is not entitled to remove this cause to the Federal court. It is further considered by the court that the courts of the State of North Carolina have jurisdiction of this cause, and this court declines to surrender jurisdiction thereof. It is ordered by the court that a copy of this order be sent to the clerk of said Circuit Court of the United States by the clerk of this court."

The act of the legislature of North Carolina, referred to in the foregoing order, is set forth in full in the margin.[1]

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[1] Chapter 62, Public Acts of 1899.

The General Assembly of North Carolina do enact:

SEC. 1. That every telegraph, telephone, express, insurance, steamboat and railroad company incorporated, created and organized under and by virtue of the laws of any State or government other than that of North Carolina, desiring to own property or to carry on business or to exercise any corporate franchise whatsoever in this State, shall become a domestic corporation of the State of North Carolina by filing in the office of the Secretary of State a copy of its charter duly authenticated in the manner directed by law for the authentication of statutes of the State or country under the laws of which such company or corporation is chartered and organized, and a copy of its by-laws duly authenticated by the oath of its secretary. Such corporation shall pay therefor to the Secretary of State, to be turned over by him into the state treasury, such fees as are or may be required by law.

SEC. 2. That if any such charter or by-laws, or any part thereof, filed in the office of the Secretary of State shall be in contravention or violation of the laws of this State, such charter or by-laws or such part thereof as are in conflict with the laws of this State shall be null and void in this State.

SEC. 3. That when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this State, and shall enjoy the rights and privileges and be subject to the liability of corporations of this State the same as if such corporation had been originally created by the laws of this State. It may sue and be sued in all courts of this State and shall be subject to the jurisdiction of the courts of this State as fully as if such corporation were originally created under the laws of the State of North Carolina.

SEC. 4. That on and after the first day of June, eighteen hundred and

It was admitted that defendant had complied with the terms of the act before the cause of action set out in the complaint of plaintiff had accrued.

When the case was thereafter called for trial in the state court,

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ninety-nine, it shall be unlawful for any such corporation to do business or to attempt to do business in this State without having fully complied with the requirements of this act.

SEC. 5. Any such corporation violating any provision of this act shall forfeit to the State of North Carolina a penalty of two hundred dollars for each and every day after the first day of June, eighteen hundred and ninety-nine, on which such corporation shall have continued to operate or do business without having complied with the requirements of this act. Such penalty shall be recoverable by the treasurer of the State for the benefit of the State of North Carolina, and it shall be his duty to sue for such forfeitures in the Superior Court of Wake County as the same accrue.

SEC. 6. No telegraph, telephone, express, insurance, steamboat or railroad company, which is a foreign corporation of another State doing business in North Carolina, shall be allowed to sue in the courts of North Carolina on or after June first, eighteen hundred and ninety-nine, until such foreign corporation has become a domestic corporation, either by a special act of the legislature, or under the provisions of this act.

SEC. 7. No such foreign corporation, mentioned in the preceding section of this act, shall be allowed to enter into a contract in the State of North Carolina on or after the first day of June, eighteen hundred and ninety-nine, nor shall any such contract heretofore or hereafter made or attempted to be made and entered into by such corporation in the State of North Carolina be enforcible by such corporation unless such corporation shall on or before the first day of June, eighteen hundred and ninety-nine, become a domestic corporation under and by virtue of the laws of North Carolina.

SEC. 8. Any such corporation violating the provisions of this act by doing any business in this State without first becoming a domestic corporation in the manner prescribed by law, shall, in addition to the penalty prescribed in section five of this act, forfeit a penalty of five hundred dollars for each day any such business shall be done by it in the State of North Carolina on and after the first day of June, eighteen hundred and ninety-nine. The amount so forfeited under the provisions of this section shall be recovered by the treasurer of North Carolina and it shall be the duty of said state treasurer to institute suit for same in the Superior Court of Wake County: *Provided*, The business contemplated in this section of this act does not embrace such business as is strictly the business of interstate commerce.

SEC. 9. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

SEC. 10. That this act shall be in force from and after its ratification.

Ratified the 10th day of February, A. D. 1899.

a motion was again made to dismiss the same from that court because of the removal to the United States Circuit Court. The motion was again denied, and an exception taken by the defendant. The case was then tried in the state court and resulted in a verdict for the plaintiff, upon which judgment was entered, and exception taken to the verdict and to the entry of judgment. Defendant appealed from the judgment to the Supreme Court of the State of North Carolina and assigned as error, among other things, the refusal of the trial court to recognize the removal, and its trial of the cause after it had been legally removed to the Federal court. The Supreme Court of North Carolina affirmed the judgment, 129 N. C. 336, and decided against the right claimed by defendant to a removal of the cause under the statute of the United States above referred to.

Mr. W. A. Henderson and *Mr. F. H. Busbee* for plaintiff in error. *Mr. Charles Price* was on the brief.

Mr. E. J. Justice for defendant in error. *Mr. J. C. Pritchard* was on the brief.

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

The state court refused to recognize the validity of the order of removal of this case to the Federal court solely because of the state statute, and because of the admitted compliance of defendant with its provisions. It held that by complying with the statute the defendant became a citizen of North Carolina, so far at least as to prevent it from applying for removal as a citizen of another State. We, therefore, assume the sufficiency of the facts to warrant the decision of the Circuit Court of the United States removing the case to that court, provided the defendant company was a citizen of Virginia and did not become a citizen of North Carolina by virtue of its compliance with the state statute.

The ruling of the state court, by which it proceeded to judg-

ment in the case notwithstanding the order of removal to the Federal court, is reviewable here under section 709, Revised Statutes. *Stone* v. *South Carolina*, 117 U. S. 430; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556.

Two propositions were argued at the bar: (1) Whether the state court had the right to pass upon the question of the validity of the order of the Circuit Court of the United States removing the case to that court? (2) Did the defendant company, which was originally incorporated in the State of Virginia, have the right as a citizen of Virginia to remove the case into the Federal court, notwithstanding the defendant company had complied with the statute of North Carolina, which declared that upon doing the things therein mentioned the defendant became a domestic corporation of North Carolina?

In the view we take of this case it is unnecessary to dwell upon the first of these questions. We, therefore, address ourselves to the second.

The statute of North Carolina provides in substance that a railroad company incorporated under the laws of any State or government, other than North Carolina, which desires to own property or carry on business, or to exercise any corporate franchise within that State, shall become a domestic corporation of the State of North Carolina "by filing in the office of the Secretary of State a copy of its charter duly authenticated in the manner directed by law for the authentication of statutes of the State or country under the laws of which such company or corporation is chartered and organized, and a copy of its by-laws duly authenticated by the oath of its secretary." Section 3 of the act provides:

"That when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this State and shall enjoy the rights and privileges and be subject to the liability of corporations of this State the same as if such corporation had been originally created by the laws of this State. It may sue and be sued in all courts of this State and shall be subject to the jurisdiction of the courts of this State as fully as if such corporation were originally created under the laws of the State of North Carolina."

It is further provided by section 4 that it shall be unlawful for such foreign corporation to do business or attempt to do business in North Carolina after the first day of June, 1899, without having fully complied with the requirements of the act. It is admitted that the company did comply with the provisions of the act in relation to filing its charter, by-laws, etc., with the Secretary of State.

It early became material to inquire into the nature of the status of corporations with regard to the jurisdiction of the Federal courts under the Constitution and laws of the United States. A recent statement of the law on that subject is contained in the case of *St. Louis & San Francisco Railway Company* v. *James*, 161 U. S. 545. It was said by Mr. Justice Shiras, in delivering the opinion of the court in that case, that after considerable contention in the courts, it was finally determined by this court that the citizenship of a corporation was that of the State originally creating it, and that it was a presumption of law that the members of the corporation were citizens of the same State.

The facts upon which the decision of the court in that case was based, so far as important to be here observed, were these: The St. Louis and San Francisco Railway Company was a corporation originally created under the laws of the State of Missouri, and it operated a railroad from Monett in the State of Missouri to the southern border of that State. Subsequently, and under provisions of the laws of Arkansas, it entered that State for the purpose of operating its road therein from the southern boundary of the State of Missouri to Fort Smith in the State of Arkansas; the portion of the railroad in Arkansas was operated by the leasing of a railroad already or partly built in that State. The State of Arkansas had provided by its legislation that before any railroad corporation of any other State or Territory should be permitted to avail itself of the benefits of the act allowing the purchasing or leasing of any road within that State, the foreign corporation should "file with the Secretary of State of this State a certified copy of its articles of incorporation, if incorporated under a general law of such State or Territory, or a certified copy of the statute

laws of such State or Territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such State; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this State, subject to all of the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation: *And provided further*, That every railroad corporation of any other State, which has heretofore leased or purchased any railroad in this State, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the Secretary of State of this State, and shall, thereupon, become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of such corporation or corporations in this State, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this State organized and existing under the laws of this State."

The railroad company, pursuant to that act, filed with the Secretary of State of the State of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri. After this had been done and while the company was operating its railroad from Monett, Missouri, to Fort Smith, Arkansas, one Etta James brought an action in the Circuit Court of the United States for the Western District of Arkansas against the company for negligence in maintaining a switch track at Monett, in Barry County, Missouri, so near its tracks that the husband of plaintiff was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. The plaintiff was the widow and sole heir at law of her husband,

and resided at Monett, and was a citizen of the State of Missouri. She recovered a verdict in the United States Circuit Court in Arkansas, and the cause was taken to the Circuit Court of Appeals for the Eighth Circuit by the railroad company, which claimed that the Circuit Court of Arkansas had no jurisdiction, because the railroad company was a citizen of Missouri and the plaintiff was a citizen of the same State. That court, desiring instructions from the Supreme Court of the United States before deciding the case, propounded the following questions:

"1. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a corporation and citizen of the State of Arkansas?

"2. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the State of Missouri?

"3. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the State of Missouri, and the cause of action accrued in the State of Missouri, and arose from an accident that resulted

from the operation of the railroad of the company in that State?

"4. In view of the facts hereinbefore set forth, did the Circuit Court of the United States for the Western District of Arkansas have jurisdiction of this action?"

After a full examination of the prior cases Mr. Justice Shiras, speaking for the court, answered the second question in the negative, observing that such answer rendered it unnecessary to answer the other questions.

Here was a corporation originally incorporated in the State of Missouri going into the State of Arkansas and operating a railroad in that State by leasing a portion of it therein and complying with a statute which provided that, upon filing a certified copy of its articles of incorporation with the Secretary of State of Arkansas, it should be regarded as formally incorporated in that State, and it should thereby become a domestic corporation, and yet it was held that defendant could not be sued by a citizen of Missouri in the Federal court in the State of Arkansas; that although to some extent and for some purposes it might be regarded as a corporation of Arkansas, it was for purposes of jurisdiction in the Federal courts to be regarded as a corporation of the State of Missouri.

The case, it will be seen, was not decided upon the ground that the cause of action had arisen in the State of Missouri. It was admitted that the cause of action was transitory, but the broad question was decided that the company was a corporation of Missouri and a citizen of that State, and could not be sued by another citizen of that State in the Federal courts of Arkansas.

It is stated in the opinion:

"The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation.

"We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed

of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

In *Louisville &c. Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, a question arose as to whether the railway company was a corporation of Kentucky as well as of the State where it was originally created. The exigencies of the case did not require a solution of that question, but the *James* case, 161 U. S. 545, *supra*, was referred to with approval in the opinion of the court, which was delivered by Mr. Justice Gray. In the course of that opinion, he said (p. 563):

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or other citizen of either

State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States."

So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a State in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State, yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the State in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship.

Considerable stress has been laid, by those holding opposite views, upon the case of *Memphis & Charleston R. R. Co.* v. *Alabama*, 107 U. S. 581. It was there held that a railroad company, having been made by the statutes of Alabama an Alabama corporation, although having previously been incorporated in Tennessee, could not remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of that State. But in that case the company was required by the legislation of Alabama to open books in that State for the subscription of stock in the capital of the corporation, so as to afford the citizens thereof an opportunity to take stock to the amount of a million and a half of dollars of the capital of the company. The Alabama act also provided that the company should, at the first meeting of the stockholders, designate a time when and a place or places in northern Alabama where, for the convenience of the citizens of the State who may be stockholders, an election for directors should be held, notice whereof was to be given in the newspapers, and elections for directors should be held at the same time both in Alabama and in Tennessee.

This court held, that by reason of the particular language used in the act, there was a separate original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the State of Alabama. It is stated in the opinion, page 584:

"The whole act, taken together, manifests the understanding and intention of the legislature of Alabama that the corporation,

which was thereby granted a right of way to construct through this State a railroad, with which any railroad company chartered or to be chartered in this State should have the right to connect its road; and which was required to construct a branch railroad in this State, to open books for subscriptions of stock to a certain amount in this State, to apply the moneys here subscribed to the construction of the road within this State, and to hold elections in this State; was and should be in law a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the legislature of Tennessee."

The difference between the above case and the cases we have already referred to is plain and fundamental, but in any event we regard the *James* case, reaffirmed and approved as it is by that of *Louisville &c. Railway* v. *Trust Company*, 174 U. S. *supra*, as decisive of the case before us.

We do not subscribe to the doctrine that if a corporation files its charter in one State, after having been first chartered in another State, and is sued by a citizen of the State in which it filed its charter, in the state courts of that State, the right of removal to the Federal courts will be denied, while at the same time if such a corporation is sued by a citizen of the State in which it filed its charter, in the United States courts, the jurisdiction of the United States courts will be sustained upon the ground that in the Federal courts the corporation is domestic in the State where it was originally created and where its original incorporators are citizens, and it will be conclusively presumed as a matter of law that they are citizens of the State originally chartering it. If there be jurisdiction in the United States courts in the latter case, on the ground that it is a corporation and citizen of the State in which it was created, that fact gives jurisdiction to the Federal court to remove the case from the state court when the corporation is sued by a citizen of the State in which it filed its charter, because such corporation is a citizen of another State, namely, the State in which it was originally created. The citizenship of the corporation is not changed because of the particular court in which the action is commenced. If it be a citizen of another State

in the one case, it is such citizen also in the other, and if the other party to the action be a citizen of a State other than the one which created the corporation the jurisdiction of the Federal courts exists, and the right of the corporation (upon complying with the statute) to remove the case from the state court when it is sued by a citizen of the State where its charter may have been subsequently filed, is granted by the laws of the United States.

We have read with respectful consideration the cases of *Debnam* v. *Southern Bell Telephone & Telegraph Company*, 126 N. C. 831, and *Layden* v. *Knights of Pythias &c.*, 128 N. C. 546, in which the Supreme Court of North Carolina comes to a different conclusion from that which we have reached in regard to the jurisdiction of the Federal courts in such a case as this, but we cannot concur in the doctrine of the Supreme Court of the State as announced in those cases. We feel bound by the decisions of this court upon that subject.

The Supreme Court of South Carolina has come to the same conclusion that we reach in this case, having altered its holding in *Mathis* v. *Railway Company*, 53 S. C. 246, 257, after the decision of the *James* case, 161 U. S., *supra*. See, to that effect, *Wilson* v. *Southern Railway &c.*, 36 S. E. Rep. 701.

In *Walters* v. *Chicago &c. Railroad Company*, 104 Fed. Rep. 377, the United States Circuit Court in Nebraska held, in accordance with the principles maintained in the *James* case, that the defendant, although made a domestic corporation of Nebraska, yet having in fact been originally created by the State of Illinois, was a citizen of that State. The motion to remand to the state court was therefore denied.

We are of opinion that the plaintiff in error was not a citizen of the State of North Carolina at the time it was sued by the defendant in error, so far as regards the jurisdiction of the Federal courts, and that the order of removal made by the Circuit Court of the United States operated to withdraw from the state court the right to hear and determine the case.

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

DUNBAR *v.* DUNBAR.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 244. Argued April 16, 1903.—Decided June 1, 1903.

After obtaining a divorce on the ground of his wife's desertion, she not opposing the decree, the husband executed and delivered a written contract by which he agreed to pay the wife a specified sum annually for her own support during her life or so long as she remained unmarried, and also to pay her a specified sum annually for the support of their minor children whose custody was awarded by the decree to the wife. Subsequently the husband was adjudged a bankrupt and discharged. The wife sued for amounts accrued prior to the discharge both for her own support and for that of her children.

Held, that as to the amount payable for her own support it was not a contingent liability provable under the bankruptcy act, and the contract was not of such a nature as would permit the obligor to be discharged from the obligations thereunder by a discharge in bankruptcy.

Held, that as to the amount payable for the minor children, the contract was a recognition of liability on the part of the father to support them and, as it does not appear that the amount was unreasonable, the contract to do so could not be affected by a discharge in bankruptcy; and the fact that the money was payable to the mother did not affect the situation.

THE defendant in error, being the plaintiff below, brought her action in October, 1899, against the plaintiff in error, in the Municipal Court of Boston, to recover moneys alleged to be due upon a contract, which was set forth in the complaint. Issue was joined and the case tried before a single justice, and judgment ordered for the defendant with costs. An appeal was taken to the Superior Court of the county of Suffolk, and that court ordered judgment for the plaintiff for one branch only of her claim. The case was reported to the Supreme Judicial Court for the Commonwealth, and that court ordered the court below to enter judgment for the plaintiff for both branches of her claim, 180 Massachusetts, 170, and the case was remanded to the Superior Court for the purpose of entering such judgment. Pursuant to the directions of the Supreme Court, the Superior Court did enter judgment against the defendant for both branches of her

claim, for the sum of $851.60 and costs. The defendant then obtained a writ of error from this court, directed to the Superior Court of Massachusetts, where the record remained.

The case shows these facts: The parties were husband and wife, who, in 1889, were living apart, the husband in Ohio and the wife in Massachusetts. In May, 1889, the attorney for her husband came to Massachusetts and saw Mrs. Dunbar, and told her that her husband was about to seek a divorce from her. The wife at this time had no means, and the two sons of the marriage, then respectively nine and twelve years old, were living with her. The purpose of the visit of the attorney was to obtain some assurance from her that she would not contest the case, and if she did not that the husband would make provision for aiding in the support of herself and her sons until they arrived of age. The wife denied any intended desertion of her husband, but the result of the negotiations after the wife had taken counsel of friends was to give assurance to the attorney that no defence would be interposed if he made some suitable provision for herself and her children.

Upon the return of the attorney to Ohio, a suit for divorce was commenced by the husband, and the summons served by publication. No appearance was made and there was no opposition to the decree of divorce which was obtained in July, 1889. It adjudged that the marriage contract theretofore existing between the parties was thereby dissolved, and both parties released from the obligation of the same, and "that the custody of the children of such marriage, one boy, Harry H. Dunbar, aged 12 years, and Willie W. Dunbar, aged 9 years, be, and the same are, to remain in charge and under the control of the said Lottie E. Dunbar, the said Horace B. Dunbar to have the privilege of seeing said children at all reasonable times."

The ground of divorce was stated, and the court found "upon the evidence adduced that the defendant has been guilty of wilful absence for more than three years last past from plaintiff, and that, by reason thereof, the plaintiff is entitled to a divorce as prayed for."

After the divorce the husband sent to a friend of his wife, to be delivered to her in performance of his agreement, a written

contract, in which he bound himself to pay to Lottie E. Dunbar, of Ashburnham, Mass., five hundred dollars yearly, so long as she remained unmarried, in monthly installments. In that contract he also agreed to pay "to our children, Harry H. Dunbar and Willie W. Dunbar, the sum of two hundred and fifty dollars each yearly, until they each attain the age of fourteen years; after that age they are to be paid by me such extra allowance as will give them a good and sufficient education befitting their station in life, and a suitable maintenance until each attains the age of twenty-one years." This writing was signed by the husband and acknowledged before a notary public of Hamilton, Ohio.

Payments upon this contract were made by the husband, but in 1896 they had become somewhat in arrears, and disputes arose as to the validity of the agreement. Thereafter another contract was entered into and payments were made as called for in that contract until some months prior to December 2, 1898. On such last named date the defendant was adjudged a bankrupt, on his voluntary petition in bankruptcy, in the United States District Court in Bankruptcy, Southern District of Ohio, Western Division, and on April 24, 1899, was discharged from all debts and claims provable under the act of Congress, relating to bankruptcy, against his estate, existing on the 2d day of December, 1898.

In the schedule of the defendant it appeared that he named the plaintiff as a creditor, as follows:

Lottie E. Dunbar, Charlestown, Mass. . . . Alimony due up to present time.	$ 540
Lottie E. Dunbar, Charlestown, Mass. . . . Alimony payable yearly.	1300

The plaintiff at the first meeting of the creditors in bankruptcy proceedings, which was held before a referee appointed therein, appeared by an attorney, who produced and filed his power of attorney, and filed her claim for $691.63, for installments on the contract due to December 2, 1898. The husband had paid nothing on the contract since some time before December 2, 1898, and finally the wife commenced an action to recover the amounts due thereon.

The following is a copy of the contract sued on:

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1899, in consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of September, 1889, and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

"That said Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child, Harry H. Dunbar, the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child, Willie W. Dunbar, the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first and tenth of each and every month—the first installment being for the month of May, 1896, shall be paid between the first and tenth of June, 1896.

"And, in addition to the foregoing, said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July, 1896, over and above the installment otherwise due for said month.

"And the said Lottie E. Dunbar hereby agrees that she has not nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance, or for the support, maintenance or education of said children, save and except as fixed and limited by this agreement."

Properly signed by both parties and witnessed.

The particulars of her claim were stated as follows:

"Horace B. Dunbar to Lottie E. Dunbar Dr.

1. To installments due under covenant for alimony from December, 1898, to October 1, 1899, ten months, at $41.66 a month $416 60

Amount brought forward,	$416 60
2. To monthly allowance due her for support and maintenance of Willie W. Dunbar, from December, 1898, to October 1, 1899, ten months, at $33.33 a month	333 30
	$749 90"

The defendant pleaded his discharge in bankruptcy as a bar, and the Supreme Judicial Court of the State held that it was not good.

Mr. James Hamilton Lewis and *Mr. George Fred Williams* for plaintiff in error. *Mr. James A. Halloran* was on the brief.

Mr. Frank H. Stewart for defendant in error. *Mr. John Oscar Teele* was on the brief.

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

Had the provisions of this contract, so far as contracting to pay money for the support of his wife is concerned, been embodied in the decree of divorce which the husband obtained from his wife in Ohio on the ground of desertion, the liability of the husband to pay the amount as alimony, notwithstanding his discharge in bankruptcy, cannot be doubted. *Audubon* v. *Shufeldt*, 181 U. S. 575. We are not by any means clear that the same principle ought not to govern a contract of this nature when, although the judgment of divorce is silent upon the subject, it is plain that the contract was made with reference to the obligations of the husband to aid in the support of his wife, notwithstanding the decree. The facts appearing in this record do not show a case of any moral delinquency on the part of the wife, and the contract, considering the circumstances, might possibly be held to take the place of an order or judgment of the court for the payment of the amount, as in the nature of a decree for alimony. We do not find it necessary, however, to decide that question in this case, because in any

event we think the contract as to the support of the wife is not of such a nature as to be discharged by a discharge in bankruptcy.

Conceding that the bankruptcy act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898, 30 Stat. 544, yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which in our opinion is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. Mr. Justice Bradley, in *Riggin* v. *Magwire*, 15 Wall. 549, speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the bankruptcy act of 1841. The fifth section of that act gave the right to prove "uncertain and contingent demands," but it was held that a contract such as above described was not within that section.

It was remarked by the justice in that case that if the contract had come within the category of annuities and debts payable in future, which are absolute and existing claims, the value of the wife's probability of survivorship after death of her husband might have been calculated on the principles of life annuities.

But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question; inclination, age, health, property, attractiveness, chil-

dren. These would at least enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.

In many cases where actions are brought for the violation of contracts, such as *Pierce* v. *Tennessee Coal &c. Railroad Company*, 173 U. S. 1; *Roehm* v. *Horst*, 178 U. S. 1, and *Schell* v. *Plumb*, 55 N. Y. 592, it is necessary to come to some conclusion in regard to the damages which the party has sustained by reason of the breach of the contract, and in such cases resort may be had to the tables of mortality, and to other means of ascertaining as nearly as possible what the present damages are for a failure to perform in the future, but we think the rules in those cases are not applicable to cases like this under the bankruptcy act.

Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if having found the value as depending upon the mortality tables you desire to deduct from that the valuation of the other contingency, it is pure guesswork to do it.

It is true that this has been done in England under the English bankruptcy act of 1869. In *Ex parte Blakemore*, L. R. 5 Ch. D. 372 (1877), it was held by the court of appeal that the value of the contingency of a widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. That decision was made under the thirty-first section of the bankruptcy act of 1869. James, Lord Justice, said:

"No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of a particular life is uncertain, the expectation of life at a given age is reduced to a certainty when you have regard to a million of lives. The value of the expectation of life is arrived at by an average deduced from practical experience."

Although the English statute makes it necessary to arrive at a conclusion upon this point, yet there is no "practical experience"

as to the chances of the continuance of widowhood, such as may be referred to where the probable continuance of life is involved. In the latter case we have the experience tables in regard to millions of lives, and under such circumstances there is, as Lord Justice James said, almost a certainty as to the valuation to be put on such a contingency. But under the English statute, the thirty-first section makes every kind of debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, so long as the value of the liability is "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." So under that act, in *Ex parte Neal*, L. R. 14 Ch. D. 579, there was a separation deed between husband and wife, and the husband was to pay an annuity to the wife, which was terminable "in case the wife should not lead a chaste life; in case the husband and wife should resume cohabition; and in case the marriage should be dissolved in respect of any thing done, committed, or suffered by" the other party, after the date of the deed. The annuity was also to be proportionately diminished in the event of the wife's becoming entitled to any income independent of the husband, exceeding a certain amount a year. After the execution of the deed the husband went through bankruptcy, and it was held that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation. In that case, speaking of the thirty-first section of the act of 1869, it was stated that "words more large and general it is impossible to conceive; they cover every species of contingency." It was also stated that it was "difficult to see how any case could arise which would not come within" the language of this act. Bramwell, Lord Justice, said: "But for the present bankruptcy act our decision must have been the same as that in *Mudge* v. *Rowan*," L. R. 3 Ex. 85 (1868), but he said that the present bankruptcy act was very different in its terms from the act which was in force when that case was decided.

In the case of *Mudge* v. *Rowan*, *supra*, there was a deed of separation between husband and wife, in which the husband covenanted to pay an annuity to his wife by quarterly installments, the annuity to cease in the event of future cohabitation

by mutual consent. It was held that this was not an annuity provable under the bankruptcy act of 1849, 12th and 13th Vic. ch. 106, section 175; nor a liability to pay money under the 24th and 25th Vic. ch. 134, section 154.

The one hundred and seventy-fifth section of the act of 1849 expressly provided that the creditor might prove for the value of any annuity, which value the court was to ascertain. Kelly, Chief Baron, said:

"The annuity seems to me to be so uncertain in its nature as to be impossible to be valued. In many cases the Commissioner of Bankruptcy may have to deal with contingencies the value of which depends on a variety of considerations, and where the valuation is very difficult. But here I am at a loss to see any single circumstance upon which a calculation of any kind could be based."

Martin, Baron, said:

"This contingency depends on an infinite variety of circumstances, into which it is idle to suppose a commissioner could inquire."

Channell, Baron, concurring, said:

"The tendency of recent legislation, and the course of recent decisions, has been to free a debtor who becomes a bankrupt from all liability of every kind; but I do not think an order of discharge a bar to such a claim as the present. . . . I quite admit that, to bring an annuity within the act of 1849, it is not necessary to have any actual pecuniary consideration. I also feel that in many cases the difficulty of calculating the present value of contingencies may be very great, and yet they may be within the acts. But here it appears to me that the difficulty is insuperable."

In *Parker* v. *Ince*, 4 H. & N. 53 (1859), there was a bond conditioned to pay an annuity during the life of the obligor's wife, provided that if the obligor and his wife should at any time thereafter cohabit as man and wife the annuity should cease, and it was held that the annual sum thus covenanted to be paid by the defendant was not an annuity within the one hundred and seventy-fifth section of the bankruptcy law or consolidation act of 1849, nor a debt payable upon a contingency

within the one hundred and seventy-seventh section, nor a liability to pay money upon a contingency within the one hundred and seventy-eighth section, and consequently the discharge in bankruptcy was no bar to an action for a recovery of a quarterly payment due on the bond. Martin, Baron, said:

"That cannot be such an annuity as would fall within the one hundred and seventy-fifth section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife who are separated living together again? Their doing so depends upon their character, temper, and disposition, and it may be a variety of other circumstances. Then is it money payable upon a contingency within the one hundred and seventy-eighth section? I think it is not."

It is only, therefore, by reason of the extraordinarily broad language contained in the thirty-first section of the English bankruptcy act of 1869 that the English courts have endeavored to make a fair estimate of the value of a contract based on the continuance of widowhood, even though the value was not capable of being ascertained by fixed rules, nor assessable by a jury, but was simply to be estimated by the opinion of the court or of some one entrusted with the duty.

In the *Blakemore* case, L. R. 5 Ch. D. 372, *supra*, after the announcement of the judgment, the report states that it was then arranged that it should be referred to an actuary to ascertain the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency of widowhood. In other words, it was left to the actuary to guess the proper amount to be deducted.

No such broad language is found in our bankruptcy act of 1898. Section 63*a* provides for debts which may be proved, which, among others, are (1) "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest;" (4) "founded upon an open account, or upon a contract express or implied,"

In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct.

We do not think that by the use of the language in section 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

The language of section 63*a* of the act of 1898 differs from that contained in the bankruptcy act of 1867, and also from that of 1841. The act of 1867, section 19, 14 Stat. 517, 525, carried into the Revised Statutes as section 5068, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order, and the creditor was then to be allowed to prove for the amount so ascertained.

Section 5 of the act of 1841, 5 Stat. 440, provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither the act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration.

Cases have been cited showing some contingent debts which were held capable of being proved under the bankruptcy act of 1898, among which are *Moch* v. *Market Street National Bank*, 107 Fed. Rep. 897, Circuit Court of Appeals, Third Circuit, 1901, and *Cobb* v. *Overman*, 109 Fed. Rep. 65, Circuit Court of Appeals, Fourth Circuit, 1901. And under former bankrupt acts, the cases of *Fisher* v. *Tifft*, 12 R. I. 56 (1878); *Heywood* v. *Shreve*, 44 N. J. L. 94 (1882), and *Shelton* v. *Pease*, 10 Missouri, 473 (1847).

The contingency in the case of *Moch* v. *National Bank*, *supra*, was that the bankrupt was the endorser of commercial paper

not due at the time of filing the petition, and it was held that under section 63*a*, subdivision 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed.

In *Cobb* v. *Overman*, *supra*, the bond of the bankrupt to secure payment to the obligee of an annuity for life was held to be properly proved under section 63*a*, clause 1.

These cases, it will be seen, do not come within the principle of the case at bar. The other cases, arising under the acts of 1867 and 1841, do not affect this case.

The Massachusetts court held the debt herein not provable, upon the authority of *Morgan* v. *Wordell*, 178 Massachusetts, 350, and *Goding* v. *Roscenthal*, 180 Massachusetts, 43. Mr. Justice Barker, in delivering the opinion of the Supreme Judicial Court of Massachusetts in the latter case, said:

"But in *Morgan* v. *Wordell*, 178 Massachusetts, 350, this court assumed that such claims were not provable under the act, and we follow that view in the present case."

We think the contract, so far as it related to the payment to the wife during her life or widowhood, was not a contingent liability provable under the act of 1898.

In relation to that part of the husband's contract to pay for the support of his minor children until they respectively became of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the States. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. The contract was a recognition of such liability on his part. We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do

should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfillment thereof should be so discharged. It is true his promise is to pay to the mother, but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose.

In *In re Baker*, 96 Fed. Rep. 954, in the District Court of Kansas, it was held that a judgment in a bastardy proceeding against the putative father, adjudging him to pay a certain sum to the mother of the child for its maintenance, was not such a debt as would be released by the discharge of the father in bankruptcy, and it was put upon the ground that by virtue of the judgment and bond given thereon, the father became liable for the maintenance of the illegitimate son the same as if he were his legitimate offspring, and that the bankruptcy law was never intended to affect the liability of the father for the support of his children.

In the case of *In re Hubbard*, 98 Fed. Rep. 710, the District Court of Illinois held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a state court requiring him to pay a certain sum for the support of his minor children. Kohlsaat, District Judge, said:

"The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness, but it was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also every principle of law, statutory, natural, and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule."

As the defendant would still remain liable for the support of his minor children, even if discharged from this contract under the act, and he would remain liable for past support, why should it be held that Congress intended that such a contract, to do what

the law enjoins upon him as a duty, should be released? There is no language in the act which plainly so provides, and we ought not to infer it.

The amendments to the bankruptcy act passed in 1903, 32 Stat. 797, contain an amendment of section 17 of the act of 1898, which relates to debts not affected by a discharge, and it provides, among those not released by a discharge in bankruptcy, a debt due or to become due for alimony, or for the maintenance or support of wife or child. It is true that the provisions of the amendatory act are not to apply to cases pending before their enactment. They are only referred to here for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children.

The judgment is

Affirmed.

BUCHANAN *v.* PATTERSON.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 266. Argued April 29, 30, 1903.—Decided June 1, 1903.

An administratrix of one who in 1818 became a member of a firm which had in 1798 sustained losses, resulting in what are known as French Spoliation Claims, presented the claims under the act of 1885 to the Court of Claims and obtained awards therefor. The findings clearly showed that the Court of Claims proceeded on the assumption that her intestate was a member of the firm when the losses were sustained. In 1899, Congress appropriated money to pay certain claims which had been favorably passed on by the Court of Claims including those awarded to this administratrix as such and as representing such firm. After collecting the amounts she applied to a state court of competent jurisdiction for instructions as to distribution of the fund. Next of kin of the partners of 1798 denied that her intestate could share in the fund under the provisions of the act of 1885, which limited payments thereunder to next of kin of the original sufferers; she contended that the awards of the Court of Claims and the appropriation by Congress to her as administratrix were conclusive as to the right of her intestate to participate in the awards.

Held, that it was not the duty of the Court of Claims under the act of 1885

to investigate and determine the rights of each individual of a class, but only to determine the validity and amount of a claim with a specification of ownership sufficient to identify the claim itself for the payment of which an appropriation might thereafter be made, and the particular individuals of the class would be matter for subsequent investigation by some other tribunal.

Held, that it was not within the intention of Congress to conclusively determine by the appropriation act of 1899 what persons were entitled thereto, but the payments were intended to be for the next of kin of the original sufferers.

Held, that as it was clear in this case that the party named in the appropriation act was not entitled absolutely to the money as her own, and as she had submitted the question of distribution to a court of equity, that court had jurisdiction to determine the real meaning and proper construction of the act of Congress and who were entitled to the funds in her hands.

Held, that on the facts in this case, there was no error in holding that the next of kin of the members of the firm in 1798 were entitled to the fund to the exclusion of the next of kin of one who subsequently became a member thereof.

THE plaintiff in error, Esther S. Buchanan, filed her bill in Circuit Court No. 2, of Baltimore city, on August 17, 1899, against the parties defendant, for the purpose of obtaining the instructions of that court as to whom and in what proportions she should pay and distribute certain sums of money received by her from the United States under what are termed the French Spoliations acts of Congress. Answers were made by the various parties and a decree was subsequently entered giving directions for the distribution of the funds. An appeal from that decree was taken by some of the defendants to the Court of Appeals, and that court reversed a portion of the decree, (as to the proper distribution of the money,) and remanded the case for further proceedings. 92 Maryland, 334. The trial court then entered a decree in accordance with the directions of the Court of Appeals, and thereupon the original plaintiff, Esther S. Buchanan, appealed to the Court of Appeals, and that court then affirmed the decree of the court below. 94 Maryland, 534. Plaintiffs in error bring the case here by writ of error.

The first act of Congress relating to the French Spoliations was passed January 20, 1885. 23 Stat. 283.

Miss Buchanan was, in May, 1885, duly appointed administratrix upon the estate of her father, William B. Buchanan, deceased. She then, through her counsel and in common with other claimants for losses sustained by the seizures of the two vessels Patapsco and Jane, came into the Court of Claims and proved the facts upon which the rights of the several claimants were based as against the United States. In presenting the claims, she did in truth represent, with their consent, all the parties interested therein, including those now claiming against her.

The court reported (May 18, 1887) that the seizures of the two vessels complained of were illegal, and that the claimants were entitled to the following sums from the United States. A list was then given of those entitled to an appropriation, on account of the ship Patapsco, in which was included the name of Esther S. Buchanan, as follows:

"Esther S. Buchanan, administratrix of the estate of William Buchanan, who was the surviving partner of the firm of S. Smith & Buchanan, deceased, to the sum of $25,056."

In relation to the ship Jane, in the list of those entitled to an appropriation was the following:

"Esther S. Buchanan, administratrix, representing Smith & Buchanan, $11,660.21."

After this report had been made, and on March 23, 1891, Esther S. Buchanan was duly appointed administratrix *de bonis non* with the will annexed of the personal estate of James A. Buchanan, her grandfather.

No action of Congress in relation to these claims was had until 1899, when an act was passed, approved March 3, 1899, 30 Stat. 1161. The act provided for the payment of claims allowed under the Bowman and Tucker acts by the Court of Claims, and on page 1191 it provided as follows:

"French Spoliation Claims.

"To pay the findings of the Court of Claims on the following claims for indemnity for spoliations by the French prior to July thirtieth, eighteen hundred and one, under the act entitled 'An act to provide for the ascertainment of claims of American

citizens for spoliations committed by the French prior to the thirty-first day of July, eighteen hundred and one:' *Provided*, That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursements of the awards, namely."

Then follow appropriations to a number of claimants in satisfaction of the losses sustained by the illegal seizures of vessels and cargoes.

Among them, on page 1194, is included the following:

"On the ship Jane, John Wallace, master, namely:

"Esther S. Buchanan, administratrix, representing Smith & Buchanan, $11,660.21."

On page 1195 is the following:

"On the ship Patapsco, William Hill, master, namely: . . . (names of various claimants for other interests in same ship).

"Esther S. Buchanan, administratrix of the estate of William B. Buchanan, who was the surviving partner of the firm of S. Smith & Buchanan, deceased, $25,056, the value of the cargo shipped by said firm."

Pursuant to the proviso in the act of 1899, the Court of of Claims, upon the application of the attorney of record for Esther S. Buchanan, administratrix, representing Smith & Buchanan, deceased, ordered, in the case of the ship Jane, a certificate to be issued to the Secretary of the Treasury, as follows:

"The Court of Claims hereby certifies that it appears by evidence on file in the above-entitled case that said Esther S. Buchanan, on whose behalf an appropriation or award was made by the act of March 3, 1899, entitled 'An act for the allowance of certain claims for stores and supplies reported by the Court of Claims under the provisions of the act approved March third,

eighteen hundred and eighty-three, and commonly known as the Bowman act, and for other purposes,' for the sum of eleven thousand six hundred and sixty dollars and twenty-one cents ($11,660.21), represents the next of kin of William B. Buchanan, the surviving member of the firm of Samuel Smith & Buchanan, deceased, the original owner of the claim upon which said award was made.

"And the court further certifies that it appears on the record of the said case that at the time when the award of this court was made the said claim was not held by assignment or owned by an insurance company."

The same kind of a certificate was made in relation to the ship Patapsco.

These certificates were made on June 15, 1899, and were filed with the Secretary of the Treasury, and the moneys mentioned, being a total of $36,716.21, were thereafter paid to Miss Buchanan.

Having received the money from the Government, the plaintiff in error then commenced this suit individually, and as administratrix of the estate of William B. Buchanan, deceased, and as administratrix *de bonis non* with the will annexed of James A. Buchanan, deceased, in Circuit Court No. 2, of Baltimore city, in which she stated the various facts under which the money had been paid her, and that she had in her hands for distribution, among the persons particularly entitled to the same, the sum of $22,629.47, after the payment of all costs, etc. She also averred that she was advised that she held funds for the benefit of and distribution among, not only the next of kin of her own decedent, the said William B. Buchanan, but also the next of kin of the other partners of said firm of S. Smith & Buchanan, to wit, Samuel Smith and James A. Buchanan, in the proportions and according to the laws of distribution which the court might hold to be proper in the cause. She also gave the names of the next of kin of William B. Buchanan, namely, herself and her brother, Wilson C. Buchanan, and then stated who were the next of kin of James A. Buchanan, deceased, living at the date of the passage of the act of Congress directing the payment of the claims, to wit, March 3,

1899, so far as they were known to her, and she stated that she had given the names of all of the next of kin of Samuel Smith and James A. Buchanan living at the time of the passage of the act of Congress, March 3, 1899, although she said there might be others unknown to her who might lay claim to participate in the distribution of the fund, and she was in doubt as to the proportion in which the beneficiaries should participate in the shares of their ancestors in the fund. She then stated:

"Twelfth. That according to the information and belief of your oratrix, the said Samuel Smith, James A. Buchanan and William B. Buchanan were equal copartners, but a claim has been made on your oratrix by Robert Carter Smith, one of the distributees of Samuel Smith, and a party defendant herein, wherein he asserts that his ancestor, the said Samuel Smith, had a one half interest in the property of said copartnership, and that, therefore, the next of kin of the said Samuel Smith are entitled to have for distribution among them one half of the fund now in the hands of your oratrix for distribution; but your oratrix is informed and does verily believe that distribution of said fund should be made in three equal parts among the next of kin of the three partners in said firm of S. Smith & Buchanan."

Other facts were given in relation to the existence of parties who might possibly claim some interest in the fund, and in her complaint she finally said that, by reason of the facts above set forth, she was in doubt to whom and in what proportion she should pay and distribute the sum of money in her hands, and that she was advised and therefore alleges that a distribution of the same can only be had under the order of a court of equity in a manner adequate to insure her own protection in the future. She thereupon asked that the court assume jurisdiction of the fund in her hands as administratrix, as already set forth, and that it direct and supervise the distribution of the same among the parties whom the court may find to be entitled to participate therein, according to the proportion and rule which this court may declare to govern the same.

Answers were made by some of the parties and the bill taken as confessed as against others. Upon the trial evidence was

given under objection, and the state court has found that at the time of the illegal seizures of the vessels in 1798 William B. Buchanan was about three years old, he having been born on September 9, 1795; that in 1798, the year the losses occurred, there was a firm of S. Smith & Buchanan, consisting only of S. Smith and James A. Buchanan, the father of William B. Buchanan, and they were the only original sufferers from the illegal seizures of the ships. William B. Buchanan did not become a member of the firm until about twenty years later, or until January 1, 1818, and he became the survivor of the firm formed in 1818, which was also known as S. Smith & Buchanan.

It thus appears that although William B. Buchanan was the survivor of a firm of S. Smith & Buchanan, as that firm was constituted in 1818, he was not the survivor of the firm of S. Smith & Buchanan, as that firm was constituted in 1798, when these illegal seizures occurred.

The trial court held that the moneys should be divided into three portions, one of which should go to the next of kin of Samuel Smith, another to the next of kin of James A. Buchanan and another to the next of kin of Willian B. Buchanan, being Esther S. and Wilson C. Buchanan.

The Court of Appeals, on appeal from the decree of the Circuit Court, held that this was an erroneous disposition of the money, and that it should be divided into two portions, one of which should go to the next of kin of Samuel Smith, and the other to the next of kin of James A. Buchanan; Samuel Smith and James A. Buchanan being the only members of the firm that sustained the losses and being the original sufferers from the illegal seizures. The writ of error has been sued out for the purpose of reviewing this decree.

Mr. Archibald H. Taylor and *Mr. Edward P. Keech, Jr.*, for plaintiffs in error. *Mr. John Pierce Bruns* was on the brief.

Mr. Arthur W. Machen, Jr., *Mr. Frank P. Clark* and *Mr. Arthur W. Machen* for defendants in error.

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

The contention of the plaintiffs in error is that Congress, by the acts mentioned, and particularly that of March 3, 1899, ratified and adopted the findings and decisions of the Court of Claims made in pursuance of the act of 1885, in the cases of the two ships Patapsco and Jane, and that the act of 1899 recognized and designated William B. Buchanan as an original sufferer within the meaning of Congress, by virtue of his being a partner, and the surviving partner, of S. Smith & Buchanan, and that the act gave to the personal representative of William B. Buchanan the awards in question, for the benefit of his next of kin and the next of kin of his two partners. They also assert that the Court of Claims having made the additional final certificate required by the act of Congress, and the Secretary of the Treasury, in accordance with those certificates, having paid the money to the plaintiff in error, administratrix, for the benefit of the next of kin of William B. Buchanan, to the full extent of his partnership interest in the firm, there was no power in any court to in anywise alter the statute or make any other distribution than such as would give to the next of kin of William B. Buchanan one third of the total sum to be distributed.

It becomes necessary, in order to fully appreciate the action of the Court of Claims and of Congress subsequently to the passage of the act of 1885, to examine the latter act and determine its scope and purpose. The act provided for an investigation to be undertaken by the court as to the validity of the claims for indemnity upon the French Government, for losses of citizens of the United States or their legal representatives, arising from illegal captures, seizures, etc., of vessels or cargoes prior to the treaty of 1800 between France and the United States. The act did not assume to provide for the identification of all the next of kin of the original sufferers from such illegal seizures. The court was to determine the validity and the amount of the claims included within the description contained in section 1 of the act of 1885, and it was also to de-

termine the present ownership of such claims. The matter of chief importance between the claimants and the United States was for the court to ascertain and determine the validity and the extent of the claims.

The particular class of persons who were the owners of the claims and to whom the moneys might be properly paid was at this time of subsidiary importance, so far as the United States was concerned. Although the present ownership was to be determined, and if by assignee, the date of the assignment and the consideration paid therefor, yet this was obviously for the mere purpose of informing Congress as to the present situation of a claim, whether owned by next of kin of those who suffered the loss or by assignees, but the particular individuals who composed the next of kin or the assignees were not then of importance, as gathered from the language and purpose of the act. All this action of the court was by the terms of the act made advisory only. Congress specifically withheld from the court any right to render a judgment which would in any manner conclude the United States or commit it to the payment of any claims determined by the court under the third section of the act. All that Congress did was to give jurisdiction to the Court of Claims to inquire into the matter of each claim which might be presented to it and to report to Congress its opinion of the validity and the amount of the claim with a statement as to its ownership. The whole subject thereafter remained with Congress subject to its future action.

Regarding its powers and duties under this act, the Court of Claims itself stated its opinion in the case of *The Ship Jane*, 24 C. Cl. 74. It held that the court could not determine to whom the money should be distributed, which Congress might thereafter award as indemnity in the French Spoliations cases, nor could it determine who were the next of kin of a deceased claimant, nor whether there were any. All that the court could determine in its report to Congress was the validity of a claim against France, its relinquishment by the United States and the amount thereof. It also held that its decisions in these cases were not judgments which judicially affect the rights of any one, and that after the court had reported a French Spolia-

tion case it remained with Congress to determine, first, the measure of the indemnity which the United States should give; and, second, the persons who were equitably entitled to participate therein. The purpose of the court was, as it stated, to require a claimant to file his letters of administration and prove to the satisfaction of the court *that the decedent whose estate he administered was the same person who suffered loss through the capture of a vessel.*

Again, in *The Leghorn Seizures* (*Field, Administrator*, v. *United States*), 27 C. Cl. 224, the court held that the French Spoliations act of 1885 conferred jurisdiction, but did not impose liabilities; that Congress conceded that several classes of claimants seeking redress for French spoliations might come into the Court of Claims and have the question of the liability of the United States determined, and conceded nothing more.

From these extracts it is plain that the Court of Claims did not regard it as its duty under the act of 1885 to investigate and determine the rights of each individual of a class, but only to determine the validity and amount of a claim, with a specification of ownership sufficient to identify the claim itself, for the payment of which an appropriation might be thereafter made. The particular individuals of the class would be matter for subsequent investigation by some other tribunal.

In *Blagge* v. *Balch*, 162 U. S. 439, the meaning and purpose of the act of 1885, together with the act of March 3, 1891, 26 Stat. 862, 908, came before this court for consideration, and it was held that the result of the action of Congress was to place the payments prescribed under the act of 1891 within the category of payments by way of gratuity and grace, and not as of right as against the Government; that under the proviso contained in the act of 1891, Congress intended the next of kin to be beneficiaries in every case, and excluded creditors, legatees, assignees and all strangers to the blood, and that the words "next of kin," as used in the proviso, meant next of kin living at the date of the act (1891), to be determined according to the statute of distribution of the respective States of the domicil of the original sufferers.

The court distinguished the case from *Comegys* v. *Vasse*, 1

Pet. 193, and *Williams* v. *Heard*, 140 U. S. 529. In these cases it was held that assignees in bankruptcy took title to the moneys.

The same proviso mentioned in *Blagge* v. *Balch*, *supra*, and contained in the act of March 3, 1891, is found in the act of 1899, 30 Stat. 1161, 1191. So we know from the above case that the desire of Congress was to make payments to the next of kin of the original sufferers of the losses, and that assignees in bankruptcy should not take. The identification of the particular persons belonging to the class that Congress desired to aid was evidently not within the purpose of the act of 1891 or that of 1899.

Under the act of 1885, the plaintiff in error, Esther S. Buchanan, presented the claims arising out of the capture of the vessels Patapsco and Jane, together with their cargoes. It is not disputed—on the contrary, it is admitted—that she represented on the trial before the Court of Claims, with their consent, all the parties interested in the claim of S. Smith & Buchanan, including those who now claim in opposition to her so far as the proportion of the award to be paid to the different parties is concerned. That she represented these different persons, with their consent, in the examination before the Court of Claims, shows that there was between them at that time no diverse interest involved; that, so far as regarded the validity of the whole claim and its amount, the parties were situated alike, and had the same interest as against the United States in proving the validity of their claim and the amount thereof. That she was authorized to receive the amount that might be awarded, and that thereafter the question of proportion and distribution would arise, is a plain deduction from the facts stated. As the material point before the Court of Claims was the validity of the claim and its amount, in regard to which all claimants appeared in the same interest, it was not of much moment who should be named to receive the award (if any were to be made), and therefore the statement by the court that Esther S. Buchanan was the administratrix of William B. Buchanan, the survivor of the firm, was not calculated to call for any comment, for the reason, as stated, that the appropriation would be to a

representative of the next of kin, the individual members of which might be thereafter identified. The history given by the Court of Claims was, upon the question of ownership, just enough to form a basis for an appropriation to some one, who would thereupon distribute to the proper persons among themselves. The reports of the court were not intended as an identification of such persons.

After the report of the Court of Claims to Congress, Miss Buchanan had in 1891 taken out letters of administration upon the estate of James A. Buchanan. Soon after the passage of the act of 1899 she obtained the certificates already referred to from the Court of Claims, in one of which, in regard to the ship Jane, it was stated that she "represents the next of kin of William B. Buchanan, the surviving member of the firm of Samuel Smith & Buchanan, deceased, the original owners of the claim upon which said award was made," and in the other certificate, in regard to the ship Patapsco, it was stated that she "represents the next of kin of William B. Buchanan, surviving partner, etc., deceased, the original owner of the claim upon which said award was made." These certificates obviously proceeded upon the report which the courts had theretofore made in these two cases, and in which it is plain that the court reported the fact that the members of the firm of S. Smith & Buchanan, as that firm was constituted in 1798, were the original sufferers of the loss in 1798. It is also plain that the court assumed that the William B. Buchanan named in the certificate was a member of the firm in 1798, which suffered the loss, and it was to the administratrix of the survivor of that firm (1798) that the certificate in truth applied. This simply carried out the purpose of the court, expressly stated in this case, to insist that the decedent whose estate was administered was the same person who suffered loss through the capture of a vessel. In the certificates, as well as in the report of the Court of Claims, it is evident that the court assumed that the persons entitled to the distributive share of the moneys were the next of kin of the original sufferers, whoever they might turn out to be, although the court supposed that William B. Buchanan was the survivor of the firm that suffered the loss in 1798.

The case of *United States* v. *Gilliat*, 164 U. S. 42, simply holds that under the special statute therein referred to the certificate made by the Court of Claims and sent to the Secretary of the Treasury was conclusive, and the United States had no right of appeal from the conclusion stated in the certificate.

In this case, the Court of Claims thought there were three members of the firm of S. Smith & Buchanan at the time of these captures. In the fourth finding, in regard to the ship Patapsco, the court reported that "John Donnell and the firm of S. Smith & Buchanan owned jointly the cotton shipped on that vessel, and that Samuel Smith, James A. Buchanan and William B. Buchanan, citizens of the United States, formed the said firm of S. Smith & Buchanan;" that is, formed the firm at the time of the capture in 1798; and in the tenth finding the court found that on November 9, 1820, "said Samuel Smith, James A. Buchanan and William B. Buchanan, copartners, and trading as hereinbefore set forth as copartners, under the firm name of S. Smith & Buchanan, assigned" to assignees for the benefit of their creditors. Thus the court assumed that the firm consisted of the same members in 1798 and in 1820, and that William B. Buchanan was the survivor. This is clearly a mistake. William B. Buchanan was born in 1795, and was then, at the time of these captures, but three years old, and was not a member of the firm at that time, as the state court finds. But clearly the Court of Claims had reference to the firm as it was composed when the losses occurred, whoever in fact were then the members of that firm.

There is nothing in its report which would show that it regarded William B. Buchanan as one of the original sufferers because of his being a member of the firm of 1818, of S. Smith & Buchanan. The whole history of the case as given by the court shows that William B. Buchanan was mistakenly supposed to have been a member of the firm in 1798, and it was on that account that he was regarded as the survivor of that firm. Whatever equity the parties might claim on account of William B. Buchanan becoming a member of the firm in 1818, it is plain that those equities were not regarded or known or supposed to exist by the Court of Claims.

Taking this report of the Court of Claims, it seems to us evident that the appropriations for the payment of the claims made by the act of 1899, 30 Stat. 1194, 1195, proceeded upon the report made by that court to Congress in these cases, and that the language of that act, in the case of the ship Jane, to "Esther S. Buchanan, administratrix, representing Smith & Buchanan, $11,660.21," and in the case of the ship Patapsco, "Esther S. Buchanan, administratrix of the estate of William B. Buchanan, who was the surviving partner of the firm of S. Smith & Buchanan, deceased, $25,056, the value of the cargo shipped by said firm," when taken in connection with the other facts as to the firm of 1798, shows that the appropriation was intended for the administratrix of the survivor of the original firm existing in 1798, at the time the losses occurred, and that the next of kin of the members of that firm at that time were in reality the parties intended by Congress to receive its gratuity. It was not within the intention of Congress to determine by the appropriation who those persons were, but the appropriation was to Esther S. Buchanan as a representative of the class; in other words, the representative of the next of kin of the original sufferers, without therein determining who they were. The intent of Congress to make the payment in each case to the representative of those who were next of kin of the original sufferers, or in other words, of the firm as it stood in 1798, we think is perfectly certain. Whoever they might be, Congress intended the payment to be for those who were the next of kin, and it did not conclude the fact as to who they were, by appropriating the money to Esther S. Buchanan. It was to be for her as the representative of the next of kin of the original sufferers.

Congress could, of course, have given this fund to any one it chose, as it was a case of gratuity in any event; but the question is, what did Congress, in fact, mean when it made the appropriation in the act of 1899, and that meaning, we feel convinced, was as we have already stated.

The cases of *United States* v. *Jordan*, 113 U. S. 418; *United States* v. *Price*, 116 U. S. 43, and *United States* v. *Louisville*, 169 U. S. 249, are not in conflict with this result. In those cases the

appropriation was to the party named in the act and a specific sum was directed to be paid to such party. It was not a payment to him in trust for some other and unidentified members of a class to which he belonged, but it was a positive and absolute direction by Congress to pay to the individual named in the act the amount stated therein. In such cases there is no subject for identification of the members of any class and no occasion for the further action of any one before payment is to be made.

In the case at bar, it is clear that the party named in the appropriation was not entitled to the money absolutely as her own. It was an appropriation to her for the benefit of others, herself included, and those others were identified only as a class, and that class was intended as the next of kin of the firm of S. Smith & Buchanan, as it existed in 1798.

Having obtained payment of the sum appropriated by Congress, the plaintiff in error, Esther S. Buchanan, came into a court of equity and asked to have the fund distributed under its authority. She stated all the facts, and while claiming the right to share in the distribution of the money in her character as one of the next of kin of William B. Buchanan, yet she still submitted the whole question as to the proper distribution to the court. The court had jurisdiction to determine as to the real meaning and the proper construction of the act of Congress, and the highest court of that State, upon appeal from the trial court, has held in substance that it appears that there were but two members of the firm in 1798, and it accordingly decided that the intent of Congress was clearly to make the gift to the next of kin of the members of the firm in 1798, which would result in giving one half to the next of kin of S. Smith and the other one half to the next of kin of James A. Buchanan, among whom are found Esther S. Buchanan and her brother, Wilson C. Buchanan.

We see no error in the decree of the Maryland Court of Appeals, and it is, for the reasons stated,

Affirmed.

BLACKFEATHER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 276. Argued May 1, 1903.—Decided June 1, 1903.

The moral obligations of the government towards the Indians are for Congress alone to recognize, and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them.

Under the act of October 1, 1890, 26 Stat. 636, jurisdiction was conferred upon the Court of Claims to hear and determine the rights in law or equity of the tribes of the Shawnee and Delaware Indians arising out of the subject matter referred to in the act, and there is no grant of jurisdiction to hear or determine the rights of individual members of those tribes. The claims of the Shawnee Indians which under the act of July 1, 1892, were to be presented to the Court of Claims are those of a tribe or band of Indians and not of individual members thereof.

Statutes which extend the jurisdiction of the Court of Claims and permit the government to be sued will be strictly construed, and the grant of jurisdiction therein contained must be shown clearly to cover the case and if it do not it will not be implied.

THE petitioner filed his amended petition in the Court of Claims in August, 1892, in which he asked to recover from the United States over five hundred and thirty thousand dollars on the grounds therein set forth. There was a demurrer to the amended petition by the United States on the ground that it did not allege facts sufficient to constitute a cause of action. The demurrer was sustained, 37 C. Cl. 233, and the plaintiff has appealed to this court.

In his petition the petitioner represents himself as a Shawnee Indian by blood and descent, a member and the principal chief of the Shawnee Tribe or Nation, and residing in the Indian Territory. He states that he brings suit in the Court of Claims as such principal chief of such Shawnee Tribe or Nation under the provisions of two acts of Congress, the first of which is entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October 1, 1890, 26 Stat. 636, and the second entitled, "An act supple-

mentary and amendatory to an act entitled 'An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes,' approved October first, eighteen hundred and ninety," approved July 6, 1892. 27 Stat. 86. These acts are set out in the margin.[1]

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[1] Act of 1890. 26 Stat. 636.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians, June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation out of any money or funds which have, or may be, paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf and for their use in the name of some per-

The petitioner asks to recover and collect from the United States the several amounts of money thereafter set out at length in payment for the destruction, loss, forcible taking, carrying and driving away live stock, farm products, household goods, money and other personal property of divers descriptions and kinds belonging to, owned and possessed by and the property of the said Shawnee Indians, by white and United States citizens and soldiers, in the State of Kansas and the Indian Territory, at divers times and places in the year 1861, and all the time up to and including the year 1866. Reference is then made to a schedule which is made part of the petition, and in which appear the names of between three and four hundred Indians, and the schedule gives their individual claims, varying in amounts from as high as $7000 down to $75, and aggregating $530,945.14.

It is contended that the claims arise out of treaty relations with the United States, (mentioned in the foregoing acts of Con-

son as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases; and copies of the petitions filed in the case at the commencement of the suit shall be served upon the Attorney General of the United States and on the principal chief in the Cherokee Nation by the marshal of the District Court for the Indian Territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of moneys which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution mandamus, or in any other way which the said court may see fit.

gress,) particularly articles 11 and 14 of the treaty of May 10, 1854, 10 Stat. 1053, 1057, between the United States and the Indians, and also out of sections 2154 and 2155 of the Revised Statutes of the United States. The articles of the treaty are as follows:

"ARTICLE 11. It being represented that many of the Shawnees have sustained damage in the loss and destruction of their crops, stock, and other property, and otherwise, by reason of the great emigration which has, for several years, passed through their country, and of other causes, in violation, as they allege, of guaranties made for their protection by the United States; it is agreed that there shall be paid, in consideration thereof, to the Shawnees, the sum of twenty-seven thousand dollars, which shall be taken and considered in full satisfaction, not only of such claim, but of all others of what kind soever, and in release of all demands and stipulations arising under former treaties, with the exception of the perpetual annuities, amounting to three thousand dollars, hereinbefore named, and which

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SEC. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government, in the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right to appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Act of 1892. 27 Stat. 86.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October first, eighteen hundred and ninety, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them and the United States.

are set apart and appropriated in the third article hereof. All Shawnees who have sustained damage by the emigration of citizens of the United States, or by other acts of such citizens, shall, within six months after the ratification of this treaty, file their claims for such damages, with the Shawnee agent, to be submitted by him to the Shawnee council for their action and decision, and the amount, in each case, approved, shall be paid by the said agent: *Provided*, The whole amount of claims thus approved, shall not exceed the said sum stipulated for in this article: *And provided*, That if such amount shall exceed the sum, then a reduction shall be made, *pro rata*, from each claim, until the aggregate is lowered to that amount. If less than that amount be adjudged to be due, the residue, it is agreed, shall be appropriated as the council shall direct."

"ARTICLE 14. The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected, and to have their rights vindicated."

Section 2154 of the Revised Statutes, which is part of the act of June 30, 1834, 4 Stat. 731, reads as follows:

"SEC. 2154. Whenever, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed."

Section 2155 of the Revised Statutes, which is also part of the act of June 30, 1834, 4 Stat. 731, reads as follows:

"SEC. 2155. If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payments shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any

payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence."

It is also stated that at the time the property was taken the Indians were in amity with and had always been loyal to the United States. Judgment was asked in favor of the Indians mentioned for the respective sums set opposite their names, and that ten per centum of the amount might be allowed the attorneys for their services.

Mr. John C. Chaney and *Mr. Alphonso Hart* for appellant.

Mr. Assistant Attorney General Pradt and *Mr. Special Attorney Button* for appellee.

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

The duty of this court is simply to construe the acts of Congress of 1890 and 1892. The Court of Claims has no jurisdiction of the subject matter of this petition, unless it is conferred by one or the other of the above acts. The moral obligations of the Government toward the Indians, whatever they may be, are for Congress alone to recognize, and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them.

Upon examination of the act of 1890, it appears that jurisdiction is conferred upon the Court of Claims to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, under the provisions of article 15 of the treaty of 1866, between the United States and the Cherokee Nation, and also under articles of agreement between the Cherokee Nation and the Shawnee Indians, made June 7, 1869, and articles of agreement made with the Delaware Indians, April 8, 1867, and also of the Cherokee freedmen settled, etc., under provisions of article 9 of the treaty of 1866.

The language of the first section, in our opinion, confers jurisdiction upon the Court of Claims to hear and determine the rights in law or equity of the tribes of the Shawnee or Delaware Indians, arising out of the subject matter provided for in the subsequent parts of the act, and there is no grant of jurisdiction to hear or determine the rights of individual members of those tribes. It is true the statute speaks of the Shawnee and Delaware Indians, but the words Shawnee and Delaware Indians mean the tribes and not individual members of those tribes of Indians. The rights must be those which arise out of the subject matter which is referred to in sections 2, 3 and 4 of the act. This is stated in terms in the first section. The subsequent sections of the act show, as we think, that Indian tribes and not individual members thereof are intended. And no jurisdiction is granted to hear claims such as are included in this case, whether they are made by tribes or by individual members of a tribe.

The second section permits a suit against the Cherokee Nation and the United States Government to recover from the Cherokee Nation moneys due and unpaid to the Shawnees, etc., which the Cherokee Nation have before paid out, or may hereafter pay per capita in the Cherokee Nation and which the Cherokee Nation had refused or neglected to pay to the other Indians. The suits are in reality against the Cherokee Nation, and the recovery is from that nation. The separate or joint suit mentioned in this section is a separate or joint suit of the tribes and of the freedmen, and not of the individual members thereof. In either event it does not include such a case as this.

Section 3 permits the bringing of "the said suit or suits" in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen in their behalf and for their use, in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. The exercise of this jurisdiction is not to be barred by any lapse of time heretofore, nor are the rights of the Indians to be impaired by any acts passed and approved by the Cherokee National Council. The right given by the third section is to commence a suit or suits which had already

been spoken of in the second section of the act. The second section gave no right to commence this suit, as we have seen. Neither section includes the rights of individual Indians.

A perusal of section 4 shows that the right to bring a suit against the United States, therein provided for, was limited to the purpose of collecting from the United States Government any amount of money that in law or equity may be due from the United States "to said tribes in reimbursement for their tribal fund for money wrongfully diverted therefrom." We think that individual Indians had no right to commence such an action as this under the act of 1890, even though it be assumed that the tribe had such right under that act for the recovery of the value of property taken from the tribe. Such a suit, as the one before us, is plainly not included in the grant of jurisdiction in this section.

By the act of 1892, it is provided that "the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication," (under the act of 1890,) "shall present to the said court all their claims against the United States and the Cherokee Nation," etc.

The result is that this act does not grant jurisdiction to the Court of Claims to hear and decide the questions arising under this petition. The grant of jurisdiction is to hear and determine all the claims of the Shawnee tribe or band of Indians.

The claims are those of a tribe or band, and not those of the individual members of Shawnee tribe or band. The reference in the act of 1892 shows that Congress assumed that whatever their nature, it was the claims of the Shawnee tribe or band that had been referred to the Court of Claims for adjudication by the act of 1890, and not claims of the individual members thereof. The act of 1892 enlarges the scope of the act of 1890 so as to include all claims of the tribe or band, instead of claims of the nature provided for in sections 2, 3 and 4 of the act of 1890, but the claims must be claims of a band and not of an individual.

These acts have been before this court on a previous occasion.

In *United States* v. *Blackfeather*, 155 U. S. 180, 194, Mr. Justice Brown, speaking for the court, said:

"While there may be a moral obligation on the part of the Government to reimburse the money embezzled by the Indian superintendent, and in fact an appropriation appears to have been made for that purpose, act of July 7, 1884, c. 334, 23 Stat. 236, 247, it is by no means clear that, under the acts of 1890 and 1892, the Shawnees were authorized to recover and collect from the Government any other moneys than those which they claimed in their tribal relation or capacity. The money in question is not due the tribe as such, but to certain individual orphans, who claim to have been defrauded. But whether this be so or not, there is nothing in the record to indicate how much of this money was embezzled by the guardians created by the Indian council, and how much by the Indian superintendent, so that there is in reality no basis for a decree in their favor."

While the question in issue here was, as is seen, not decided in the above case, yet the expression contained in the opinion shows the court was not prepared to hold that the acts embraced claims of individual Indians.

As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do not, it will not be implied. Statutes of this nature extending the right to sue the Government will generally be strictly construed. We concur with the following remarks of Judge Weldon, contained in the opinion delivered by him in this case in the Court of Claims:

"The act of 1892, seems to have been enacted for the purpose of enlarging the scope of the right given under the act of 1890. But is it sufficiently broad to embrace the individual right of each Indian who may have suffered a depredation at the hands of the persons alleged?

"The statute (1890) is entitled 'An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes,' and provides, in substance, that they shall present to the

said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of any description whatsoever arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, express or implied, under such treaties made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them, and the United States.

"The right to sue, by the phraseology of this statute, is in the assertion of rights growing out of treaties, and for contracts, express or implied, under treaties made and entered into by and between the said Shawnees, Cherokees, and the United States. Can it be said that there has been a treaty, a contract, express or implied, between the United States and the individual Indians, who, though the medium of the principal chief, are now prosecuting these claims?

"The attention of the court is called to the fourteenth article, (of the treaty of 1854,) which provides that 'The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated.' Does this phraseology establish contractual or treaty relations, having the effect of contracts, with each individual Indian composing the Shawnee tribe? Or, rather, is it not a general clause, limited in its effect to the parties to the treaty, to wit, the United States on one side and the Shawnee tribe upon the other?

"The plaintiff, by the allegations of the petition, has asserted an individual obligation existing between the United States and each of the claimants, and in order to recover it must appear that such a relation exists.

"The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either express or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians.

"The acts of Congress referred to by the allegations of the petition and the argument of counsel for the claimant, are not applicable to the claim made by this petition. The condition upon which remuneration to the Indian is to be made under section 2154, Revised Statutes, is not shown to exist in this case. And so it may be said of section 2155 of Revised Statutes, that the condition upon which the Indian is entitled to remuneration out of the Treasury is not shown to exist in the claims made in this proceeding.

"The act of 1892 specifies that the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October 1, 1890, shall present to said court all their claims against the United States. The claims referred to this court under the act of 1890 were the claims of the Shawnee tribe or band of Indians, and not the personal claims of the individual Indians belonging to said tribe or band of Shawnees.

"The evident object of the act of 1892 was to enlarge the jurisdiction of this court with reference to the same class of claims as were cognizable under the act of 1890, to wit, the claims of the Shawnee tribe or band of Indians."

We think it clear that no jurisdiction over this case is granted by the language of the sections of the Revised Statutes above referred to.

We see nothing in the act, approved May 9, 1860, 12 Stat. 15, appropriating moneys "for the payment of claims of certain members of the Shawnee tribe of Indians," which affects the conclusion we have reached that the acts of 1890 and 1892 refer to tribes and not individuals. The act of 1860 appropriates, in terms, money to pay claims of certain members of the tribe. It is apparent that when Congress intends to include individuals as distinct from tribes, it does not speak of them as Shawnee Indians, but as "certain members" of the Shawnee tribe.

Congress may, of course, at its pleasure, still confer jurisdiction upon the Court of Claims in such terms as shall, without

doubt, cover claims of the nature set forth in this record. In our judgment it has not done so as yet. The judgment of the Court of Claims must be

Affirmed.

UNITED STATES *v.* MICHIGAN.

ORIGINAL. IN EQUITY.

No. 11. Argued April 20, 21, 1903.—Decided June 1, 1903.

The effect of the legislation of Congress granting a right of way through a military reservation and 750,000 acres of public lands to be sold by the State of Michigan and the proceeds applied, under the conditions prescribed, to the construction of the St. Mary's River canal, and of the legislation of the State of Michigan in regard to the construction, maintenance and surrender of the canal to the United States, as the same are set forth in the complaint, was to create a trust, of which the State of Michigan was the trustee, to construct and maintain the canal as a work of national importance, and the State of Michigan acquired no individual beneficial interest therein. When the canal was surrendered to the United States by the State the Federal Government was entitled to whatever surplus remained in the hands of the State from the tolls collected over and above the expenses of maintenance and also to the value of the tools and materials connected with the canal at the time of the surrender.

THE United States, by leave of court, duly filed in this court its original bill in equity against the State of Michigan, to which bill the defendant has filed a demurrer substantially for want of equity, and also because it appears therefrom that the complainant has been guilty of gross laches in regard to the matters therein set forth. It will be most convenient to set forth the bill with the exception of some portions thereof which do not seem to be material, and it is as follows:

"*To the Chief Justice and the Associate Justices of the Supreme Court of the United States, in equity:*

"Philander C. Knox, Attorney General of the United States of America, for and in behalf of said United States, brings this

bill of complaint against the State of Michigan, and thereupon your orator complains and says:

"*First.*

"That the said State of Michigan, for some years previous to the date first hereinafter mentioned, was desirous of procuring the construction of a canal and lock in the Saint Marys River, at or near Saint Marys Falls, where Lake Superior empties into said river, and did at various times, by joint resolutions of the legislature thereof, importune the Congress of the United States to construct such a canal and lock on the Michigan side of said river, and was able, through the influence of its Senators and Representatives in Congress from said State, with the coöperation and influence of other States which might become directly affected in a desirable manner, to cause and procure said Congress to pass a law, which became operative on the 26th day of August, 1852, appropriating to the State of Michigan 750,000 acres of land, to be afterwards selected, to construct such ship canal and lock. Said act is in terms as follows:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to said State the right of locating a canal through the public lands known as the military reservation at the Falls at Saint Marys River in said State, and that four hundred feet of land in width, extending along the line of such canal be, and the same is hereby, granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is hereby vested in said State forever for the purposes aforesaid and no other: *Provided*, That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said falls, as, under the approval of the Secretary of War, may be selected: *And provided further*, That said canal shall be at least one hundred feet wide, with a depth of water

twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide.

"'SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents to be appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any land within said State subject to private entry.

"'SEC. 3. *And be it further enacted*, That the said lands hereby granted shall be subject to the disposal of the legislature of said State for the purposes aforesaid and no other; and the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States.

"'SEC. 4. *And be it further enacted*, That if the said canal shall not be commenced within three and completed within ten years, the said State of Michigan shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said State remaining valid.

"'SEC. 5. *And be it further enacted*, That the legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs and operating of said canal and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal

only such tolls as shall be sufficient to pay all necessary expenses for the care, charge and repairs of the same.

" 'SEC. 6. *And be it further enacted*, That before it shall be competent for said State to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

" ' Approved, August 26, 1852.'

"And your orator further shows that the legislature of the State of Michigan afterwards passed an act providing for the construction of a ship canal around the Falls of Saint Mary, the same being number thirty-eight of the session laws of the State of Michigan for the year 1853. By this act the appropriation of land made by Congress as aforesaid was accepted, with all conditions therein expressed attached, and made obligatory upon the State of Michigan. By its said act, also, the governor was authorized to appoint a board of five commissioners and an engineer for the purpose of looking after the construction of said canal and lock; provisions were made relative to the contract proposed to be entered into for the construction of the canal; the expenses of surveying, locating and constructing the same; the manner in which the expenses attendant upon such construction should be paid, which was substantially out of the lands so appropriated by Congress; the keeping of accounts connected with such construction; the turning out of lands to the contractor and subcontractor, and other matters connected with such work, such act being in terms as follows:

" 'SECTION 1. *The People of the State of Michigan enact*, That the act of Congress entitled "An act granting to the State of Michigan the right of way and a donation of public land for the construction of a ship canal around the Falls of Saint Mary, in said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the State of Michigan.

" 'SEC. 2. For the purpose of carrying out the objects of said act the governor is hereby authorized, by and with the advice and consent of the senate, to appoint five commissioners and an en-

gineer, who shall prepare a plan for the construction of said canal in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal.

* * * * * * * *

"'SEC. 3. The said commissioners shall receive proposals for the construction of said canal, agreeable to said plan, and, in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof.

* * * * * * * *

"'SEC. 5. . . . The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the state treasury and under the direction of said commissioners. When, and as fast as the lands shall have been selected and located, and accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the state land office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list and to designate and mark upon the books and plats in his office the said lands as Saint Mary canal lands.

"'SEC. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract; and on the completion of the same within said period to their satisfaction and acceptance and the satisfaction of the governor and engineer, they shall have a certificate thereof to be signed by the commissioners, governor and engineer, and filed in the office of the commissioner of the state land office. Thereupon it shall be the duty of the said commissioner of the state land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for

the construction of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the secretary of state, and patents shall immediately be issued thereon, as in other cases.

"'SEC. 7. That the said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and on or before the first Monday in October in each year return a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

* * * * * * * *

"'SEC. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

* * * * * * * *

"'Approved, February 5, 1853.'

"*Second.*

"Your orator shows that the lands so appropriated were duly selected and certified to the State of Michigan, and that he is informed and verily believes, and so charges the fact to be, that the lands so appropriated were all sold and disposed of in some manner by the State of Michigan, and that at some time subsequent to such selection and certification said State of Michigan constructed, or caused to be constructed, and put into operation the canal and lock so appropriated for, but that the said State of Michigan did not report to the Secretary of the Interior, as required by the terms of section 5 of said act of

Congress, an accurate account of the sales and net proceeds of the lands granted and of all expenditures in the construction, repairs and operating of said canal, and of the earnings thereof; but, on the contrary, your orator shows that after diligent search and inquiry in the office of the Secretary of the Interior, to whom such annual reports should have been made, no such reports can be found on file, and no record or memoranda indicating that any report or reports, such as were provided for in said section, were ever made, so that your orator is unable to state in what manner said lands were sold or disposed of, or whether all the proceeds thereof were in fact devoted to the construction, control and management of said canal, as in said act provided.

"*Third.*

"Your orator further shows that by an act of the legislature of the State of Michigan, approved February 12, 1855, a superintendent was authorized to be appointed by the governor of the State of Michigan, with the advice and consent of the senate thereof, his salary fixed, and the manner of keeping record of the vessels navigating said canal and passing through said lock, as well as the tolls to be collected and the keeping of accounts, were all provided for; that from the completion of said canal and lock the same were controlled, operated and managed by the State of Michigan, and that during the entire management of the same by said State, as your orator is informed and verily believes and therefore charges the fact to be, no funds belonging to the State of Michigan were ever permanently invested or involved in such control, operation and management, but, on the contrary, said canal was wholly constructed from the appropriation of such lands so made by the United States aforesaid, and was managed, controlled, repaired and maintained from the amounts collected as tolls from the vessels passing through said canal and lock during the several years when said State of Michigan was in such control thereof.

"*Fourth.*

"And your orator further shows that he is informed and verily believes, and therefore charges the fact to be, that during

such management and control by the State of Michigan there were from time to time moneys collected in the form of tolls in excess of the amounts actually used at the period of such collection, and that this was done without intention on the part of the State of Michigan to make a profit from the management and control of said canal in violation of the act of Congress hereinbefore quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed to navigation or any time when so needed, and that said fund gradually increased in amount with the increasing volume of commerce through the canal until finally, at the time when the canal was turned over to the United States, there was in the treasury of the State of Michigan belonging to the fund of said canal, not appropriated or the expenditure thereof in any way provided for, the acknowledged sum of $68,927.12, all of which had been paid for or collected in the manner hereinbefore stated for the purposes hereinbefore mentioned, and in direct compliance with the requirements of the act of Congress orginally providing for the construction of said canal; and that said money had been collected in good faith and for the purposes of devoting the same ultimately to the repair, improvement, supervision and expenses of the management thereof.

"And your orator further shows that there was purchased and collected from time to time a large quantity of tools, implements and property of various kinds in connection with extensions, repairs, improvements, management and control of said canal and lock by defendant, and at the time of the transfer to the United States as aforesaid the same were on hand and within the control and in the custody of the defendant, all of which properly belonged and appertained to the said canal and lock and to the defendant in its capacity as the manager and controller thereof, but whether any further and larger sum of money than is hereinbefore stated was, should or might have been on hand and within the control of said defendant, in its treasury or otherwise, or might or should have been accredited to the account of the said canal and lock, your orator does not know and has no means of being informed, and is therefore

obliged to depend upon an accounting by the defendant, hereinafter to be prayed for, for correct and authentic information.

"*Fifth.*

"And your orator further shows that the State of Michigan had no beneficial interest in said canal or lock, except as it affected the general public welfare, and had expended, or claimed to have expended, all the appropriation of Congress for the construction of the same, and that the increasing demands of commerce required great expenditures of money for the enlargement and betterment of said canal and lock, together with the probable construction of a new and enlarged lock, and that it was not convenient, if possible, to provide the funds therefor by the collection of tolls upon the vessels passing and repassing through said canal; that the State of Michigan not alone being interested in such enlargement and improvement, but rather the general public, and particularly the inhabitants of several rapidly growing States of the Union, it was proposed to transfer the canal to the United States to accomplish such end, and for that purpose an act was passed by the legislature of the State of Michigan and became operative on March 3, 1881."

(This act, although not set forth in the bill, is given in the margin.)[1]

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[1] Act No. 17, Public Acts 1881.

An act to authorize the board of control to transfer the Saint Mary's Falls Ship Canal, with the property belonging to the same, to the United States.

Whereas, Congress at its last session included in the river and harbor bill the following:

For improving and operating the Saint Mary's River and Saint Mary's Falls Canal, two hundred and fifty thousand dollars. "And the Secretary of War is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Mary's Canal and the public works thereon: *Provided*, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use: *And provided further*, That after such transfer the Secretary of War be and hereby is authorized to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair;" therefore,

"By the terms of said act the board of control of said canal, constituted by defendant for its management, was authorized and empowered, at any time when they might deem it proper, to transfer all material belonging to said canal and to pay over to the United States all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance in accordance with the act transferring the same to the United States; and the Congress of the United States in turn passed an act authorizing the Secretary of War to accept on behalf of the United States from the State of Michigan the said canal and the public works thereon, and appropriating $250,000 to improve and operate the same, the same being the act approved June 14, 1880, found in 21 Stat. 189." (This act is correctly set forth in the preamble to the foregoing act of the State of Michigan.)

SEC. 1. *The People of the State of Michigan enact*, That the board of control of the Saint Mary's Falls Ship Canal be and hereby is authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States, in accordance with (the) provisions of the above mentioned clause: *Provided*, That this cession is upon the express condition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls Ship Canal, and in and over all lands acquired or hereafter acquired for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls Ship Canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.

SEC. 2. The board of control of the Saint Mary's Falls Ship Canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided*, Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels.

This act is ordered to take immediate effect.

Approved March 3, 1881.

"And thereupon said canal actually was transferred to the officers of the Government of the United States connected with the War Department thereof, and your orator shows, avers and charges that no tools, implements, personal property, chattels, goods, moneys or effects of any name or nature that were in the treasury of the State of Michigan, or should or might have been therein at the time of such transfer, or within the custody of said State of Michigan, defendant herein, or might have been in such custody connected with or belonging to said canal or lock, its funds, its management and control, were so transferred and turned over.

"*Sixth.*

"Your orator further shows that, while certain of the terms of the act of Congress appropriating the land for the construction of said lock and canal indicated a donation to the State of Michigan for such purpose, it was really the intent and purpose of the Congress of the United States to appropriate such lands, not for the purposes of exclusively enriching the State of Michigan, increasing its commerce or extending its authority alone, but for the purpose of accomplishing a public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States, and for that reason, while granting said lands to the State of Michigan in certain of its terms, it was provided that in case of the failure to construct said canal the proceeds of the sale of such lands should be returned to the United States; also that the State of Michigan should have no beneficial interest in the revenue from said canal, when constructed, while in its management and control, but that the said canal and lock should be actually free to the United States Government, and for the use of all persons desiring the same, except as to the necessary tolls to pay for their supervision, repairs and maintenance; and it was also provided that a strict account should be kept of the sales of said lands, and that they should be applied to the construction of said canal and lock and to no other purpose whatever; also that annual reports should be made by the State of Michigan and forwarded by the governor thereof to the Secre-

tary of the Interior concerning the management, control and sale of lands; and thus, instead of being an actual grant or donation of lands to the State of Michigan for its individual benefit, and to become a part of its domain and to be within its ownership, the terms of said act merely operated to create a trust in the State of Michigan for the purpose of carrying out a public work in which it, the State of Michigan, had become interested for the general public good. Your orator further shows that by the act of the legislature of the State of Michigan hereinbefore quoted said donation or appropriation of lands was accepted subject to all limitations, restrictions and conditions imposed by Congress as aforesaid. Your orator further shows that the State of Michigan, at the time and continuously until a very recent period, hereinafter to be mentioned and set forth, not only regarded its sale of said lands, its construction of said works and its management and control of the latter as a trust for the public good from the complainant, but also through its legislature, as well as various of its officers, so declared; and that in an act of the legislature of the State of Michigan passed and approved February 14, 1859, the same being No. 175 of the session laws of the State of Michigan for said year, and particularly in the third paragraph of the preamble thereof, said legislature made use of the following language:

"'Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of this State thereto,' etc.

"And your orator further shows that the treasurer of the State of Michigan, who, by virtue of his office, was one of the members of the said board of control of the Saint Marys Falls Ship Canal, in his annual report for the year 1883, duly made to the governor and transmitted to the legislature of said State, made use of the following language:

"'Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All

business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the state treasury under act No. 17, laws 1881, the State acting simply as trustee.'

"But your orator shows that of late said defendant, through its officers and servants, and particularly its attorney general and the board of control of St. Marys Falls Ship Canal, denies such a trust, or its liability to the United States in the premises.

"*Seventh.*

"Your orator further shows and charges that it became and was the duty of the State of Michigan to transfer and pay over to the United States all funds appertaining to or connected with or collected for the repairs and management of said canal to the complainant, and to transfer to the complainant all property of every name and nature within its custody and control in connection with said canal and lock, and that instead of so performing its equitable duty in the premises, the said State of Michigan, the defendant herein, converted said funds to its own use, by passing a joint resolution transferring the same from the canal fund to the general fund in the treasury of said State, said joint resolution being No. 20, of the public acts of 1897, which in terms is as follows:

"'Whereas there has remained to the credit of the St. Marys Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any person who paid the same into the fund or by the General Government;

"'And whereas there now remains on hand, under the board of control of the St. Marys Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

"'*Therefore, resolved by the Senate and House of Representatives of the State of Michigan*, That the auditor general be, and he is hereby, directed to transfer such balance as shown upon

the books of his office to the same, and it shall hereafter become a part of the general fund of the State.

"'*And be it further resolved*, That the board of control of the St. Marys Ship Canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State.'

"Your orator further shows that a due and proper request to account to the United States in the premises, and to pay over all funds and turn over all property in its hands to the United States, has been made by your orator of the governor of the State of Michigan and all of the officers of said State directly concerned in any manner with the custody, management or control of said fund or property, and particularly of the board of control of the St. Marys Ship Canal, which consists of the governor, auditor general and treasurer of the said State of Michigan; and also of the attorney general of the State of Michigan, and that said reasonable and just request has been refused by them and each of them."

The bill prayed for an accounting as to the sales of the lands, the prices obtained therefor, the application of the proceeds of the sales or exchange of such lands to the cost of the construction of the canal, the tolls received, their application, and also an accounting as to the tools on hand at the time of the transfer of the canal to the United States.

Mr. Horace M. Oren, attorney general of the State of Michigan, for defendant.

There was no trust relation between the United States and the State of Michigan, but the State, by the act of 1852, took an absolute, unconditional and indefeasible title upon its acceptance of the grant and the completion of the canal, and by right of such ownership belongs to it any incidental pecuniary benefits or earnings that may have arisen from its operation of the canal.

First: The words of grant found in the act are such as are

commonly employed to vest a fee title and a beneficial interest in the grantee.

Second: The limitations upon the use of the canal imposed by the act in question cannot be considered as conditions subsequent intended to operate in possible impairment of an otherwise indefeasible title, but as covenants of the grantee enforceable only through actions in that behalf and not by forfeiture or defeasance of the estate granted.

Third: The acts of both the United States and the State as expressed in legislation negative the idea that the State's title to the canal was not absolute and indefeasible, and that the United States had an usufructory interest in the tolls or other earnings thereof.

Admitting the allegations in complainant's bill, it does not appear that the conditions relative to the use and operation of the canal imposed by the act of August 26, 1852, were violated by the State. No breach of the conditions upon which a money demand could be predicated is claimed in complainant's bill except that the State made a profit out of the operation of the canal. A surplus of tolls was on hand to meet possible emergencies, but this is not to be held as a violation of the limitation upon the amount of tolls that could be collected. A certain portion of the earnings of the canal was not subject to the conditions which related to the rates of toll that could be charged. The United States, by subsequently taking over and accepting the canal from the State, particularly in the light of the several acts of offer and acceptance, must be held to have waived any claims for a breach of the condition imposed by the original grant.

Conceding *arguendo*, that upon acceptance of the grant the State became a mere trustee and not seized of an estate implying the vesting of a beneficial interest in the grantee, the United States was not named or intended as *cestui que trust.*

But whether *cestui que trust*, or having any interest in the execution of the trust that would entitle it to apply to a court of chancery to compel its proper enforcement, the United States acknowledged the due execution of the trust and discharged the trustee by its taking over of the canal and by the

declarations contained in the act of Congress in reference thereto.

The declarations of the legislature and officers of the State of Michigan did not create a trust, and certainly not one in which the United States would have a beneficial interest as *cestui que trust.*

If Congress, on the termination of the so-called governmental agency or mixed trust and power, could have made a claim of right to have the surplus tolls accumulated by the State in carrying out such agency turned over to itself, yet nothing short of a declaratory act to that effect would create the right on the part of the Department of Justice to make this demand upon the State.

The acts of Congress and the acts of the legislature of Michigan relating to the taking over of the canal by the United States operated as a settlement of all accounts between the United States and the State, rendering an accounting unnecessary.

Mr. Marsden C. Burch for the United States.

Laches have been set up as a ground of demurrer, but as no consideration has been given to that ground in the brief or in oral argument, that question might well be considered eliminated. The only remaining question is whether the State constructed the canal and operated it upon a trust for the United States. It was a mixed trust and power. The original granting act had a two-fold purpose. First, the granting of an easement or right of way through the public domain for the purpose of constructing the canal. Second, the appropriation of lands and the disposal of the same, the construction of the canal and its operation and maintenance. While it is true the term "granted" was used in the act, it will be observed that the property granted was "for the aforesaid purposes and no other." These words of express limitation serve to show that it was not the intention of the Government to invest the State with unqualified ownership in the canal, but simply with the management and control of the same. The word "grant" is not a technical word like "enfeoff," and the State took but a naked

trust in the thing granted. *Rice* v. *Railroad Company*, 1 Black, 378, construing an act of Congress granting lands to a Territory for the purpose of aiding in the construction of a railroad.

The intention of Congress that the whole enterprise was merely a trust is evident from the fact that due care was taken to provide in the act for an annual accounting and reports by the State to the Secretary of the Interior. These reports and accounts have never been rendered, and thus it becomes necessary to invoke this court in aid thereof. The Government is entitled to an accounting for all the lands sold, the prices received for them, the amount of tolls earned and collected, and the amount of money expended on behalf of the canal. It is also entitled to any moneys on hand at the time the canal was turned over, as well as all tools, implements, machinery, etc., or their equivalent in money.

The act of the legislature of Michigan accepting the grant subject to all the conditions expressed in the act of Congress completed the trust relation. Subsequently, the State, in passing other legislation regarded it as a trust and so characterized it from time to time. The report of the state treasurer also regarded it in this light in reporting the amount of money on hand in the canal fund after the canal had been turned back to the United States.

The money had never been paid over by the State. By a joint resolution of its legislature, the amount was converted to the use of the State and covered into its general fund.

The State took the lands for the purpose of constructing the canal upon certain conditions and limitations, obligating itself to render accounts and reports of all its doings in the premises. The acts of Congress and the acts of the legislature taken together clearly indicate that a trust was created and the United States now seeks an accounting by the trustee.

The bill is well founded in law and the demurrer should be overruled.

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

By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a party on the one side and a State on the other. This was decided in *United States* v. *Texas*, 143 U. S. 621, 642.

In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.

Whether, under these circumstances, technical words were used to express the thought that the State was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. *Winona &c. R. R. Co.* v. *Barney*, 113 U. S. 618, 625.

The general purpose of these statutes was to build a ship canal, by means of the funds procured from the sale or other disposition of the public lands of the United States, to be used by all those whose business or pleasure should call them to pass through it in order to reach their destination.

As is well known, the Saint Marys River connects the waters of the lakes, Huron and Superior. The navigation of the river is interrupted by Saint Marys Falls, and it early became necessary, in order to provide conveniences for a rapidly increasing commerce, that there should be built a ship canal around these falls, so that large vessels coming from or going to Lake Superior should be thereby enabled to pursue their voyage to the east or to the west without interruption by those falls. The State of Michigan did not feel at that time (1850–1852) able to undertake such work herself, although it was a matter of much importance to many of her citizens. Finally the United States passed the act of 1852, set out in full in the foregoing state-

ment. The State subsequently accepted the same with all the conditions contained therein. We think it sufficiently appears from a perusal of these two acts that it was assumed that the grant of the right of way through the lands of the United States and the grant of the 750,000 acres of its public lands in the State of Michigan would pay the cost of construction of the canal, and the tolls to be collected by the State would repay it for all advances made by it in the repairs which would naturally and from time to time be required in such a work. There was no reason why the United States should provide that the State of Michigan should actually receive a profit over and above the payment to it of all its expenses for the construction of the canal and for keeping it in repair. If, through the action of the United States, a public work of national importance were constructed within the boundaries of that State, and the State itself reimbursed for every item expended by it in the construction and in the keeping of such work in repair, it would certainly seem as if the State could properly ask no more. It was clearly not the intention that the State should realize a beneficial interest from the transaction between the United States and the State over and beyond that which would arise from the existence of this canal. The cost of its construction and the keeping of it in repair were not to be borne by the State, even to the extent of a single dollar. That the parties supposed the cost would be borne by the United States is proved by an examination of the statutes, and if it be a fact, it goes far to show that the State was in this matter acting in effect and substance as an agent, or, in other words, as a trustee for the United States, and that the transaction was not to be a source of profit to the State, by reason of getting more from the United States than it would cost to build the canal.

The expectation that the means provided by the United States for the construction of the work would be adequate for that purpose, was not a visionary one, and it is proved by the fact, alleged in the bill and admitted by the demurrer, that such means were in truth adequate, and the canal was wholly constructed from the appropriation of the lands granted by the United States, and managed, repaired and maintained from

the tolls exacted by the State from vessels passing through the canal.

An examination of the act of Congress of 1852, set forth in the foregoing statement of facts, will show, as we think, the trust character of the transaction between the United States and the State. There is granted to the State, by section one, the right of locating a canal through the public lands of the United States four hundred feet in width, but this right of way is by the terms of the act to be used by the State or under its authority for the construction or convenience of such canal and the appurtenances thereto, and the use thereof is thereby vested in the State forever, but "for the purposes aforesaid and no other." The canal must be at least one hundred feet wide, with a depth of water of twelve feet, and with locks at least two hundred and fifty feet long and sixty feet wide. The act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose; that is, in trust for use for the purposes of a canal, and for no other. The State had no power to alien it and none to put it to any other use or purpose. Such a grant creates a trust at least by implication. We have just held in *Northern Pacific Company* v. *Townsend*, *ante* p. 267, in reference to a grant of a right of way for the railroad, that it was "in effect a grant of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

The second section granted to the State, "for the purpose of aiding said State in constructing and completing said canal, 750,000 acres of public lands," belonging to the United States and lying within the State, which were to be subject to the disposal of the legislature of the State for such purpose and no other, and the canal was to be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States. It was also provided that if the canal should not be commenced within three years and completed within ten years, the State

was bound to pay to the United States the amount it received upon the sale of any part of said lands by the State at not less than $1.25 per acre, although the title to the purchasers from the State should remain valid. The State was bound to cause to be kept accurate accounts of sales and net proceeds of the lands granted and of all expenditures in the construction, repair and operating of the canal and of the earnings thereof, and was to render a statement of the same annually to the Secretary of the Interior, and whenever the State should be fully reimbursed for all advances made for the construction, repairs and operation of the canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances from the receipts from the lands and canal with such interest, the State was then only to be allowed to tax for the use of the canal such tolls as should be sufficient to pay all necessary expenses for the care, charge and repairs of the same, and before the State could dispose of any of the lands, the route of the canal was to be established and a plat thereof filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office. The sixth paragraph of the bill calls special attention to these facts.

In this Federal statute we find the purpose of the United States in granting the land. It was not for the benefit of the State of Michigan, and the State did not thereby receive any beneficial interest in such lands. As soon as it was repaid its outlay for the cost of the construction and for the maintenance and repairs of the canal, the tolls were to be reduced to such a sum as should be sufficient only to pay the necessary expenses for the care, charge and repair of the same. Evidently it was not supposed that the State was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.

Defendant refers to certain grants of land made to Illinois, Indiana and Ohio, and perhaps to some of the other States, where such grants were made to aid in the construction of canals in those States, and where possible profits from the construction of such canals were within the contemplation of the various grants.

But in the acts referred to there are no restrictions upon the tolls which the States may charge for the use of their respective canals, the only limitation imposed being that the Government should have their free use for the passing of its vessels, while in this act the tolls which the State may charge are to be only such, after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge and repairs thereof.

The State of Michigan, through an act of its legislature, duly accepted the terms of the act of Congress, and agreed to carry out all the conditions therein made obligatory upon that State. An attentive reading of that statute shows its purpose to conform to all of the provisions of the Federal statute. It provides (section 7) for keeping accurate books of account of sales and net proceeds of the lands and for making returns to the Secretary of the Interior containing such accounts; provides (section 5) for designating the lands granted as "Saint Mary Canal Lands;" and also (section 3) provides that in letting contracts for construction of the canal, the responsibility of the proposed contractor and his ability to carry into effect the object of the act of Congress are to be considered. Reading both statutes, it seems to us the effect was to create a trust, and that the State was made the trustee to carry out the purposes of the act of Congress in the construction and maintenance of the canal. If there were funds arising from the sale of the lands over and above the cost of construction and other expenses of the canal, it could not within reason (after a perusal of these two statutes, with the provisions for accounting for sales and net proceeds of lands, and the other provisions of the statutes already mentioned) be supposed the parties understood that Michigan was to have for its own treasury the balance arising beyond such cost, maintenance, etc., of the canal. If a surplus arose in the course of the operation of the canal the tolls were to be at once reduced, and it seems to us that that surplus would upon a fair and reasonable construction of the acts belong to the original owner of the lands, by means of which the State, as in substance the agent of the United States, was enabled to construct the canal and secure the tolls arising from its operation, to be expended upon its maintenance

and for necessary repairs. This would certainly be so after the formal transfer of the canal and after the surplus was conclusively ascertained, and was subject to no further claims for repairs of the canal on the part of the State. The tolls were in fact the proceeds of the trust fund (the lands) which belonged to the United States, and should be tranferred with the rest of the trust property.

Where Congress grants land to a State to be used as provided in this statute, we think a trust or power to dispose of the lands for the purpose of carrying out the improvement is granted, and in this case no beneficial interest passes to the State by the language used, considering the whole statute. *Rice* v. *Railroad Company*, 1 Black, 358, 378.

If any particular part of the statute in this case were ambiguous or its meaning doubtful, of course the intention must be deduced from the whole statute and every part of it. Hence the importance of those provisions which in effect, if carried out, prevent the State from making any direct profit by the construction of the canal or from the tolls received from vessels passing through it. And where words are ambiguous, legislative grants must be interpreted most strongly against the grantee and for the Government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public. *Rice* v. *Railroad Company*, *supra*, p. 380. This rule of construction obtains in grants from the United States to States or corporations in aid of the construction of public works. 1 Black, 381.

Then, too, there is the almost contemporaneous construction placed upon the Federal statute by the legislature of Michigan in the act No. 175, approved February 14, 1859, in the preamble of which it is said that " whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress and the assent of this State thereto," etc. Again, the treasurer of the State, who by virtue of his office was one of the members of the board of control of the Saint Marys Falls Ship

Canal, in the course of his annual report for the year 1883, made to the governor and transmitted to the legislature of the State, used the following language:

"Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the state treasury under act No. 17, laws of 1881, the State acting simply as trustee."

We do not, of course, assume that the state treasurer could bind the State of Michigan by any admission he might make in a report to the legislature of that State, but it shows simply the understanding of that official, who was so closely connected with the construction and operation of the canal, in relation to the surplus funds in the treasury of the State arising out of the operation of the canal. That the state legislature in 1859 regarded the State as a trustee, is evident from the above language in the portion of the preamble quoted.

Finally, by the joint resolution of the legislature, being No. 20 of the Public Acts of 1897, it was stated as follows:

"Whereas, there has remained to the credit of the Saint Mary's Ship Canal fund a credit balance which was on hand at the time of the transfer of the said canal from the State to the United States, and no claim has been made for any part of such moneys, either by any persons who paid the same into said fund or by the General Government,

"And whereas, there now remains on hand, under the control of the board of control of the Saint Mary's Ship Canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery; therefore

"*Resolved by the Senate and House of Representatives of the State of Michigan*, That the auditor general be and he is hereby directed to transfer such balance as shown upon the books of his office to and the same shall hereafter become a part of the general fund of the State.

"*And be it further resolved*, That the board of control of the

Saint Mary's Ship Canal be and they are hereby authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this State."

From these statutes and resolutions we think it quite clearly appears that the State and its public officers thought that a trust had been created, and that the State had received the lands in trust for the purpose of carrying out the provisions of the Federal statute. A surplus arising from the sales of lands and from the tolls, over and above all cost of construction, repairs, etc., after the formal transfer of the canal itself, belongs to the United States, and it is the proper party to recover the same.

The counsel for defendant, however, urged that other action by the United States shows that no such trust existed. He referred to the joint resolution of the State adopted in 1869, wherein the necessity for the immediate enlargement of the Saint Marys Falls Canal, a work of urgent necessity and national importance, was advocated, and it was therein said that the State of Michigan had no funds properly applicable to such purpose, and it was, therefore, resolved that the board of control of the canal should be authorized and directed to transfer the canal, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States, provided the State should be first guaranteed and secured to the satisfaction of the board against loss, by reason of its liability, on certain bonds which had been issued by it under authority of an act to provide for the repairs upon the canal, "and to perform the trust respecting the same," approved February 14, 1859. Even in this act of 1859, the legislature, as has already been stated, acknowledges the trust and passes an act for the purpose of performing its obligations respecting the same. But it is said that this resolution (of 1869) providing for the transfer of the canal was not noticed or accepted by the United States until 1880, when Congress, by an act approved June 14, 1880, authorized the Secretary of War to accept on behalf of the United States from the State of Michigan the

canal, provided "such transfer should be made so as to leave the United States free from any and all debts, claims and liability of any character whatever. Said canal after such transfer to be free for public use."

This offer under the act of 1880 was accepted by the State by act No 17, Public Acts of Michigan of 1881, *supra*, and the board of control was authorized and directed: First. "To transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States," in accordance with the provisions of the act of Congress approved June 14, 1880; and, second, "At any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund*, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided, Such transfer of material and payment of moneys* shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels."

It is argued from this legislation that Congress thereby recognized and acknowledged the ownership of the canal by the State free from any trust connected therewith, and that the provision by the State for transferring all material belonging to the canal and for paying over to the United States all moneys remaining in the canal fund, etc., were upon the condition just quoted, and it is stated that there was no proof that such dry dock had been constructed, and hence there was no liability on the part of the State to pay the moneys or deliver the tools. But if the original transaction amounted to a trust, as we think it did, the attempt of the State to impose a condition upon its payment of the moneys and the transfer of the tools did not take away its liability as trustee nor make it necessary that the United States should build the dry dock before it should be entitled to the money and the tools. The United States might have been satisfied to permit the State to retain its nominal title and to remain in possession, and to operate the canal under its original obligations, and when in 1880 it authorized the Secretary

of War to accept the canal from the State without any liability on its part for debts or claims in regard to the canal, it did not thereby in any manner admit the non-existence of any trust theretofore created. Assuming that the land grant and the tolls had been sufficient to construct the canal and operate and repair it, there was no reason why the United States should assume or agree to pay any debts or claims which might exist in regard to the canal. The consideration for the transfer of the material and the payment of the moneys amounted at most to a provision in the nature somewhat of a condition subsequent, and the right to such transfer and payment did not rest upon the prior building of the dry dock by the United States. There was nothing in this legislation, in our opinion, which changed the character in which the State had acted as trustee up to the time of such transfer of the canal, and the liability of the State was not altered by reason of the act of 1880 or that of 1881.

We are of opinion that the bill shows a cause of action against the State of Michigan as trustee, and its liability to pay over the surplus moneys, (if any,) which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all cost of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12. This sum the United States in substance (especially in the fourth paragraph of the bill) admits is all that is due from the State on account of such tolls. It is not entitled to go back of that amount and call for an accounting as to the tolls prior to the transfer of the canal to the United States. The latter is also entitled to recover the value of the tools, etc., mentioned in the bill, as of the time of the transfer of the canal.

We think there is no ground of defence arising from any alleged laches on the part of the United States in bringing this suit. Assuming the existence of what would be laches in a private person, the defence that might arise therefrom is not available ordinarily against the Government. *United States* v. *Beebe*, 180 U. S. 343, 353.

There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defence to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon.

Demurrer overruled and leave to answer given, etc.

CONLEY *v.* MATHIESON ALKALI WORKS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 238. Argued April 15, 16, 1903.—Decided May 18, 1903.

Granting the existence of a cause of action, it is not every service upon an officer of a corporation which will give a state court jurisdiction of a foreign corporation. The residence of an officer of a corporation does not necessarily give the corporation a domicil in the State. He must be there officially, representing the corporation in its business. *Goldey* v. *Morning News*, 156 U. S. 518.

Service in New York of a summons upon a director of a foreign corporation who resides in New York is not sufficient to bring the corporation into court where, at the time of service, the corporation was not doing business in the State of New York.

See also *Geer* v. *Mathieson Alkali Works*, *post*, p. 428.

THE case is stated in the opinion of the court.

Mr. William W. MacFarland for plaintiff in error.

Mr. Alfred Ely for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff is a citizen of the State of New York, and the defendant was incorporated in the State of Virginia. The plain-

tiff as assignee of T. T. Mathieson brought this action in the Supreme Court of New York County, State of New York, against the defendant for moneys alleged to be due on a contract made and entered into by Mathieson and defendant. The complaint alleged that the contract was made in the city of New York on the 15th of August, 1893. The articles of agreement show that Mathieson's employment was as general superintendent for the term of eight years, in the erection and general management of the works of the corporation, "and also of their operation, after the same shall have been erected." The defendant had designated no agent upon whom service could have been made, and summons was served on R. T. Wilson and John G. Agar, two members of the board of directors of the corporation, both residents of the city of New York. They were not officers of the company. Before the time for answer had expired, on defendant's motion the cause was transferred to the United States Circuit Court for the Southern District of New York. A motion was made in that court to set aside the summons and service as null and void. Affidavits were presented by both parties, and ruling on them the court said that if the facts stated by the affidavits of the defendant were true, that at the time of the service of the summons and for some months before defendant corporation had ceased to do business in the State, the motion should be granted. But it was said that "the affidavits of complainant are mainly on information and belief, but annexed to them is a letter, the genuineness of which is not questioned, which bears date March 15, 1901, (two months and a half after the alleged cessation of business at Niagara Falls,) and signed by the treasurer of the defendant corporation, in which he speaks of the plant at Niagara Falls as still being operated by the defendant. Under these circumstances the court would not be warranted in granting this motion, in view of the conflict of fact. If, however, the defendant feels assured that the apparent discrepancy can be explained, and is willing to pay the expenses of a reference, it may be sent to a master to take testimony and report to the court whether or not at the time of the service of the summons the defendant corporation was doing business within this State."

A reference to the master was made. After taking testimony (which occupies sixty-two pages of the record), the master reported that, beside its plant at Saltville, the defendant, prior to December 31, 1900, owned and operated a plant for the manufacture of caustic soda and bleaching powder by electricity, located at Niagara Falls, under a patented process, known as the Castner electrolytic process; that on the 31st of December, 1900, it conveyed this plant and all of the property of the defendant, of every kind and description, to the Castner Electrolytic Alkali Company, a corporation organized under the laws of Virginia; that the consideration expressed for the conveyance was one dollar and other valuable considerations, but that the substantial consideration was the entire capital stock of the Castner Electrolytic Alkali Company; that the selling agent for the products manufactured at Niagara Falls, before and after the transfer, was Arnold Hoffman & Co., a corporation organized under the laws of Rhode Island, and had and has its principal place of business in Providence, in that State; that said company was and is the selling agent for the Saltville products, with some exceptions, and that said corporation has a branch office in the city of New York, but the business dealings of the defendant corporation and of the Castner Company with Arnold Hoffman & Co. are carried on through its Providence office; that the defendant, since a period prior to the 31st day of December, 1900, had, and still has, its principal place of business in the city of Providence, and that its books and records are kept there, and it has also an office force, consisting of several employés, that its bank account is also kept in said city and that it has no office in the State of New York—none of its books, records or accounts are kept there, nor has it, since January 1, 1901, sold any of its products there; that a by-law of the company, adopted in 1896, provided that the directors should hold monthly meetings in the city of New York, on the second Wednesday of each and every month in each year, but that it did not appear, however, that meetings had been held in compliance with the by-laws, the fact being that they were held sometimes in Saltville and sometimes in Providence, and, during the year 1901, at least, were held not more than two or

three times in New York city, and then at the branch office of Arnold Hoffman & Co., or at the office of R. T. Wilson & Co., bankers, in Wall street, a member of which firm was a director of the defendant company, and one of its principal stockholders; that the admissions in a letter of the treasurer of the company, March 15, 1901, "are fully explained by the fact that it followed earlier correspondence in which the plan for disposing of the plant at Niagara Falls for the stock of a new company was brought to the attention of Mr. Pell," the president, to whom the letter was addressed. The master's report concluded as follows:

"Upon the facts thus outlined, it does not appear that the defendant corporation was, at the time of the service of the summons herein, viz., April 18, 1901, doing business within this State.

"The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company and that the operations of that company were carried on under the same management as before December 31, 1900, is not material. The new corporation was a separate legal entity, and whatever may have been the motives leading to its creation it can only be regarded as such for the purposes of legal proceedings.

"It was that corporation alone which transacted any business in this State, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation. *People* v. *Am. Bell Telephone Co.*, 117 N. Y. 241; *United States* v. *The Same*, 29 Fed. Rep. 17."

The plaintiff excepted to the report, the rulings of the master on the admission of testimony, and to his conclusions. The report was affirmed and the service of summons set aside and declared null and void. This ruling is assigned as error.

The fundamental proposition of plaintiff in error is that the state court had jurisdiction of the defendant in error, and that therefore the Circuit Court of the United States had jurisdiction. To sustain the jurisdiction of the state court subdivision 3 of section 432 and section 1780 of the Code of Civil Procedure of the State are cited. Subdivision 1 of section 432 provides for service upon certain enumerated officers of a foreign corpo-

ration; subdivision 2 provides for the designation of a person by the corporation upon whom process may be served. Subdivision 3 is as follows:

"If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State."

Section 1780 is as follows:

"SEC. 1780. An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

"3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

These sections, it is insisted, gave the state court jurisdiction, and that it follows that the Circuit Court had jurisdiction. But granting the existence of a cause of action, it is not every service upon an officer of a corporation which will give the state court jurisdiction of a foreign corporation. This was declared in *Goldey* v. *Morning News*, 156 U. S. 518. The case arose in New York, and the question presented was "whether, in a personal action against a corporation which neither is incorporated nor does business within the State, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation."

As there was a difference between the rulings of the state court of New York and the Circuit Courts of the United States

on the question, it was elaborately considered "upon principle and in the light of previous decisions of this court." The decisions were examined and the question was answered in the negative, and it was announced, as "an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." It was also held that the defendant by filing a petition for removal did not waive defects in the service of summons, and that objection could be made to such service in the Circuit Court of the United States in the same manner as if the action had been originally commenced there. *Goldey* v. *Morning News* was affirmed in *Wabash Western Railway* v. *Brow*, 164 U. S. 271.

The principle announced in *Goldey* v. *Morning News* covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially—there representing the corporation in its business. *St. Clair* v. *Cox*, 106 U. S. 350. In other words, a corporation must be doing business there, and, recognizing the necessity of this, the Circuit Court referred that issue to a master. The decision upon the issue was adverse to the contention of the plaintiff, and we cannot say that it was not sustained by the evidence and the presumptions which must be conceded to the report of a master and the judgment of the lower court. The defendant was competent to convey its property to the Castner Electrolytic Alkali Company, and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law, which provided for a monthly meeting in New York, could not of itself keep the corporation in New York. The testimony is positive that no business of the corporation

was done in New York city after the transfer of the Niagara Falls plant; that all of the business of the corporation was conducted at Providence, except that of a purely manufacturing character, which was conducted at Saltville.

The following is an extract from the testimony of the secretary and treasurer:

"The offices of the Mathieson Alkali Works at Providence conducted all the business of the company except that of a purely manufacturing character, which was conducted at Saltville. They keep there the general books of account, the books of record, the stock books. They had charge of the general course of the company's affairs and transacted its finances; collected the money and paid the bills. In fact, attended to all the business which generally comes under the conduct of a company's general office. This was done solely at Providence and nowhere else."

And he further testified that all of the goods of the corporation were sold at Providence. The affidavits filed by the defendants were as positive as the oral testimony. The order of the Circuit Court is, therefore,

Affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* MISSOURI *ex rel.* GOTTLIEB.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No 256. Argued April 21, 1903.—Decided May 18, 1903.

1. In estimating, for purposes of taxation, the value of the property of a telegraph company situate within a State, it may be regarded not abstractly or strictly locally, but as a part of a system operated in other States; and the taxing State is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or priviliges under the act of Congress of 1866, or because it is engaged in interstate commerce.

Where the highest court of a State has decided that the board of equalization has acted according to the methods prescribed and authorized by

the laws of the State and that an order made by it is legal under the state constitution and statutes, the decision constitutes an interpretation of the law of the State and is not open to dispute in this court.

2. Proceedings before a board of equalization are *quasi*-judicial, and if an order made by it is within its jurisdiction, it is not void and cannot be resisted in an action at law; nor can overvaluation be made a ground of defence at law. The action of the tax officers being in the nature of a judgment must be yielded to until set aside. And this can only be done in a direct proceeding.

THE defendant in error is the tax collector of Jackson County, Mo., and brought this action against the plaintiff in error in the Circuit Court of that county for the sum of $1027.22, the taxes assessed against plaintiff in error for the year 1899, apportioned to Jackson County. The answer of the plaintiff in error alleged illegality in the taxes upon two grounds: First, that the taxes were levied upon the franchise of the plaintiff in error, derived from the United States under certain acts of the Congress; second, that the state board of equalization, intending to injure the plaintiff by compelling it to pay an excessive and disproportionate share of state and local taxes, assessed its poles, wires and instruments at far more than their actual value.

The plaintiff in error is a telegraph company, incorporated by the State of New York. It does business in the State of Missouri, having offices in a number of cities of that State, and its lines run between those cities and to and from them to other places in the Union; in other words, the plaintiff in error engages in intrastate and interstate business. It claims to have no franchises from the State of Missouri, (except in an unimportant instance,) but occupies the streets of its cities, and its public roads and highways, by authority of the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes." The material part of section one of the act is as follows:

"SECTION 1. That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the

military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

Section two provides that the messages between the officers and agents of the government shall have priority, and be sent at rates to be fixed by the Postmaster General.

Section three forbids the transfer of the rights conferred by the act.

Section four gives the United States the power to purchase the telegraph lines, property and effects of any company availing itself of the benefits of the act.

Section four is as follows:

"*And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this act."

Under the constitution and laws of Missouri, the state board of equalization, composed of the governor, secretary of state, state auditor, state treasurer and attorney general, assesses railroad and telegraph property, and it also equalizes the real and personal property assessed by the local assessors. Exercising its powers of original assessment, the board made the following order in regard to the property of plaintiff in error:

"State of Missouri, office of state auditor.

"Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the state board of equalization, viz.:

"The state board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company, through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidence of value, and all matters bearing upon

the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and the gross receipts and net earning power, and the franchise and value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the state board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the state board of equalization that the assessed value thereof be distributed upon the classes of property as follows:

6075.98 miles of poles at $71.50 per mile	$434,432 57
23,767.34 miles of wire at $22.02 per mile	523,356 82
3375 instruments at $5.70 each	13,537 50
All other property at	856,400 56
	$1,827,727 45"

The apportionment of the tax to Jackson County was as follows:

For state purposes	$202 43
For county purposes	283 40
For road purposes	35 41
For general county school purposes	370 61
For school building purposes	2 98
For other school purposes	19 03
For Kansas City municipal purposes	81 21
For Independence municipal purposes	25 38
For Kaw township railroad purposes	2 03
For Blue township railroad purposes	4 74
Total	$1027 22

The case was tried without a jury and the trial court found "the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment, the poles, wires and instruments of the value hereinbefore set forth. And the court finds the fact to be from the evidence that in valuing 'all other property' of defendant the state board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation, and as to this item of the above-named valuation the court finds the issues for the defendant."

Judgment was entered against plaintiff in error in the sum of $605.82, being the tax on the poles, wires and instruments of the company, with interest at two per cent for collectors' fees, and also for an attorney's fee. The amount found due was made a first lien against the property of defendant in error, and special execution ordered to be issued. Both parties moved for a new trial, which motions were denied. Both parties then appealed to the Supreme Court of the State, which court reversed the judgment of the Circuit Court. After an elaborate discussion of the case the Supreme Court said:

"It follows that the judgment of the Circuit Court holding that the tax assessed against 'all other property at $856,400.56' to be unlawful, is erroneous, and that the plaintiff is entitled to a judgment for the whole amount of the tax sued for. Judgment is accordingly entered, here, for the plaintiff, for $1027.22, back taxes for the year 1899, with interest thereon from the first of January, 1900, at the rate of one per cent per month, Rev. Stat. 1899, sec. 9225, and costs." 165 Missouri, 502.

This writ of error was then sued out. Other facts appear in the opinion.

Mr. John F. Dillon and *Mr. Eleneious Smith*, with whom *Mr. Alexander New* and *Mr. Henry D. Estabrook* were on the brief, for plaintiff in error.

I. The Western Union Telegraph Company is an agent of the government and an instrument of interstate commerce;

and its franchises exercised in Missouri having been derived solely from the Federal government are exempt from taxation by the taxing authorities of the State. *Pensacola Tel. Co.* v. *West. U. Tel. Co.*, 96 U. S. 1.; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *California* v. *Pacific R. R.*, 127 U. S. 1; *San Francisco* v. *West. U. Tel. Co.*, 96 California, 140; *C. P. R. R.* v. *California*, 162 U. S. 91; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Robbins* v. *Taxing Dist.*, 120 U. S. 493; *Phil. S. S. Co.* v. *Pennsylvania*, 122 U. S. 344; *West. U. Tel. Co.* v. *Pendleton*, 122 U. S. 358.

II. The state board of equalization has discriminated against plaintiff in error and in favor of other persons generally. The board, in order to discriminate as aforesaid, fixed the value of the property of the Western Union Telegraph Company for taxation at far more than its full actual cash value and intentionally equalized and adjusted the values of other property throughout the State at 40 per cent of the actual cash value thereof. The necessary effect of all of which has been that the said company has been discriminated against in violation of the Fourteenth Amendment to the Constitution of the United States. *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S. 153; *National Bank* v. *Kimball*, 103 U. S. 732; *State ex rel.* v. *Cunningham*, 153 Missouri, 642; *State ex rel. Wright* v. *St. L. I. M. & S. Ry. Co.*, 82 Missouri, 683; *State ex rel.* v. *Davis*, 131 Missouri, 457; *Railroad Co.* v. *State*, 64 Missouri, 294; *State* v. *Hannibal & St. Joseph R. R. Co.*, 75 Missouri, 208; *Ward* v. *Board of Equalization*, 135 Missouri, 309; *House* v. *Clinton Co. Court*, 67 Missouri, 522; *State ex rel.* v. *Board of Equalization*, 108 Missouri, 235; *State ex rel.* v. *Vaile*, 122 Missouri, 33; *People* v. *State Board of Equalization*, 191 Illinois, 528; *Ex parte Ft. Smith & Van Buren Bridge Co.*, 62 Arkansas, 461; *Los Angeles Co.* v. *Ballerino*, 99 California, 597; *Pacific Postal Co.* v. *Dalton*, 109 California, 604; *Randall* v. *City of Bridgeport*, 63 Connecticut, 321; *Board of Supervisors* v. *Railroad Co.*, 44 Illinois, 229; *Iowa & Dakota Tel. Co.* v. *Schauber*, (Iowa) 91 N. W. Rep. 78; *C. B. & Q. R. Co.* v. *Board of Comrs.*, 54 Kansas, 786; *Mer-*

rill v. *Humphrey*, 24 Michigan, 170; *Walsh* v. *King*, 74 Michigan, 350; *State ex rel.* v. *Savage*, (Nebraska) 91 N. W. 557; *Manufacturing Co.* v. *Strafford*, 51 N. H. 455; *Manchester Mills* v. *Manchester*, 58 N. H. 38; *Mercantile Nat. Bank* v. *Mayor, etc., of New York*, (N. Y.) 64 N. E. 756; *City of Chattanooga* v. *Railroad Co.*, 7 Louisiana, 563; *Weeks* v. *City of Milwaukee*, 10 Wisconsin, 242; *Hersey* v. *Supervisors*, 16 Wisconsin, 185; *Lefferts* v. *Supervisors*, 21 Wisconsin, 688; *Iron Co.* v. *Hubbard*, 29 Wisconsin, 52; *Hersey* v. *Board of Supervisors*, 37 Wisconsin, 75; *Railroad Tax Cases*, 13 Fed. Rep. 722; *Second National Bank* v. *Caldwell*, 13 Fed. Rep. 429; *In re Watson*, 15 Fed. Rep. 511; *California Tax Cases*, 18 Fed. Rep. 385; *State of Indiana* v. *Putnam Palace Car Co.*, 16 Fed. Rep. 193; *Dundee Mortgage Co.* v. *School Dist. No. 1*, 21 Fed. Rep. 151; 24 Fed. Rep. 197; *Taylor* v. *Louisville & Nashville R. R. Co.*, 85 Fed. Rep. 302; 88 Fed. Rep. 350; *Chicago Union Traction Co.* v. *State Board of Equalization*, 114 Fed. Rep. 557; Cooley on Taxation, 2d ed. pp. 748–785; Judson on Taxation, sec. 478; Welty on Assessments, sec. 186.

III. Where discrimination of the character mentioned under point II exists, it amounts to fraud in law and a denial of the equal protection of the law and the courts will grant relief. Likewise where lack of jurisdiction to make the assessment is shown. Authorities under point II, and *State ex rel.* v. *Vaile*, 122 Missouri, 33; *State ex rel. Love* v. *Railroad*, 121 Missouri, 12; *Black* v. *McGonigle*, 103 Missouri, 192; *State ex rel. Morris* v. *Cunningham*, 153 Missouri, 642.

IV. In all cases where franchises such as those possessed by the Western Union Telegraph Company have been considered in estimating the value of property assessed and such assessments have been sustained, statutes providing for the assessment of corporations under a "unit" system have contained express and detailed provisions for correctly ascertaining the valuation of the property to be assessed. No such provisions are found in the laws of Missouri. The "ways and means" for any such assessment have not been prescribed. Furthermore, the statutes of Missouri exclude any such mode of assessment of telegraph companies. *West. U. Tel. Co.* v. *Massa-*

chusetts, 125 U. S. 530; *Massachusetts* v. *West. U. Tel. Co.*, 141 U. S. 40; *W. U. Tel. Co.* v. *Taggart*, 163 U. S. 1; *State Railroad Tax Cases*, 92 U. S. 575; *Pullman Co.* v. *Penn.*, 141 U. S. 18; *Adams Ex. Co.* v. *Ohio*, 165 U. S. 194, and on rehearing, 166 U. S. 185; *Bridge Co.* v. *Kentucky*, 166 U. S. 150; *St. Louis* v. *Wennecker*, 145 Missouri, 238.

V. The franchise of a corporation "to be" a corporation is not taxable in a foreign State in which it is licensed to do business. *London & S. F. Bank* v. *Block, Collr.*, 117 Fed. Rep. 900.

Mr. Hunter M. Meriwether, with whom *Mr. Robert E. Ball* was on the brief, for defendant in error.

I. The franchises, in the sense of intangible property, as well as the poles and wires of the Western Union Telegraph Company, are taxable by the several States. Such franchise taxes have been sustained in all recent cases by the Supreme Court of the United States against this defendant, and others similarly situated. *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Massachusetts* v. *Western Union Tel. Co.*, 141 U. S. 1-40; *Central Pacific Ry. Co.* v. *California*, 162 U. S. 91; *Western Union Tel. Co.* v. *Norman*, 77 Fed. Rep. 13; *Western Union Tel. Co.* v. *Taggart*, 162 U. S. 1; American & English Ency. of Law, vol. 25, p. 873; *Adams Express Co.* v. *Ohio*, 166 U. S. *loc. cit.* 220; *Commonwealth* v. *Western Union Tel. Co.*, 2 Dauph. (Pa.) 40; *Michigan Tel. Co.* v. *City of Charlotte*, 93 Fed. Rep. 11; *Keokuk & H. Bridge Co.* v. *Kentucky*, 175 U. S. 626; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 154; *Louisville Tobacco Warehouse Co.* v. *Commonwealth*, 49 S. W. 1069; *Commonwealth* v. *Manor Gas Co.*, 188 Pa. St. 195; *Wier* v. *Norman*, 166 U. S. 171.

II. The assessment made by the state board was an assessment of the property of plaintiff in error, and did not include or in any way affect the right to exist and transact its business in Missouri or elsewhere. The tax is strictly a property tax, and having been fairly and legally assessed upon a reasonable valuation of the property, should be sustained. *National Bank* v. *Commonwealth*, 9 Wall. 353; *Railroad Co.* v.

Peniston, 18 Wall. 5, *loc. cit.* 30; *Commercial Electric Light Co.* v. *Judson*, 56 Pac. Rep. (Wash.) 829; *Louisville Ry. Co.* v. *Commonwealth*, 49 S. W. 486; *Paducah St. Ry. Co.* v. *McCracken*, 49 S. W. 178; *Owensboro National Bank* v. *City of Owensboro*, 173 U. S. 664; *Commonwealth* v. *Manor Gas Co.*, 2 Dauph. (Pa.) 128; *New York* v. *Roberts*, 171 U. S. 658.

III. There is a clear distinction between a license tax and a property tax. The former involves a charge for permission or authority to transact certain business, while the latter is a contribution imposed upon, and measured by the property of an individual or corporation. The State cannot impose a license, impost, or embargo on plaintiff in error, even though it be called a tax. But it can take from the property owned by plaintiff in error within the jurisdiction of the State, a sufficient amount to pay its just proportion of its governmental expenses. Nothing else having been attempted the tax should be sustained. Cooley on Taxation, 2d ed. pp. 383, 576; Burroughs on Taxation, sec. 77, p. 146; sec. 85, p. 169; Judson on Taxation, p. 130; *Welton* v. *Missouri*, 91 U. S. 275; *State* v. *Emment*, 103 Missouri, 241; *Emment* v. *Missouri*, 156 U. S. 296.

IV. The action of the state board in valuing and assessing the property of the plaintiff in error is not subject to review or attack in this proceeding. Cooley on Taxation, 2d ed. p. 748; Burroughs on Taxation, p. 238; *Hamilton* v. *Rosenblat*, 8 Mo. App. 237; *Yazoo & M. V. R. R. Co.* v. *Adams*, 25 So. Rep. 355; *Home Ins. Co.* v. *Lynch*, 56 Pac. Rep. 681; *Danforth* v. *Livingston*, 23 Montana, 558; *City of Elizabeth* v. *New Jersey Jockey Club*, 44 N. J. App. 207; *Dayton* v. *Multnomah*, 55 Pac. Rep. 23 (Oregon); *Ledoux* v. *Le Bee*, 83 Fed. Rep. 761; *McLeod* v. *Receiver*, 71 Fed. Rep. 455; 18 C. C. A. 188; *Brooklyn R. R. Co.* v. *City*, 38 N. Y. Supp. 154; *State ex rel.* v. *Springer*, 134 Missouri, 212.

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

1. On the question of fact, if it be such, as to what constituted the item "of other property at $856,400.56," in the

assessment by the board of equalization, the trial court and the Supreme Court of the State, are not in accord. The trial court found the "fact to be from the evidence that in valuation 'of other property' of defendant, the state board took into consideration the franchise of defendant company." It is apparent from the court's opinion that by franchise the court meant the rights and privileges obtained by the plaintiff in error under the act of Congress of July 24, 1866. The Supreme Court of the State, however, expressed its conclusion from the evidence, as follows:

"So that, when, in determining the value of the property of the defendant in this State, the board of equalization took into consideration 'the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stock and bonds, and the gross receipts and net earnings and franchises owned by said company, and the value thereof,' it did not and could not have included therein any franchise derived by the defendant from the government of the United States, because that government had conferred no such franchise; nor was such a valuation placed upon 'all other property,' a tax upon the franchise of the defendant company. The franchise derived by the defendant from the State of New York was considered by the board in determining the value of the property of the defendant located in this State. That is, that property was valued, not as so many poles, so much wire, so many instruments or so much 'other property' in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation towards each other—into a *system*, located partly in this State and partly in other States—gave each part a concrete value, which was much greater than its abstract value. The right to exist—the franchise—of the defendant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this State bore to the proportion of the franchise exercised in all other States, or indirectly, as was done in Massachusetts and as was done here, by being impressed upon the

tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system."

Plaintiff in error asserts the correctness of the finding of the trial court, and insists that it is the only finding that could have been made, and bases the argument against the taxes assessed on that insistence. But if the finding on the question is one of fact, necessarily we are bound by that made by the Supreme Court of the State. The trial court picked out the rights given to the defendant under the act of Congress, denominated them a franchise, contemplated the franchise as a distinct proprietary entity, and, because it was derived from the Federal government, decided that it was exempt from taxation. The necessary consequence was and is to destroy the relation between that franchise and the other properties of the plaintiff in error, regarding them, not as parts of the system, but abstractly—regarding the poles not differently from other poles, the wire not differently from other wire. The Supreme Court, on the contrary, regarded the properties as related and as constituting a system, and because of their relation having a value greater than the sum of the values of the individual things regarded merely as such. Viewing the order of the board of equalization, as the Supreme Court viewed it, was it valid? In other words, is the State in exercising its taxing power limited to assessing the mere material things used by the plaintiff in error, and must it regard them as of no greater value than they had when they reposed in lumber yards and factories, with cost added of putting them in place? Or the proposition may be stated another way, which better expresses the ultimate contention of the plaintiff in error. Conceding that the tangible property of the telegraph company derives value from its use in a system, does the company do business in the State in pursuance of the Constitution of the United States and the act of July, 1866, and become thereby an instrument of interstate commerce and a government agent, and as such exempt from the taxation contested in this case? We think the question has been answered by this court.

In *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, the effect of the act of July, 1886, upon the power of the State to tax the property of telegraph companies was considered. The laws of Massachusetts imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which was ascertained by comparing the length of its lines within the State with the length of its entire lines. The tax was sustained. The act of July, 1866, was urged against the tax as it is urged here.

The contention of the company in that case was, as it is in this, that it did not derive its existence from the taxing State but from the State of New York; that it did not do business in the taxing State by permission of that State, but by virtue of being an instrument of interstate commerce; that its rights and privileges and franchises were conferred by the United States and constituted it an agent of the United States, and as such agent it was exempt from the tax imposed. The contentions were rejected. The court did not test or measure the power of the State by the name which its laws gave the tax, and, speaking by Mr. Justice Miller, said:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."

And that power of the State was explained in an elaborate opinion and sustained. These propositions were laid down:

That the company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the State under which it was organized; that the privilege of running the lines of its wires over and along the military and post roads of the United States was granted by the act of Congress, but that the statute was merely permissive and conferred no exemption from the ordinary burdens of taxation; that the State could not by any specific statute prevent a corporation from placing its lines along the post roads or stop the use of them after they were so placed, but the corporation could be taxed in exchange for the protection it received from the State "upon its real or personal property as any other person would be." And describing the particular tax imposed it was said:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution."

In other words, the lines in Massachusetts were regarded as a part of a system and assessed accordingly.

The statute of Massachusetts came up again for consideration in *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40, and the principles announced in *Western Union Telegraph Co.* v. *Massachusetts*, *supra*, were affirmed and followed. See also *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

These cases establish that in estimating the value of the property of a telegraph company situate within a State it may be regarded not abstractly or strictly locally, but as a part of a system operated in other States, and that the State was not precluded from taxing the property because the State had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or

was engaged in interstate commerce. Every one of the fundamental propositions, therefore, contended for by plaintiff in error, those decisions declare unsound.

But it is contended that the method of assessment followed in those cases was sustained because they were prescribed by the legislature, and that in the case at bar the method adopted was not prescribed or authorized by the laws of Missouri. The answer is obvious. What the laws of Missouri authorized was competent for the Supreme Court of Missouri to decide, and it decided that the order of the board of equalization was legal under the constitution and statutes of the State. The decision, constituting as it does an interpretation of the constitution and laws of the State, is not open to dispute here. If it were, it would seem incontestable that the State could either prescribe the method or confer upon its taxing officers the power to adopt a suitable one. And there is nothing in the *Adams Express Company cases*, 166 U. S. 171; 166 U. S. 185, 226, to the contrary.

2. The plaintiff in error asserts that the board of equalization practiced discrimination against it by assessing at a value disproportionate to the value assessed on real and personal property by local assessing officers. This defence was expressed as follows:

"Defendant avers that under the law it was the duty of said board of equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the State of Missouri, among the several counties in the State, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said state board of equalization, by common arrangement, understanding and purpose among themselves, in fact did, during the period aforesaid, in violation of the constitution and laws of said State of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in said State of Missouri, assess all property, to wit, other than the property of the telegraph companies, to wit, from thirty-five to forty per cent of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the State of Missouri, this defendant was unlawfully and wrongfully discriminated

against to the extent of sixty per cent of the amount of taxes assessed by said state board of equalization and levied by the taxing officers of the State upon defendant in pursuance of such assessment."

Testimony was introduced to sustain the averments.

The Supreme Court of Missouri held, however, that plaintiff in error could not, even under the cases cited by it, avail itself of the defence. The court said:

"The defendant cannot avail itself of these cases, for the reasons, first, that it seeks to raise the question of discrimination by a defence to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; second, that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the authority of the cases relied on by it, this cannot be done."

We concur in this view. The proceedings before the board were *quasi* judicial and the order made by it was within its jurisdiction. It was not void on its face, and cannot be resisted in an action at law. This is the principle announced in the case referred to. In *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, is cited, among other cases, *Balfour* v. *City of Portland*, 28 Fed. Rep. 738. The case is especially pertinent. The action was at law for the recovery of taxes paid under protest which had been levied upon property which, it was charged, had been deliberately overvalued. Recovery was denied. The Circuit Court said:

"The property was subject to taxation by the authority and for the purpose alleged. True, the result reached was erroneous, because of the willful disregard in the proceeding of the law requiring uniformity in the valuation of property for taxation

within the jurisdiction of the defendant. Still, the proceeding being *quasi* judicial, and the subject matter within the jurisdiction of the officers who conducted it, the result reached is so far conclusive that the legality of it cannot be questioned in an action at law to recover back the one half of the tax as illegal."

So this court said in *Stanley* v. *Supervisors*, *supra*:

"It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. *Newman* v. *Supervisors*, 45 N. Y. 676, 687; *National Bank of Chemung* v. *Elmira*, 53 N. Y. 49, 52; *Bruecher* v. *The Village of Portchester*, 101 N. Y. 240, 244; *Lincoln* v. *Worcester*, 8 Cush. 55, 63; *Hicks* v. *Westport*, 130 Massachusetts, 478; *Balfour* v. *City of Portland*, 28 Fed. Rep. 738."

And we think overvaluation of property cannot be a ground of defence at law. In other words, the action of the tax officers, being in the nature of a judgment, must be yielded to until set aside. This can only be done in a direct proceeding. The property owner is in effect a plaintiff, and the condition of relief against the enforcement of the *quasi* judicial order, which he attacks, is a tender of payment of the taxes that he ought to pay. And this condition would still be upon him if he set up overvaluation as an equitable defence to an action brought against him. *County of Los Angeles* v. *Ballerino*, 99 California, 593, 597. This certainly would be so in Missouri, under the doctrine expressed by the Supreme Court of the State in the case at bar.

Judgment affirmed.

MR JUSTICE BREWER concurs in the result.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissent.

GEER *v.* MATHIESON ALKALI WORKS.

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

No. 261. Submitted April 24, 1903.—Decided June 1, 1903.

On the authority of *Conley* v. *Mathieson Alkali Works*, *ante*, p. 406, the service of a summons in New York on a director of a foreign corporation not transacting business in that State *held* insufficient.

In an action brought in a state court by citizens of one State against two corporations, citizens of another State, and the directors thereof, some of whom are citizens of the same State as the plaintiff, for the purpose of setting aside a conveyance made by one defendant corporation to the other, the action may be severable as to the conveying corporation; and if it is so, and as to the cause of action alleged against it, its directors are not necessary parties, it may remove the action as to it into the Circuit Court of the United States.

THIS is an appeal from an order dismissing appellants' bill for want of due service of process.

The suit is in equity, and was commenced in the Supreme Court of the State of New York to set aside the conveyance made by the Mathieson Alkali Company to the Castner Electrolytic Alkali Company, on the ground that the conveyance was fraudulent. The directors of the former company were made defendants. On the petition of the defendant companies the case was removed to the Circuit Court of the United States for the Southern District of New York, on the ground that the controversy was wholly between citizens of different States, and separable as to them. The appellants made the motion in the Circuit Court to remand the case to the state court, but the motion was denied, the Circuit Court saying:

"Whatever relief the complainants may be entitled to against the directors upon the facts alleged, they would as to the two corporations be entitled to a decree for retransfer of the property and an accounting for damages sustained by the transfer. This is a controversy separable from the one between complainants and the officers and directors who effected the trans-

fer, and citizenship of the parties to that separable controversy being such as the statute contemplates the motion to remand is denied."

The Mathieson Alkali Works (which we shall designate hereafter as the Mathieson Company) then moved the court to set aside the summons and the service thereof on the ground that it, the Mathieson Company, was at the time of the service of the summons a foreign corporation, and at that time, and for some time before, had no place of transacting business in the State of New York, and transacted no business therein. Affidavits were presented on the motion, and it was granted.

The appellants were plaintiffs in the court below, and we will so call them. They are stockholders in the Mathieson Company. Some of them are citizens of the State of New York, some citizens of States other than Virginia, and some citizens of Great Britain and Ireland. It is alleged that the defendant corporations are Virginia corporations, and that each has an office and place of business in the city of New York, and that all but two of the directors of the Castner Electrolytic Alkali Company, hereafter called the Castner Company, resided there, and that the property, to recover which the suit is brought, is situated in the State of New York.

The purpose of the Mathieson Company was to manufacture salt, soda, soda ash, bleaching powder and other minerals, and to carry on a general merchandise business, and engage in agriculture and stock raising.

The bill is very voluminous, and it is enough to explain the contentions in the case to say that it recites the organization and history of the Mathieson Company; the erection and operation by it of a manufacturing plant at Saltville, Virginia; the leasing by it from the Niagara Falls Power Company of land and power at Niagara Falls, and the establishment of a plant there for the manufacture of the commodities mentioned in the charter of the company, and the carrying on of a profitable business. The bill alleges on information and belief that the defendants Arnold and Wilson are respectively the president and financial agent and manager of the company; the defendants Agar and Ely, their attorneys; Gladding, an employé of

some sort, and the directors, other than Arnold and Wilson, are dummies without substantial interest in the company. That Arnold and Wilson have conducted the affairs of the company with great secrecy and for their own interests; that Arnold is a member of the firm of Arnold, Hoffman & Co., dealers in chemicals, in the city of New York, and by arrangements nominally between the firm and the company, but really between Wilson and the firm, the latter has had the exclusive sale and disposition of the products of the company since the organization, of the details of which the plaintiffs are ignorant, because they have been kept secret from the stockholders. That, though dividends have been earned, none have been declared or paid, but the earnings have been appropriated by Arnold and Wilson. That they, with the other directors, have confederated and conspired to fraudulently dispose of and do away with substantially all of the property of the company, and have attempted to do so by means of the conveyance to the Castner Company set out in the bill; and, to better conceal their acts, have obtained no certificate from the Secretary of State nor designated any person upon whom process can be served. That the Castner Company was promoted and organized by the defendants Arnold and Wilson, and is controlled by them, and they are chiefly interested in its affairs. That plaintiffs only obtained knowledge of the existence of that company within the past few days, and of the conveyance to it, but have no precise knowledge of its affairs, and believe that the great body of the stockholders of the Mathieson Company are ignorant of the existence of the Castner Company or of the conveyance to it. That by a communication from the Secretary of State it appears that the Castner Company was incorporated April 30, 1901, under the laws of Virginia, and that its officers consisted of a president, vice president and seven directors; and a provision in the articles of incorporation show that the defendants Wilson, Arnold and Agar are directors, and that Richard T. Wilson, Jr., a son of the defendant Wilson, is also a director. It is alleged that the other officers and directors are mere servants and instruments of the defendants Arnold and Wilson, and they created and organized the Castner Company as a means and contrivance to cheat and defraud the cred-

itors and stockholders of the Mathieson Company by means of the conveyance to the Castner Company. The conveyance is set out in full. It recites that it is executed for and in consideration of one dollar, and other valuable considerations, and purports to convey certain patent rights and all of the property of the Mathieson Company in the State of New York. The bill also alleges the property conveyed was delivered to the Castner Company, and it is in the possession thereof; that the patents and property conveyed are "essentially necessary" to enable the Mathieson Company to carry on the business for which it was organized, and their conveyance in effect wholly destroys the business of that corporation and renders its capital stock utterly worthless, and deprives the creditors of the corporation, of whom there then were and are a large number, and for a large amount in the aggregate, of all remedy for the collection of their debts. That the conveyance is *ultra vires*, and the defendant directors are trustees and agents of and for the stockholders, and had no power to convey away the property and patents of the company essential to the carrying on of its business. And by reason of the facts alleged the defendant directors are unfit persons to have the charge and management of the affairs of the company, and that a receiver of the corporation should be appointed, and the defendants enjoined. That for the reasons set forth plaintiffs have not applied to the defendant, the Mathieson Company, to bring this action, being advised that its directors "would not be proper persons to prosecute an action in the name of the company, which was practically an action to redress frauds they themselves had committed."

The specific relief asked is stated in the opinion.

Mr. William W. MacFarland for appellants.

Mr. Alfred Ely for appellees.

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

The facts and arguments by which it is attempted to sustain the service on the Mathieson Company are the same as

were presented in the case of *Conley* v. *The Mathieson Alkali Works*, decided May 4 of this term, *ante*, p. 406. On the authority of that case the service in this must be held insufficient to give jurisdiction of the Mathieson Company, and the order of the Circuit Court setting aside the service of summons must be affirmed if the case was properly removed to that court. And this depends upon the question whether the complaint exhibits a separable controversy between the plaintiffs and the companies.

A suit may, consistently with the rules of pleading, embrace several distinct controversies. *Barney* v. *Latham*, 103 U. S. 205, 212. It was said in *Hyde* v. *Ruble* 104 U. S. 409: "To entitle a party to a removal under this clause (second clause of section 2 of the act of 1875, same as second clause in the act of 1887) there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other." In other words, as expressed in *Fraser* v. *Jennison*, 106 U. S. 191, 194, "the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable. *Hyde* v. *Ruble*, *supra*. See also *Ayres* v. *Wiswall*, 112 U. S. 187. The application of these principles to the case at bar will be seen by the relief prayed for.

The relief prayed against the companies is as follows: Against the Mathieson Company, that the conveyance in its name be adjudged fraudulent and void, and that the same be annulled; that a receiver of its works be appointed; that its directors be enjoined from making any further disposition of its property; that it be required to make a full disclosure in respect to all of the premises set forth and alleged, and that

the complainants have access to all books, records and papers, including the stock book. Against the Castner Company, That it may be required to account for all acts and doings in the premises set forth; to make good and pay all of the damages sustained by complainants to the Mathieson Company by reason thereof; that it be adjudged to reconvey the property so wrongfully conveyed to it in the name of the Mathieson Company; that it account for and pay all of the income, earnings and revenue of the property since the date of the conveyance.

To the relief asked against the companies were the directors of the Mathieson Company necessary parties? In *Winch* v. *Berkenhead, Lancashire & Cheshire Railway Co.*, 5 De G. & Sm. 562, it was held, in a suit by a stockholder of the corporation in behalf of himself and all other stockholders, to restrain the performance of an *ultra vires* agreement, that it was not necessary that the directors should be made parties. It was said by the Vice Chancellor: "The act that is sought to be restrained is the act of the company. It is quite sufficient if there is an order restraining the company. The company itself cannot act except by means of its officers. It appears to me that the suit is properly framed, by the relief being sought against the company alone."

Hatch v. *The Chicago, Rock Island & Pacific Railroad Company*, and *The Same* v. *Same*, 6 Blatch. 105, were suits brought by the plaintiff in each in behalf of himself and all other stockholders of the defendant corporation, to restrain it from executing a contract which was alleged to be in excess of its powers. The plaintiff was a citizen of New York. The suits were brought in the Supreme Court of the State of New York. The individual defendants were directors of the corporation and resided in the State of New York, except one, who was a citizen of the State of Illinois. In the second suit one Denham was made a party, who was the treasurer of the company, but not one of its directors. His citizenship does not appear. The plaintiff in the second suit alleged that the committee of directors had determined to close the transfer office of the company in the city of New York, and to remove all of its books, moneys, securities and property beyond the jurisdiction of the

court; that the defendants had refused to permit any transfer of the shares of stock on the books of the company. Judgment was prayed in the first suit for an injunction against the execution of the illegal contract, and of the acts which were alleged to be contemplated in the performance thereof. In the second suit judgment was prayed for the same injunction, and an injunction against the other acts alleged. On the petition of Tracy and the company the cases were removed to the Circuit Court for the Southern District of New York, and a motion was made to remand. The motion was heard by Mr. Justice Blatchford, who was then United States District Judge, who said:

"These suits, therefore, are suits brought in the State of New York, by Hatch, a citizen of New York, against the members of the company, all of whom are citizens of the State which created the company, and which is a State other than New York, and against Tracy, a citizen of Illinois, and against other defendants, who are citizens of New York."

And describing the suits, said further:

"All the relief that is prayed for in either suit is by injunction, except the prayer in the first suit for a receiver. All the relief by injunction is prayed for in respect to all of the defendants. No such relief is prayed for in respect to any defendant, other than the company, that is not prayed for in respect to the company. The suits are really, both of them, wholly against the company alone. The directors and the treasurer, who are its co-defendants, are merely its servants and agents, through whom necessarily it acts. It was not necessary or proper to make them parties to the suit at all. The injunctions prayed for and the injunctions issued, if issued against the company alone, and served on any director, or on the treasurer, would bind the person so served to obedience, and, even without such service, knowledge by the officer of the existence of the injunction against the company, would bind the officer to obedience. *The People* v. *Sturtevant*, 5 Selden, 263, 277. The directors and the treasurer are, therefore, not real parties to the suits, but merely nominal parties. No personal demand is made against any one of them, nor is any personal account-

ing asked from any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. The test of this is, that, if any one of the directors or the treasurer were to resign his office, he would necessarily cease, *ipso facto*, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be, that, there being no relief prayed against the individual in his individual capacity, and the injunction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official relation ceases, the relief asked and the injunction issued become, as to him, utterly futile. This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a discovery from him in regard to matters peculiarly within his knowledge. There, the dissolution of his official relation would not affect the propriety of his being retained as a defendant. This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complaints, and which is the only guide the court can have, is between the plaintiff on the one side, and the company, as a corporate body, on the other. The plaintiff cannot, by joining as nominal defendants with the corporation, persons who are citizens of the same State with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing the cause into this court."

Heath v. *The Erie Railway Company* came up before the same learned justice, and is reported in 8 Blatchford, 347, 413. It was a suit by stockholders against the railway company and Jay Gould, James Fisk, Jr., and Frederick A. Lane, who were directors of the company. The object of the suit was to restrain *ultra vires* acts. The bill prayed for an injunction for a receiver, for an accounting by Gould, Fisk and Lane of the profits made by them, and that they "make payment and compensation to the company, for the benefit of the plaintiffs, and the

other *bona fide* shareholders, to the full extent of all such profits, benefits, gains and advantages, and of such damages, losses and injuries." The bill was demurred to, on the ground, among others, that the other directors, fourteen in number, were not made parties to the bill. The court overruled the demurrer. The main part of the opinion, which was very elaborate, is devoted to the consideration of the right of the stockholders to maintain the suit, which right was sustained on the authority of many cases. Of the ground of demurrer that the other directors had not been made parties, the court said:

"The objection that such fourteen persons ought to be made parties, as appearing to have been directors when the bill was filed, for the reason that the bill asks for an injunction against the corporation, and for a receiver of the corporation, is not well taken. The relief so asked is against the corporation. If such fourteen persons were made parties, they would be merely nominal parties and not real parties, in respect to any relief that is asked against the corporation; and no relief is asked as against them, except in respect to the matter of the classification, which has already been disposed of. This question was fully considered in the case of *Hatch* v. *The Chicago, Rock Island & Pacific R. R. Co.*, 6 Blatch. C. C. R. 105, 114 to 116."

It was, however, said by Lord Cairns in *Ferguson* v. *Wilson*, L. R. 2 Ch. 77, 90, and it was held in *Clinch* v. *Financial Corporation*, L. R. 4 Ch. 117, that it was proper in a suit by a stockholder to restrain *ultra vires* acts of a corporation to join as defendants the directors of the corporation. This ruling is reconcilable with the other cases. The reconcilation lies in the distinction between proper and indispensable parties in view of the statute providing for the removal of causes to the Federal courts. *Barney* v. *Latham*, 103 U. S. 205, *supra*.

But relief is prayed against the individual defendants as follows:

"That the individual defendants, directors of the said Mathieson Alkali Works, may be compelled to account as agents and trustees of the said company for all their acts and doings in the premises above set forth; and that they may severally and respectively be adjudged and required to make good and pay

to the said Mathieson Alkali Works and to the plaintiffs all loss and damage caused by their wrongful conduct in the premises as hereinabove set forth."

If it be conceded that in a suit which seeks such relief the Mathieson Company is a necessary party, it is certain the Castner party is not. Besides the relief is distinct from—separable from, to keep to the language of the cases—that which is sought as a result of the grounds of suit against the companies.

It follows from these views that the bill exhibits a controversy between the plaintiffs and the defendant companies, to which the individual defendants are not necessary parties, and the case was rightfully removed to the Circuit Court.

The order of the latter court setting aside the the service of summons on the Mathieson Company, and dismissing the bill for want of jurisdiction of that company, is

Affirmed.

STANLY COUNTY *v.* COLER.

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

No. 264. Argued April 27, 28, 1903.—Decided June 1, 1903.

While as a general rule Federal courts will accept the interpretation put by the courts of a State upon its own constitution and statutes, yet where the law has not been definitely settled, it is the right and duty of Federal courts to exercise their own judgment.

A presumption that the duty devolving upon the officers of a county of ascertaining the conditions upon which bonds of the county may be issued was properly exercised should and does accompany and guarantee such bonds.

County bonds issued under statutes and sections of the Code of North Carolina which permit bonds to be issued to enable counties to subscribe to stock when necessary to aid in the completion of any railroad in which citizens of the county may have an interest, *held* to be valid notwithstanding that the Supreme Court of the State had decided in another action that such bonds were invalid.

THIS suit was brought in the United States Circuit Court for the Western District of North Carolina, by the respondents against the petitioner, to recover on certain coupons attached to bonds, alleged to have been issued by Stanly County, State of North Carolina, in part payment of the subscription of said county to the capital stock of the Yadkin Valley Railroad Company. The bill alleged the following facts:

The Yadkin Valley Railroad Company was organized as a corporation under the laws of North Carolina, to construct and operate a railroad running from Salisbury in that State, south to Norwood, a point in Stanly County.

The incorporation of the said company was under and by virtue of chapter 236 of the Acts of 1870, passed by the legislature for that year; and the said chapter was amended by an act of the legislature, chapter 183 of the Acts of 1887.

The county, being desirous of aiding in the construction of said road, and acting through its proper authorities, subscribed the amount of $100,000 to the capital stock of the company, in pursuance of the authority and power conferred upon the said county under and by virtue of the acts of the legislature of North Carolina as above set out; and, also, under and by virtue of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina, all of the said acts and sections of the Code of North Carolina having been enacted and become laws in accordance with the constitution of the State.

The county still holds the stock and derives benefit from the road in increased facilities for transportation, greatly increased value of the lands of the county and from the taxes paid thereon. A copy of the bonds was attached to the bill, and is inserted in the margin.[1]

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[1] EXHIBIT A.

(Copy.)

County of Stanly Six per Cent Bond.

Stanly County, State of North Carolina, is indebted to the bearer in the sum of five hundred dollars, lawful money of the United States, payable on the first day of July, A. D. one thousand nine hundred and twenty, with interest thereon from the first day of July, A. D. one thousand eight hundred and ninety, at the rate of six per cent per annum, payable on the first

The bonds were exposed for sale and the respondents became purchasers of them in good faith, and at the highest market price, and without any notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent or otherwise than perfectly legal in their issue and sale.

Interest on the bonds issued as the same has become due has not been paid for the last four years. The coupons due and the amounts thereof are as follows:

48 Stanly County coupons, Nos. 2, 46, 48, 49 and 72, $60.00 each	$2880 00
33 Stanly County coupons, Nos. 81, 92, 95, 96, 98, 108, 110, 112, 116, 118, 120, all numbers inclusive, $30.00	990 00
Making the sum of	$3870 00

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day of July in each year at the First National Bank of Salisbury, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable. This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, making a total of one hundred thousand dollars, issued by authority of an act of the general assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled "An act to amend the charter of the Yadkin Railroad Company," and of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina, and authorized by a majority vote of the qualified voters of Stanly County, at an election regularly held for that purpose on the 15th day of August, A. D. 1889, duly ordered by the board of commissioners of Stanly County.

This series of bonds is issued to pay the subscription of one hundred thousand dollars made by Stanly County to the capital stock of the said railroad, known as "The Yadkin Railroad Company." Stanly County reserves the privilege of paying the principal and interest of any or all of this series of bonds at any time after the expiration of ten years, upon the board of commissioners of said county first giving three months' notice of such payment in some newspaper published in said county, when such bonds shall be paid, according to number, beginning with number one.

In testimony whereof, the chairman of the board of county commissioners of Stanly County hath hereunto subscribed his name, for and on behalf of said board, and the clerk of the Superior Court of Stanly County hath countersigned the same and affixed thereto the seal of said Superior Court, this first day of July, A. D. one thousand eight hundred and ninety.

——— ———, *Chairman.*

Countersigned: ——— ———, *Clerk of Superior Court.*

The payment of said sums was demanded at the proper time and refused, although the said total sum had been collected from the tax payers of the county by the board of commissioners, in pursuance of the power conferred upon them, and was in the hands of I. W. Snuggs, (one of the petitioners here,) as treasurer of the county, and he having received the same for the payment of said interest, became and is the trustee and agent of the bond and coupon holders, and therefore holds the same "for the use and in trust for complainants." The complainants are informed and believe that the reason why said treasurer has not accounted to them is that he has been restrained by a certain process of injunction, issued by one of the Superior Courts of the State of North Carolina in a suit brought in the name of the board of commissioners, and in the names of James P. Nash and G. R. McCain as plaintiffs, and against the said I. W. Snuggs as defendant, but that complainants were not made parties to the same, nor was any other bondholder. The treasurer and board of commissioners unless restrained will dispose of the fund collected as aforesaid. An injunction was prayed, and the statement of an account, and the appointment of a receiver asked.

The answer attacked the validity of the bonds, and averred that their invalidity was adjudged by the Supreme Court of the State in the case of *Commissioners* v. *Snuggs*, 121 N. C. 394, "and that there has been no other decision or judgment given by said Supreme Court in conflict with the aforesaid decision; but that the said decision is uniform with the decision of the same court, delivered in the case of *Bank* v. *The Commissioners*, 119 N. C. 214, which are the only two cases in which the principle or validity of these bonds has ever been before the Supreme Court of the State." There were proper replications made to the answer. The case was submitted on the pleadings and certain exhibits, some of them being the records of the suits in the courts of North Carolina.

The grounds upon which the bonds are claimed to be invalid are indicated in the opinion. A decree was entered declaring and adjudging the bonds to be valid obligations of the county of Stanly; that complainants (respondents here) in the suit

were *bona fide* purchasers and holders thereof; that I. W. Snuggs was the trustee of the bondholders, and held the sum of six thousand dollars as such trustee for the benefit of the bondholders under and by virtue of the law and the orders of the board of commissioners of the county, and for the sole purpose of paying off and discharging the interest due on the bonds as set out in the bill. The decree also appointed a receiver for said sum, and ordered that said I. W. Snuggs pay the same to the receiver. It was further adjudged that the board of commissioners of Stanly County be enjoined from in any manner interfering with the execution and performance of the decree. The decree was reversed by the Circuit Court of Appeals and the cause was remanded "with directions to dissolve the injunction, discharge the receiver, and dismiss the bill." 37 C. C. A. 484. A rehearing was granted, and the decree of the Circuit Court was affirmed. 113 Fed. Rep. 705.

Mr. James E. Shepherd and *Mr. A. C. Avery* for petitioners. *Mr. C. M. Busbee* was on the brief.

Mr. John F. Dillon for respondents. *Mr. Harry Hubbard*, *Mr. John M. Dillon* and *Mr. Charles Price* were on the brief.

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

It will be observed that the bonds recited that they were "issued by authority of an act of the general assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled 'An act to amend the charter of the Yadkin Railroad Company,' and of sections 1996, 1997, 1998 and 1999 of the code of North Carolina, and authorized by the majority vote of the qualified voters of Stanly County, at an election regularly held for that purpose, on the 15th day of August, A. D. 1889, duly ordered by the board of commissioners of Stanly County." The act of March 3, 1887, referred to, was an amendment of the act by which the Yadkin Railroad Company was incorporated, (1870 -'71,) and was declared by the Supreme Court of the State not

to have been passed in accordance with the constitutional provision, requiring the yeas and nays to be entered upon the journals of each house of the general assembly. *Bank* v. *Commissioners*, 119 N. C. 214; *Commissioners* v. *Snuggs*, 121 N. C. 394. The ruling was decided to be binding upon this court. *Wilkes County* v. *Coler*, 180 U. S. 506; *S. C.*, *ante*, p. 107.

The same objection does not lie to the sections of the code of North Carolina recited in the bonds, and the controversy in the pending case turns upon the meaning of those sections and the effect of the recitals in the bonds.

Section 1996 provides as follows: "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." This section and the four succeeding sections were the reproductions of a statute passed in 1868–'9, a few days more than a year after the constitution of 1868, and were passed upon and interpreted by the Supreme Court of North Carolina in *Commissioners* v. *Snuggs*, *supra*. The court said:

"It is most reasonable to conclude that the policy and purpose of both the constitutional provision and the statute (code provisions) were the same, the only difference being that in case of state aid no approval by vote of the people was required, while a majority vote of the people was required in cases of county aid. The object of the statute must have been to provide by a general act means by which counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the same time of the enactment of the statute of 1868–'9 and always since that time any county of the State duly observing the limitations of section 7 of article VII of the constitution, and under an act passed according to the requirements of section 14, article II of the constitution, could and can subscribe to the capital stock of the railroad company whether unfinished or to be begun. The act of 1868–'9, however, considering the condition of affairs then existing, that is, that there were counties which had a pecuniary interest in rail-

roads that had been begun but were unfinished, enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by a general law passed according to section 14, article II, of the constitution. This reasoning leads us to the still further conclusion that, at the time when the act of 1868–'9 was brought forward in the Code, section 1996, and the four succeeding sections, it could have had reference to no cases except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the constitution of 1868, and that, therefore, the code sections could not apply to the present case, because the Yadkin Railroad was not begun to be constructed until about 1889."

It will be observed, therefore, that the Supreme Court decides that the interest of the county must have been *pecuniary*, and the railroad must have been begun *at the adoption of the constitution of 1868*.

To this case the respondents oppose the contentions that its interpretation of the constitution and code sections is (1) incorrect, and this involves the further contention that we may exercise an independent judgment of them; (2) that the recitals in the bonds were assurances to *bona fide* purchasers that the conditions expressed had been fulfilled. In other words, the recitals were assurances that the county had a pecuniary interest (assuming such to be the interest meant) in the Yadkin Railroad, and that the road had been begun before the bonds were issued—even begun before the adoption of the constitution of 1868. As far as the contention includes both dates, we may immediately dispose of it. We cannot assent to the view that purchasers of the bonds could have assumed that the railroad had been begun before the adoption of the constitution of 1868. The adoption of the constitution antedated the charter of the company. It would therefore be extreme to hold that purchasers of the bonds could have assumed that the railroad had been begun before it was authorized to be built, or that a different act of incorporation could have been assumed from that which the bonds themselves indicated. Commercial securities must necessarily be fortified by many presumptions, as

we shall hereafter have occasion to remark, but it would be straining somewhat to hold that a purchaser of bonds issued for a subscription to the capital stock of a railroad company could assume that the company existed prior to the time stated in the bonds or was incorporated by a different statute than that mentioned. Pretermitting consideration of the other conditions for a time, we are brought to the contention of the respondents, that we are not constrained to follow the opinion of the Supreme Court of North Carolina.

The general rule undoubtedly is that we accept the interpretation put by the state courts upon the state constitutions and statutes. There are exceptions to the rule, and the case at bar presents one of them. The rule and its exceptions are stated in *Burgess* v. *Seligman*, 107 U. S. 20, and the many cases by which the rule was sustained are collected in a note on page thirty of the opinion. In that case a statute of Missouri provided that the stockholders of a corporation at its dissolution were liable for its debts. It also provided that no person holding stock as executor, etc., or holding stock as collateral security, should be personally liable, but the persons who pledged the stock should be considered as holding the same, and be liable. The Supreme Court of Missouri held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. This court decided to the contrary, and held that it was not bound to follow the decision of the Supreme Court of the State. The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise our own judgment was asserted. It was said that state decisions were to be followed when they had become a rule of property, and that "this is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general

jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

Burgess v. *Seligman* was applied in *Folsom* v. *Ninety-Six*, 159 U. S. 611, to sustain the validity of bonds issued by the defendant township to aid in the construction of a railroad. The power to issue them depended upon several statutes and the constitution of the State. After the bonds were issued the Supreme Court of the State decided that the statutes authorizing the issue of the bonds were unconstitutional. There had been no decision to that effect prior to the issuing of the bonds. We held that the decision of the Supreme Court was not binding, and construed the constitution and statutes for ourselves, and sustained the bonds.

It was, however, said in *Burgess* v. *Seligman* that even in cases in which we may exercise an independent judgment, if the question seems "balanced with doubt," we will "lean towards an agreement of views with the state courts." But we are unable to yield that deference to the decision in *Commissioners* v. *Snuggs*, notwithstanding our respect for the learned tribunal that delivered it. We are unable to construe the code sections as having had "reference to no cases except those where the counties had an interest in unfinished railroads at the adoption of the constitution of 1868." The prohibition of the constitution was directed to the State; the power given by the code sections was directed to counties. It is easy to conceive the reasons which induced the different provisions. The State might indeed not desire to extend its general aid beyond what had been done or commenced. Local interest might be different, and the exact fulfillment of the conditions upon which aid could be granted was assured and any abuse guarded against, by requiring a vote of the people. Besides, there is no reference in the code sections to the constitution of 1868, or any retrospective implications in them. The language is that

which would naturally be employed to express a present and continuing power, to be exercised as occasion should arise. And the contemporaneous construction sustains this view. There was a vote of the people of the county authorizing the subscription, and not through all the publicity and discussion of the canvass, not in the proceedings before the board of commissioners when the subscription was made, was there an intimation expressed, as far as the record shows, that the power of the counties of the State was limited by and depended upon what existed at the date of the constitution of 1868. And for four years a tax was levied and interest paid on the bonds.

As we have seen, section 1996 confers power on the boards of commisioners of counties "to subscribe stock to any railroad company or companies, when necessary to aid in the *completion* of any railroad in which the *citizens* of the county may have an *interest*." These conditions, as we have also seen, were defined to mean, by the Supreme Court of the State, in *Commissioners* v. *Snuggs*, an interest of the county, as distinguished from the interest of its citizens, and a pecuniary interest as distinguished from that which comes from the facilities afforded by a railroad; and the completion of a railroad to signify one begun, but not finished. These definitions may be disputed, and are disputed.

A county is in many ways a distinct legal entity from its citizens, but it is created for their benefit, and its duties and powers are conferred to be exercised for their welfare. This is true even of its ordinary and governmental functions; it is especially true of the power to subscribe to the stock of a railroad company, and in conferring such power the predominant thought would be, not the interests of the county as such, but the interests of its citizens as such. And the language of the Code of North Carolina conforms to and exactly expresses the thought—accurately marks a distinction between the county acting through its board of commissioners and the citizens of the county, and provides that the interests of the latter shall induce the exercise of the powers and duties of the former. Such interests could not be pecuniary—could only be that which comes from the possession and advantages of railroads. And

the same consideration would seem to lead to a different definition of the word "completion" than that given by the Supreme Court of North Carolina. Of course, there can be no completion of a thing which has not been begun, but it does not follow that the legislature intended to express a distinction between railroads which could receive, according to the degree of their construction. The statute regards not actual construction but aid to construction. Its purpose is the production of a result—the building of railroads, and, it is manifest, that aid given before their commencement would be as efficient, and might be more necessary, than that given after their commencement. It is not easy to conceive what purpose would be subserved by confining the aid to roads which have been begun; and there would be certain embarrassment in deciding the degree to which construction must be advanced. However, these are but passing observations. We may rest the validity of the bonds on the right of a *bona fide* holder from their recitals to assume that the county had the interest claimed and that the railroad had been begun before subscription to its stock was made. It makes no difference whether the existence or non-existence of those conditions could have been ascertained by inquiry. Purchasers were not expected to be at or near the sources of information. The bonds were not offered in Stanly County only, or in the State of North Carolina only. They were expected to be offered in the financial markets of the other States of the Union; even offered in the financial markets of the world. They were payable to bearer. They were expected to have, and their value, to an extent, depended upon their having almost the currency and sanction of money. If a buyer of bonds is chargeable with knowledge not only of want of power to issue them, (a considerable risk, as the records of the courts show,) but also of the non-performance of conditions *in pais*, their value would be much diminished. And what good would such a holding subserve? The affairs of a county can only be administered by its officers, and to their attention and duty its interests must be entrusted. When the power to issue bonds, therefore, depends upon the existence of conditions, the local officers are charged with the duty and the responsibility of ascertaining

them, and the presumption that the duty was exercised should and does accompany and guarantee the bonds in every financial market. And this court has so decided. In *Evansville* v. *Dennett*, 161 U. S. 434, the bonds passed upon recited that they were "issued by the city of Evansville in payment of a subscription to the Evansville, Henderson and Nashville Railroad Company, made in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council of said city, passed in pursuance thereof." The bonds were dated May 1, 1858. Other bonds were issued December 1, 1870, in payment of the subscription of the city to the stock of the Evansville, Carmi and Paduca Railroad Company. The recital in the latter bonds was as follows:

"By virtue of an act of the general assembly of the State of Indiana, entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847; and by virtue of an act of general assembly of the State of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of 7 per cent per annum, for the purpose of paying the subscription as authorized above." The charter of Evansville authorized the city "to take stock in any chartered company for making roads to said city. . . . *Provided*, That no stock shall be subscribed or taken by the common council in any such company, unless it be on the petition of two thirds of the residents of said city, who are freeholders of the city, dis-

tinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed."

The charter of Evansville was amended in 1865, but the amendment was declared unconstitutional by the Supreme Court of the State, and another act was passed in 1867. The latter act authorized a subscription to the stock of the railroad company, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor. The ordinances of the city recited that an election was held, but did not recite that a petition of resident freeholders of the city was presented to the common council as required by the charter, and no such petition was in fact presented. The case came to this court on certificate, and the following questions were propounded: Did the recital in the first series of bonds put the purchaser upon inquiry as to the terms of ordinances under which the bonds were issued? Did the recital in the second series of bonds, those issued to the Evansville, Carmi and Paducah Railroad Company, (1) put the purchaser upon inquiry as to the terms of the resolution under which they were purported to have been issued; (2) estop the city from asserting that the bonds were not issued for a stock subscription upon a petition as prescribed by the charter; (3) "was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

Sustaining the validity of the first series of bonds, the court said, by Mr. Justice Harlan, it could not be doubted that the city had the power to subscribe to the stock upon the performance of the conditions expressed in the question propounded, and further said they "were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be questioned, although

the statute declared that the power should not be exercised except under the circumstances stated in the statute."

And of the effect of the recital that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof," it was observed: "This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised."

Passing on the second series of bonds and expressing the principle applicable, *School District* v. *Stone*, 106 U. S. 183, was quoted from as follows: "'Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of" the statute, have been held in favor of *bona fide* purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued.' *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *Bolles*, 94 U. S. 104; *Mercer County* v. *Hacket*, 1 Wall. 83; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 238–9, and authorities there cited; *Cairo* v. *Zane*, 149 U. S. 122."

And again: "As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before

them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

In *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, the bonds passed on recited that all the requirements of law had been fully complied with by the proper officers in the issuing of the bonds. It was held that the county was estopped from asserting, against a *bona fide* holder for value, that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado. See also *Waite* v. *Santa Cruz*, 184 U. S. 302, where effect of recitals in bonds was thoroughly considered and the doctrine of prior cases repeated and affirmed.

The application of these cases to that at bar is denied by petitioners. The argument is (to quote counsel):

"The preliminary question, whether the railroad was incomplete or the county had an interest, was not one as to which the commissioners had peculiar knowledge, qualifying them to answer. They had such knowledge as the whole public could obtain—nothing more. It was incumbent on the respondents to inquire about the fact, because the incompleteness or completeness, or the interest of the county, was a test of the existence of the power of the board, not a condition precedent to the exercise of a power granted."

It is also said that counties having an interest were constituted a class, and only members of the class could have exercised the power conferred by the code sections. We think the distinctions made are not substantial. No matter how you may designate the interest of the county or the condition of the railroad, they were facts which bore the same relation to the power of the board of commissioners of Stanly County, as the facts in the cited cases bore to the power of the officers the exercise of which was sustained. It is indifferent whether you call the facts which were to be ascertained tests of power or conditions precedent or marks of a class. They were something which were to exist prior to the exercise of the power, and the existence of which the law imposed on the board of commissioners the duty to ascertain.

Decree affirmed.

KEAN *v.* CALUMET CANAL AND IMPROVEMENT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 8. Argued January 9, 12, 1903.—Decided May 4, 1903.

The common law, as understood by this court, and the local law of Indiana as to the effect of conveyances of land bordering on non-navigable waters are the same.

Where the State of Indiana acquired land from the United States under the Swamp Land Act of September 28, 1850, the patent describing the whole of certain fractional sections enumerated and bordering on non-navigable water between Indiana and Illinois, it acquired all the land under water up to the line of the State, such being the local law of Indiana. The making of a meander line has no certain significance and does not necessarily import that the tract on the other side of it is not surveyed or will not pass by a conveyance of the upland shown by the plat to border on the lake. *Hardin* v. *Jordan*, 140 U. S. 371; *Mitchell* v. *Smale*, 140 U. S. 406, followed.

THE case is stated in the opinion of the court.

Mr. William P. Fennell for plaintiffs in error.

Under section 2396, U. S. Rev. Stat., the original survey of 1834 did in fact and in law stop at the "water course."

A survey made by proper officers of the United States and confirmed by the Land Department cannot be shown to be inaccurate by collateral attack in the courts. *Russell* v. *Maxwell Land Grant Co.*, 158 U. S. 253.

The fact that the survey under which the patents issued was contested at every step by the interested parties and was finally decided after six months' consideration by the Secretary of the Interior affirming the decision of the land office affords strong evidence of its correctness and honesty. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273.

Wolf Lake must be taken as a whole, not in sections. It is a lake between two States.

This case is identical in law and in fact with *Hardin* v. *Jordan*, 140 U. S. 379, only the rule of property is different in In-

diana from what this court assumed to be the law in Illinois. *State* v. *Portsmouth Savings Bank*, 106 Indiana, 459.

The defendant in error must recover on the strength of its own title, just as in *Hardin* v. *Jordan*.

By reference, a plat of a section becomes a part of the conveyance, as much so as if it had been copied into the patent deed. *Piper* v. *Connelly*, 108 Illinois, 646; *Louisville & Nashville Railroad Co.* v. *Koelle*, 104 Illinois, 455; *McCormick* v. *Huse*, 78 Illinois, 363, citing *McClintock* v. *Rogers*, 11 Illinois, 279.

If defendant in error has not the paramount title to the land in question it is a mere intruder without title.

But the success of appellant in this case does not depend upon a construction of the swamp land act of September 28, 1850. Whether or not that act operated as a grant *in præsenti* to the various States of all the swamp land within their borders is not the question before this court, unless it finds also that the title passed to the appellees as riparian owners, because if appellees have no title to the water, they are mere intruders, and as to them, the patents issued under the new survey are conclusive "that the lands were of the character which by the patents they were represented to be." *Wright* v. *Roseberry*, 121 U. S. 488; *Eberhardt* v. *Hogaboom*, 115 U. S. 67. All presumptions are to be indulged in support of proceedings upon which a patent is issued, and the patent is not open to collateral attack in an action of ejectment or to quiet title. *Eberhardt* v. *Hogaboom*, 115 U. S. 67; *The Iowa Railroad Land Company* v. *Antoine*, 52 Iowa, 429.

Riparian rights have nothing to do with the title to land under the water. *Diedrich* v. *The N. W. Ry. Co.*, 42 Wisconsin, 262.

It was evidently the intention of both the National and state governments to convey the border lands to the edge of the pond, and according to the general rules of conveyancing if there is a discrepancy between the meander line as indicated on the map and the actual water line, the natural monument which was intended by the parties to be the boundary, would be the boundary and not the artificial meander line.

Nothing could be clearer than that the Indiana Supreme Court has held in this case that the deeds of the border lands did not convey the bed of the lake to defendant in error. And the court is not the less explicit upon the question of riparian rights. *State of Indiana* v. *Milk*, 11 Fed. Rep. 389; *Boorman* v. *Sunnuchs*, 42 Wisconsin, 233; *State* v. *Gilmanton*, 9 New Hampshire, 461; *Seaman* v. *Bis*, 24 Illinois, 521; *Fletcher* v. *Phelps*, 28 Vermont, 257; *Mansur* v. *Blake*, 62 Maine, 38; *Wheeler* v. *Spinola*, 4 New York, 377; Angell on Water Courses, section 41; *Paine* v. *Wood*, 108 Massachusetts, 160; *Diedrich* v. *North-Western Ry. Co.*, 42 Wisconsin, 248.

The action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings where by the rules of law the legal title must prevail. *Johnson* v. *Towsley*, 13 Wallace, 83; *Warner* v. *Van Brunt*, 19 Wallace, 653; *Shepley et al.* v. *Cowan et al.*, 91 U. S. 340; *Moore* v. *Robins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Vance* v. *Van Brunt*, 101 U. S. 519; *United States* v. *Schurz*, 102 U. S. 401; *Smelting Company* v. *Kemp*, 104 U. S. 646; *State* v. *Smelting Company*, 106 U. S. 447; *Quinn* v. *Conlon*, 104 U. S. 421; *Baldwin* v. *Stark*, 107 U. S. 465; *Cornell* v. *Lammers*, 21 Fed. Rep. 200; *Cragin* v. *Powell*, 128 U. S. 593; *Gazzam* v. *Lessee of Elam Phillips et al.*, 20 How. 374.

Land cannot pass as appurtenant to land.

In *Child* v. *Starr*, 4 Hill, 396, it is held: "A conveyance of one acre of land can never be made by any legal construction to carry another acre by way of incident or appurtenance to the first." Such is the doctrine laid down in 2 Met. 147; 8 Met. 260; 10 Pet. 25; 15 John. 447.

If this were an action of ejectment it would be barred by the statute of limitation on account of the twenty years' adverse possession. *Vandugan* v. *Hepner*, 45 Indiana, 589. But this being a suit to quiet title is barred by the fifteen years' statute. *Caress* v. *Foster*, 62 Indiana, 145; *Milner* v. *Hyland*, 77 Indiana, 458.

That unnavigable lakes and ponds have always had a legal status distinguished from swamp lands, see Huberus, Book 2, tit. 1, par. 25, p. 104; 1 Huber. Book 2, tit. 1, par. 25, p. 104;

Roman Law, Digest, Lib. 41, tit. 1, De aq. A. R. D., section 12; Callistratus, Lib. 2, Institutes; Ulpian, Digest, Lib. 43, tit. 14, sec. 4; French Law, section 1566, arts. 556, 558, Code Civ.; Traite du Domaine Publique Français; Treatise of Proudon & Dumay on the Public Domain of France, Book 4, § 1566; Barrett's Code Napoleon, § 558; German Law, Frederican Code, § 35, Book 1, art. 7, p. 45; Bracton, Ed. 14, 1569, Book 2, chap. 2, p. 2, fol. 9; Fleta, Lib. 3, chap. 2, §§ 8, 9; Lib. 3, chap. 2, p. 8; Grotius, Lib. 2, chap. 3, §§ 9, 16; chap. 8, § 12; 1 Huberus, 123, § 33, and p. 104; Roman Civil Law, Dig. Lib. 41, tit. 1, § 16; Heinnecius Jus. Nat. & Gen. Lib. 1, chap. 9, § 25; Heinnecius Elementa Juris. Lib. 2, tit. 1, § 358.

Mr. Frederick S. Winston, with whom *Mr. James F. Meagher*, *Mr. Silas H. Strawn* and *Mr. G. E. Hamilton* were on the brief, for defendant in error.

I. The Supreme Court of Indiana, having held that all of the land involved in this suit was in fact included in the survey of 1834–35, this court will not disturb that finding of fact. *Gardner* v. *Bonestell*, 180 U. S. 362; *Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658; *Hedrick* v. *A., T. & S. F. R. R.*, 167 U. S. 673; *Republican River Bridge Co.* v. *Kansas Pac. R. R.*, 92 U. S. 315.

The Supreme Court of Indiana, not only in the opinion in the case at bar, but also in the opinion of *Kean* v. *Roby*, 145 Indiana, 221, has held, *as a matter of fact*, that all of the land in question was surveyed by the Federal Government in 1834–35.

II. All of the land in question having been included in the survey of 1834–35, the United States having conveyed it all under that survey to the State of Indiana in 1853, and defendant in error holding under mesne conveyances from the State, by the same description, the survey of 1875 was void, and plaintiffs in error acquired no rights thereunder, as held by the Supreme Court of Indiana in *Kean* v. *Calumet Canal & Improvement Co.*, 150 Indiana, 699; *Kean* v. *Roby*, 145 Indiana, 221; following *Tolleston* v. *State*, 141 Indiana, 197, and as held by this court in *Hardin* v. *Jordan*, 140 U. S. 371, and *Mitchell* v. *Smale*, 140 U. S. 406. See also *Davis* v. *Wiebold*, 139 U. S. 507.

The facts in the case at bar are much more favorable to the defendant in error than were the facts in the *Hardin* and *Mitchell* cases to the prevailing party in those cases. Here we have a finding by the Supreme Court of Indiana that, as a matter of fact, all the land in question, whether in the bed of the lakes or elsewhere, was actually surveyed in 1834–35. More than that, the defendant in error in our case holds under a patent from the Federal Government all the land in question, made pursuant to and after the passage of the swamp act in 1850, while Hardin holds under a patent issued by the Government in 1841, prior to the passage of the swamp act. In this case, also, there is no question of any interest of the State or of the United States in and to the land in question. And that is just as true with respect to the land in the beds of Wolf Lake and Lake George as it is with respect to the upland. On this point see further, *Moore* v. *Robbins*, 96 U. S. 530; *Smelting Co.* v. *Kemp*, 104 U. S. 640; *Wright* v. *Roseberry*, 121 U. S. 488; *Doolan* v. *Carr*, 125 U. S. 618.

We therefore say that the cases cited by the plaintiffs in error, upon the proposition that the decision of the Secretary of the Interior is *res adjudicata*, are not in point.

III. The rights of the owners of land bordering on inland non-navigable lakes are settled by the law of the State wherein the land lies.

This principle has been so frequently laid down by this court that we believe any extended comment superfluous. Notwithstanding the difference of opinion in the *Hardin* and *Mitchell* cases upon other points, the court has always been unanimous on this question.

Since the decisions in the *Hardin* and *Mitchell* cases this court has repeatedly reaffirmed that doctrine, particularly in the cases of *Lowndes* v. *Huntington*, 153 U. S. 1, 19; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 363.

IV. What then is the law of the State of Indiana respecting non-navigable lakes, and particularly respecting Wolf Lake and Lake George?

In *Ross et al.* v. *Faust et al.*, 54 Indiana, 471, decided in

1876, the court held that the title of riparian proprietors on White River, in said State, extended to the thread of the stream, regardless of the facts that the survey lines of the United States surveyors meandered the banks and did not include the bed thereof, and that such bed was not, in terms, sold to, nor paid for by, purchasers of the lands bordering on such river. See also *Ridgway* v. *Ludlow*, 58 Indiana, 248; *Edwards* v. *Ogle*, 76 Indiana, 302; *State* v. *Portsmouth Savings Bank*, 106 Indiana, 435; *Tolleston Club of Chicago* v. *State*, 141 Indiana, 197; *State of Indiana* v. *Milk*, 11 Fed. Rep. 389; *Stoner* v. *Rice*, 121 Indiana, 51; *Brophy* v. *Richeson*, 137 Indiana, 114; *Tolleston Club of Chicago* v. *Clough*, 146 Indiana, 93; *Kean* v. *Roby*, 145 Indiana, 221.

It appears therefore to be the settled law in the State of Indiana that, where an inland non-navigable lake covers a subdivision of land and the government survey designates the dry land in such subdivision as a fractional subdivision, or lot, the purchaser from the Government of such subdivision or lot takes the title to all that portion of the bed of the lake contained within the subdivision. That is to say, he takes as a riparian owner, his title includes, and he owns, the land beneath the lake far enough beyond the meander line and water's edge to make out the full subdivision in which his land is so situated. The decision in this case is the latest expression of the Supreme Court of that State, and is in no sense *dictum*. *Wade* v. *Travis County*, 174 U. S. 499. See also *Leffingwell* v. *Warren*, 2 Black, 599; *Fairfield* v. *Gallatin County*, 100 U. S. 47.

V. If the common law of Indiana were as found by this court, in *Hardin* v. *Jordan*, to be the common law of Illinois, then the defendant in error, as a riparain owner of bordering lands, owns to the center of the lakes, and, consequently, all of the land in controversy.

For the sake of the argument, let us assume, contrary to the fact, that the survey made in 1834–35 of township 37 north, range 9, and township 37 north, range 10, did not include Wolf Lake and Lake George. Then we submit that, under the rule of the common law, as stated by this court in *Hardin* v.

Jordan, defendant in error, as the owner of the land bordering on these lakes, would take to the center thereof. *Forsythe* v. *Smale*, 7 Biss. 201; *Fuller* (*Hardin*) v. *Shedd*, 161 Illinois, 462.

VI. Counsel for plaintiffs in error would impose upon this court the burden of examining the record to ascertain whether or not the defendant in error in the prosecution of this suit is barred by the statute of limitations of the State of Indiana. This was a question of fact, which has been decided adversely to the plaintiffs in error, both by the *nisi prius* and the Supreme Courts of the State of Indiana.

If this court would go into the record to determine this question, its conclusion must necessarily, we submit, affirm that of the state courts. A jury was waived, the case tried before the court, and the finding and judgment of the trial court having been affirmed by the state Supreme Court, the question as to whether or not the defendant in error complied with the statute of limitations of the State of Indiana cannot be here reviewed. It is not a Federal question. *Gardner* v. *Bonestell*, 180 U. S. 362, 370; *River Bridge Co.* v. *Kansas Pacific Ry. Co.*, 92 U. S. 315; *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Hedrick* v. *A., T. & S. F. R. R.*, 167 U. S. 673; *Murdoch* v. *City of Memphis*, 87 U. S. 590.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding to quiet title brought by the Calumet Canal and Improvement Company in a court of the State of Indiana. The company got judgment, which was affirmed by the Supreme Court of the State, 150 Indiana, 699, and the case is brought here by writ of error. The land in question is land bordering on and extending under certain non-navigable water up to the state line, the Illinois side of which was the subject of the decisions in *Hardin* v. *Jordan*, 140 U. S. 371, and *Mitchell* v. *Smale*, 140 U. S. 406. But the facts in this case are somewhat different. The Calumet company claims title through mesne conveyances from the State of Indiana. The State of Indiana got its title under the Swamp Land Act, September 28, 1850, c. 84, 9 Stat. 520; Rev. Stat. §§ 2479 *et seq.*, and patents

of the United States dated 1853, purporting to be in pursuance of that act, and referring to the official plat of survey, which was made in 1834. The patent set forth describes "the whole of fractional sections" enumerated and bordering on the water, in which sections lies the disputed land. The State afterwards conveyed by the same description. It is not denied that the company got the land above the water line, as shown in the plat referred to, but it is denied that it got more. The water has been receding and drying up, so that the question is important. The defendant set up a later survey in 1875 of the land which was covered by water in 1834, and is covered, to a less extent, still, and patents from the United States in pursuance of the same, for tracts below the original water line. They deny that the State ever owned this land, or, if it did, that it conveyed it, and they allege the later survey to be conclusive.

On general principles of conveyancing the State would have acquired the land in controversy here by a conveyance from the United States describing the upland according to the survey, because the local law of Indiana and the common law as understood by this court are the same, so far as this case is concerned. *Stoner* v. *Rice*, 121 Indiana, 51; *Hardin* v. *Jordan*, 140 U. S. 371. The case is stronger if the land passed under the Swamp Land Act, as has been held by the state court with regard to this and similar patents. *Mason* v. *Calumet Canal & Improvement Co.*, 150 Indiana, 699; *Kean* v. *Roby*, 145 Indiana, 221; *Tolleston Club of Chicago* v. *Clough*, 146 Indiana, 93; *Tolleston Club of Chicago* v. *State*, 141 Indiana, 197. See *Mitchell* v. *Smale*, 140 U. S. 406, 414.

The making of a meander line has no certain significance. *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 52. It does not necessarily import that the tract on the other side of it is not surveyed or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Mitchell* v. *Smale*, 140 U. S. 406, 414; *Horne* v. *Smith*, 159 U. S. 40, 43; *Grand Rapids & Indiana Railroad* v. *Butler*, 159 U. S. 87, 93. In this case its immediate import was only to indicate the contour of the lake. It would

seem, to be sure, that the settled understanding of the land department has been that in cases like the present the meander line marked the limit of the grant. But probably the cases are comparatively rare in which that understanding was acted on by an attempt subsequently to convey the land under water on the further side of the line at dates before the transactions with which we have to deal. The title to such land was not considered of much importance in the early days or worth the trouble of an independent survey. See *Newsom* v. *Pryor*, 7 Wheat. 7, 11. The United States was more anxious for settlers than for revenue from that source. It is not necessary to consider how we should decide the case with our present light if the question were a new one. It is not new. For twelve years the decisions in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* have stood as authoritative declarations of the law. Probably in most cases the statute of limitations has cured the defects of title which those cases may have shown. Meantime many titles must have passed on the faith of those decisions. The United States can meet them by the form of its conveyances. It seems to us that it would be likely to do more harm than good to allow them to be called in question now.

It is said that the land under water was not embraced in the survey of 1834. It would seem from the plat and the field notes that the sections and dividing lines were clearly marked off and posts set. The case is similar to *Kean* v. *Roby*, 145 Indiana, 221, where the survey was pronounced sufficient. No difficulty was felt on the ground that the survey did not cover the submerged land in *Hardin* v. *Jordan*, 140 U. S. 371. But furthermore, the land was selected as "swamp and overflowed lands" by the State. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so it was confirmed to the State by the act of March 3, 1857, c. 117, 11 Stat. 251; Rev. Stat. § 2484. The confirmation encounters none of the difficulties of cases like *Stoneroad* v. *Stoneroad*, 158 U. S. 240. The land surrounding the water, at least, was surveyed, so that the identification of the submerged portion was absolute. We are of opinion that the State of Indiana got a title to the whole land in dispute.

If the State of Indiana got a title, it gave one. There is not much controversy on this point. We should follow the decision of the state court in this case so far as this question is concerned, if there was no other evidence of the state law. But the law of Indiana is shown by the other cases cited above to be clear on this point.

The resurvey by the United States in 1874 does not affect the Calumet company's rights. As the United States already had conveyed the lands, it had no jurisdiction to intermeddle with them in the form of a second survey. *Hardin* v. *Jordan*, 140 U. S. 371, 400; *Grand Rapids & Indiana Railroad Co.* v. *Butler*, 159 U. S. 87, 94, 95; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289.

Of course, we shall not undertake to revise the finding of the state courts that the statute of limitations had not run in favor of the plaintiffs in error, and that, if any one is to profit by it, the Calumet company would prevail.

Judgment affirmed.

MR. JUSTICE WHITE, with whom concurs MR. JUSTICE MCKENNA, dissenting.

The importance of the question which this cause involves and the far reaching and injurious consequences which, in my opinion, must arise from the continued application of what seems to me to be the erroneous theories upon which it is now decided, not only constrain me to dissent, but cause me to state fully the reasons by which I am controlled.

The controversy is between opposing claimants to lands once a part of the beds of certain non-navigable bodies of waters, styled lakes—and which shall be hereafter referred to by such designation. Both parties asserted title under patents of the United States.

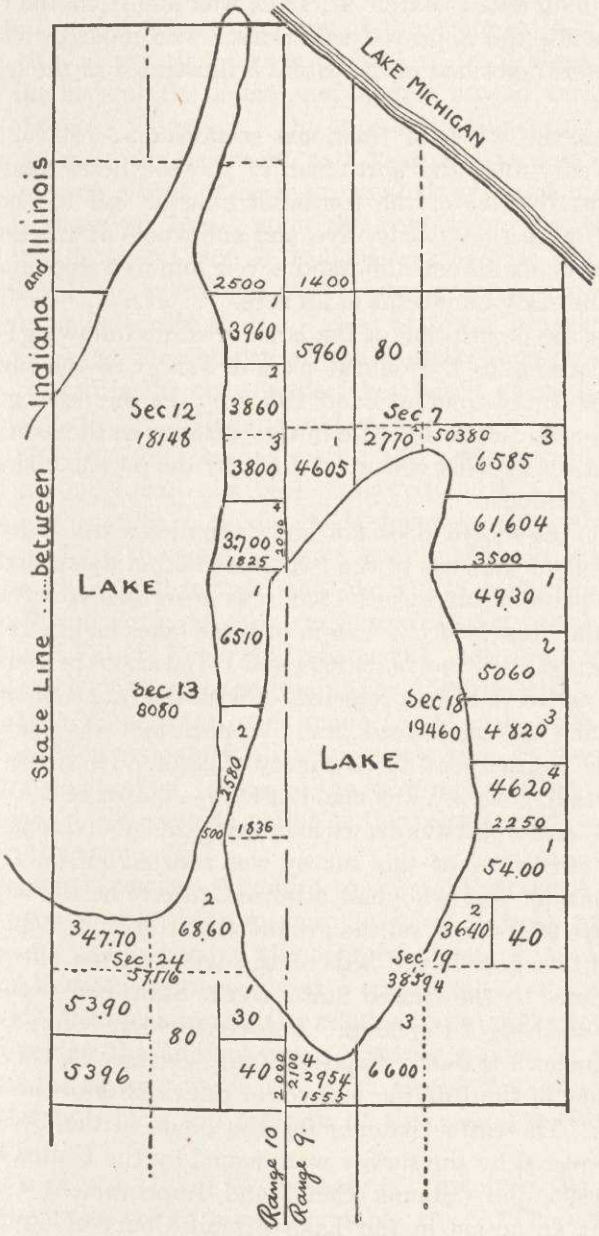
In 1834 surveys were made by the United States of townships 37 north, in ranges 9 and 10 west, second principal meridian, lying in Lake County, in the extreme northwestern portion of the State of Indiana. Township 37 in range 9 was bounded on the west by township 37 in range 10, and the latter was bounded on the west by the State of Illinois. From

the eastern boundary of township 37 in range 10 there was less than a mile intervening to the Illinois boundary on the west. In consequence, the sections or fractional sections appearing on the plat of survey of that township were only the extreme easterly tier of sections, being those numbered 1, 12, 13, 24, 25 and 36. A copy of a portion of the government plat of survey of the townships named, in which are embraced the lands whose title is in dispute, is inserted for convenience of reference on opposite page.

The easterly of the two bodies of water, lying partly in both townships, is known as Lake George or Mud Lake. The westerly body is called Wolf Lake. As shown by the plat, the lines of survey were not actually run across the water of the lakes, and, consequently, no attempt was made to subdivide the lands in the then beds of the lakes into legal subdivisions. The lines of survey were in fact run around the rim of each lake, and the fractional lots resulting from the meander line were given numbers, as was customary in such cases.

The land about the margin of the lakes was very flat, and the average depth of water at the time of the surveys was conjectured to be about five or six feet.

None of the fractional lots abutting on the two lakes in the townships in question had been disposed of by the United States prior to the passage of the swamp land act of September 28, 1850. Thereafter, the State of Indiana transmitted a list of lands which it desired should be patented to the State under said act, and the list embraced the portions of the townships in which Wolf Lake and Lake George were situated. This list, however, referred only to entire sections, took no note of the plat of survey and made no reference to the fractional lots abutting on the lakes or the other subdivisions of sections. In the approved list of selections made by the Secretary of the Interior the general description of the lands as given in the state lists was followed, except that where by the meander line shown on the plat of survey it appeared that a section was made fractional, the section was termed a fractional section, and the quantity of land shown on the plat to be contained in each minor subdivision or fractional section was specifically stated.


LAKE MICHIGAN
State Line ....between Indiana and Illinois
Sec 12
18148
Sec 7
LAKE
Sec 13
8080
Sec 18
19460
LAKE
Sec 24
Sec 19
Range 10
Range 9.
2500
1400
3960
5960
80
3860
3800
4605
2770
50380
6585
61.604
3500
3700
1825
4930
6510
5060
4820
4620
2250
54.00
2580
1836
347.70
68.60
3640
40
57.116
38394
53.90
80
30
5396
40
2954
1555
6600

A patent dated March 24, 1853, was issued to the State of Indiana for the approved selections. The mode in which the lands were described in the patent is illustrated in the following excerpt:

"Also, the whole of fractional sections one, twelve, thirteen and twenty-four, the north half of the southeast quarter, the southeast quarter of the southeast quarter and the northeast quarter of section twenty-five and the whole of fractional section thirty-six all one thousand seven hundred and ninety-one acres and sixty-hundreths of an acre. . . ."

After the description of the lands was the following:

"According to the official plats of survey of the said lands returned to the General Land Office by the surveyor general."

Soon after acquiring title in this manner to the border lots, the State of Indiana conveyed them, by the plat numbers, to private individuals.

While the record does not show the causes which led to the drying up of the beds of the two lakes within the meander lines on the plats of surveys of 1834, it is nevertheless certain that about the year 1874 the waters of these lakes had in great part disappeared. In the years 1874 and 1875 various persons settled on the uncovered lands referred to, with the intent of acquiring title under the homestead law. Application was made to the Interior Department for a survey thereof. In virtue of this application, a survey was made in 1875—known as the Walcott survey—and a plat was drawn exhibiting the subdivisions thereof. The confirmation of this survey was resisted in the Land Department by one who had acquired title to border lots from the State of Indiana, on the ground that the United States had no land to survey in the beds of the lakes, as the effect of the conveyance by the United States to the State had been to pass title to the beds of the lakes. This controversy before the Land Department was finally disposed of on February 23, 1877, by the Secretary of the Interior, in favor of the validity of the Walcott survey. Thereafter patents for the lands in the beds of the lakes covered by the survey were issued by the United States.

In 1895, the Calumet Canal and Improvement Company brought an action in the Lake Circuit Court of Indiana, to

quiet its asserted title to certain of these border lots and its alleged title as riparian owner to land in front thereof, once part of the beds of the lakes, and, upon a second trial of the action, obtained judgment. On appeal, the Supreme Court of Indiana affirmed the judgment, and the cause was then brought to this court on a writ of error prosecuted by claimants under the Wolcott survey, based upon the contention that the decision of the Supreme Court of Indiana was against a title and right specially set up "under the statutes, patents, deed of conveyance and authority of the United States of America." In deciding against the validity of the Wolcott survey and the patents to land in the beds of the lakes based on such survey the Supreme Court of Indiana said (p. 699):

"In 1875, certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters; and it is through this last survey, and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby*, 145 Indiana, 221. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, were wholly invalid, and, consequently, that appellee's title, as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases."

It becomes necessary, therefore, to refer to the case of *Kean* v. *Roby*, upon which the Supreme Court of Indiana rested its conclusion. As, moreover, the comprehension of the doctrines involved in that case necessitates a consideration of the course of previous decisions in Indiana relative to the subject involved, I shall review the Indiana cases preceding *Kean* v. *Roby*, in order, as far as may be, to an exact elucidation of the legal principles by which the decision of this case was below controlled.

Ross v. *Faust*, (1876) 54 Indiana, 471, involved the title to land under the bed of a non-navigable river. The land abutting on the stream had been surveyed and the stream had been

meandered. The question was whether patents of the United States conveyed land under water within the meander lines. Determining the construction of the patent solely by reference to the laws of the United States, the court decided that, as the stream was in fact non-navigable, the holder of the patent to the border lots had title to the center of the stream despite the meander line.

Ridgway v. *Ludlow*, (1877) 58 Indiana, 248, involved a controversy respecting the ownership of land once forming part of the bed of a non-navigable lake. The land bordering on the lake had evidently been acquired from the United States and the lake had been meandered. The rule in *Ross* v. *Faust* was applied, the court saying:

"We can see no difference in principle in this rule, whether applied to non-navigable rivers or non-navigable lakes, when they are within the Congressional surveys."

Edwards v. *Ogle*, (1881) 76 Indiana, 302, presented the following state of facts: On a plat of survey of a section of land, which was in great part covered by the waters of a pond, the banks of the pond were shown as meandered, but the lines of the sections, half sections and quarter sections were extended across the pond by dotted lines. A fractional portion of the southwest quarter, represented as containing 39 acres—the dry land outside of the meander—was patented by the United States in 1845. In 1851 the United States, under the swamp land act, executed to the State of Indiana a patent for the east half of the southwest quarter, being within the meander line. In 1858 the United States issued a patent to one Ogle for the west half of the same quarter section. Edwards, as owner of the thirty-nine acre tract, asserted a right to the center of the pond, which if allowed would have absorbed the land claimed by Ogle. Edwards was confined to the actual quantity of land specified in the patent. *Ross* v. *Faust* was distinguished, the court remarking of that case: "The bed of the river had not been surveyed as a part of the public domain, but, on the theory that White River was a navigable stream, the government surveys had been terminated at the margin thereof."

State v. *Portsmouth Savings Bank*, (1886) 106 Indiana, 435,

459, involved the question whether conveyances of fractional lots bordering on Beaver Lake, in Newton County, Indiana, passed title to land under the bed of the lake. The controversy was between the State claiming the bed of the lake and certain private individuals who deraigned title from the State, claiming that as the State had transferred to them rights derived under patents from the United States, their rights were coterminous with the patent and extended across a meander line to the center of the lake. Beaver Lake was a body of water covering about seventeen thousand acres of land, and averaging from five to seven miles in length and from two to four miles in width. The border lands had been surveyed in 1835 by authority of the United States, and were subject to private entry. In making the survey the same was extended around the lake and a meandering line established. As a necessary result of the meander line fractional lots were shown on the plat around the margin of the lake. Under the swamp land act the border lands, by the government subdivisions, were selected by the Secretary of the Interior and patented to the State of Indiana.

The Supreme Court of Indiana declared that it was not necessary "to determine whether the patents of the United States to the State for the fractional lots bordering upon and surrounding the lake, being grants from one government to another, by their own force carried the bed of the lake." Reviewing previous decisions of this court, construing the swamp land act, the Indiana court held that that act was a grant *in præsenti*. It was further held that, although the bed of Beaver Lake was not embraced in the list of selections made by the State, yet by the acts of its officials, immediately after the grant to it of the border lands, the State had treated the bed of the lake as swamp and overflowed land, and constructively selected the same, and that an act of Congress, approved January 11, 1873, 17 Stat. 409, releasing and quitclaiming the bed of Beaver Lake to the State of Indiana, did not operate as a grant, but simply as a confirmation of the prior selection, thereby perfecting the title as indefeasible.

The court came next to consider the claims of the grantees of the State of border lots, described in the patent from the

State according to the plat of survey which had been made by the United States. It was declared that state patents for border lots must be construed with reference to the power conferred upon state officials by the state law, and not by the rule, which would govern a conveyance by a private individual; and applying this rule, it was held that the patents for border lots carried to the grantees "no more of the swamp and overflowed lands than were included in the several surveyed subdivisions *bounded by the lake*."

Stoner v. *Rice*, (1889) 121 Indiana, 51, was a controversy between owners of border lots as a meandered non-navigable lake claiming under patents of the United States and patentees of the United States under a subsequent survey of the bed of the lake. Despite its previous ruling in *Ridgway* v. *Ludlow*, *supra*, it was now held that the rule giving a riparian owner of fractional lots abutting on a meander line title to the thread or center of the stream, was not applicable. The case was decided upon what the court assumed to be the law of the United States governing surveys of the public domain, the court said (p. 54):

"The true doctrine to apply, in the disposition of such land as is covered by the body of such lakes, we think, is that the government in making surveys included in such surveys all the land within the district surveyed, and if there was a lake or large pond which covered a part of a subdivision, it was meandered out, and the dry land in such subdivison designated as a fractional subdivision, or lot; that in the purchase of such fractional subdivision, or lot, the purchaser took title to it as a riparian owner, with the right to the land as the water receded within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision, or lot. The authorized survey divided all the land within the district into subdivisions, and if, by reason of water upon a tract of the land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision, or lot, and although thus described the sale passed title to the whole subdivision."

The court declared that the doctrine thus announced by it was not in conflict with its previous ruling in *Edwards* v. *Ogle*.

Brophy v. *Richeson*, (1894) 137 Indiana, 114, was a contest between the patentees of a fractional tract of dry land termed the southeast fractional quarter of a certain section, lying north and east of a meandered lake, and the patentees under a later survey made by the United States of the bed of the lake. It was held—following *Stoner* v. *Rice*—that the claimant under the first patent took title to all the land within the quarter section, whether dry or covered by the waters of the lake.

Tolleston Club v. *State*, (1894) 141 Indiana, 197, was an action brought by the State of Indiana for the recovery of lands within the meander lines of a United States survey. The claim was that the State had acquired title to the lands within the meander upon selections made under the swamp land act of certain land, for which patents of the United States had been issued to the State of Indiana in 1853. Although the State had conveyed the border lots which she had acquired from the United States, the theory of the claim of the State was that, despite this conveyance, she remained the owner of and was entitled to recover the land within the meander, because it was deemed, in accordance with the ruling in the *Portsmouth Bank* case, (involving Beaver Lake,) that the State, in transferring the border lots, by their designation on the government plat of survey, had retained to herself and not conveyed her title to the land under water. The defendants asserted title derived from the United States under patents issued subsequent to 1870, based upon a survey made of the bed of the water by reason of an act of Congress, which is excerpted in the margin.[1]

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[1] Act approved July 1, 1870, 16 Stat. 187.

Chap. CXCIX.—An act in relation to certain unsold lands in the counties of Porter and Lake, in the State of Indiana.

Whereas there is lying along the Little Calumet River, in the counties of Porter and Lake, in the State of Indiana, a body of lands supposed to contain about four thousand acres, which has never been sold or surveyed, and which was described in the original government surveys as impassable morass; and whereas the Calumet Draining Company has been organized under the laws of said State, for the purpose of draining the valley of said river including said morass: Therefore,

It suffices to remark that it was held that, although the United States survey showed a meander line and fractional lots or sections thereon, that this meander line, under the laws of the United States, was not a boundary, because, under said laws, its sole purpose was, not to limit the survey in any way, but simply to indicate how much dry land there was in the subdivision purchased. Consequently, it was determined that the land, both dry and wet, should be treated as having been wholly surveyed, because the lines of survey might be protracted across the meander so as to make complete surveyed sections, embracing both the dry and the wet land. The enumeration in the plat of the quantity of land contained in the subdivisions of the sections was considered as immaterial, and the doctrine of *Stoner* v. *Rice* was applied.

Whilst the claims of the patentees under the subsequent United States survey of the land within the meander was therefore rejected, and the act of Congress directing the survey was decided to be void, it was yet held that, as the State must recover upon the strength of her own title, she was not entitled to judgment for any land within the meander lines, because the grants made by the State of the fractional lots passed title to the legal subdivision beyond the meander lines, upon the theory of survey above noticed and the controlling effect of the decision in *Stoner* v. *Rice*. A petition for rehearing was filed on behalf of the State. An opinion denying such rehearing is reported in 141 Indiana, 214. The principal contention on behalf of the State was that "the court erred in holding that the land in controversy had been surveyed either by the government of the United States, or by the State of Indiana, at the time of the

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said unsold lands shall be subject to a lien under the laws of the State of Indiana for its proper proportion of the cost of such drainage, and such lien may be enforced against said lands in the same manner and to the same extent as if the said lands were owned by private persons: *Provided*, That no claim shall be held to exist against the United States for such drainage.

SEC. 2. *And be it further enacted*, That said lands may be surveyed and sold to the highest bidder, under the directions of the Secretary of the Interior, subject to said lien.

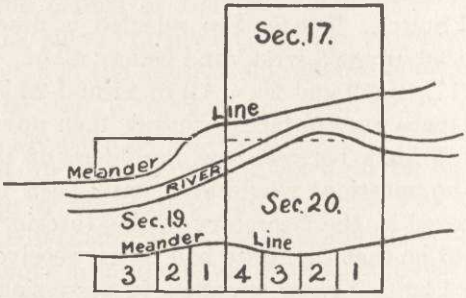
sale of such border lots by the State." The court, however, observing that this contention was dangerous ground for the State to stand upon, considered at length the provisions of sections 2395 and 2396 of the Revised Statutes of the United States, and concluded as follows:

"The land in controversy was therefore surveyed into sections, as provided by law, by the United States government surveyors, in 1834. But even if we were mistaken in this, it would, as we have said, be a dangerous contention for appellee to undertake to show that such survey was not made. The swamp land act of 1850, under which the State claims title, requires that the lands should be selected, and the selections approved by the Secretary of the Interior, as swamp lands. The land in dispute consists of parts of surveyed sections of land, selected, approved and certified from the General Land Office of the United States. The land so selected is described as in 'township No. 36, range 8 west,' and being 'all of . . . [sections] 12, 15, 17, 18, 19 and 20. All of 21 and 22 [and] N. W. $\frac{1}{4}$ 23.' But if there were in fact no survey, then no such sections would exist, at least between the meanders of the Calumet River and so no selections would ever have been made by the State or approved by the Secretary of the Interior. The consequence would be that the State had never received title, and the unsurveyed lands having remained in possession of the general government, were correctly surveyed, and sold under the act of Congress of 1870. If, therefore, we should admit this main contention of counsel for appellee, the consequence would inevitably follow that the State had never acquired title to the land in dispute. We are satisfied, however, that the conclusions reached in the original opinion—that the lands were surveyed in 1834; that they were selected, and the selections approved, under the swamp land act of 1850; that the State, therefore, acquired good title under that act; and that the act of 1870, with the resurvey and sales thereunder, was a nullity—are all correct; and we are quite unable to understand why counsel should here insist upon a contention which, if agreed to, would cut the ground entirely from under their own feet."

The *Portsmouth Savings Bank* case was distinguished by

the statement that "Beaver Lake was a large body of water, of shallow depth, which had not been surveyed by the United States government."

The precise import of the doctrine which, following *Stoner* v. *Rice*, the court applied in the case just reviewed is so aptly portrayed in the case of *Tolleston Club* v. *Clough*, 146 Indiana, 93, that it is here noticed out of its chronological order. The plaintiff commenced his action to quiet title to land derived from the State through patents issued to the State by the United States under the swamp land act. The lands in controversy were part of those which were involved in the case of *Tolleston Club* v. *State*, *supra*. The exact situation of the lands is shown on the following plat which is reproduced from the opinion of the Supreme Court of Indiana:



To convey a clear conception of the situation and character of the land, a passage is here excerpted from the opinion in *Tolleston Club* v. *State*, *ub. sup.*:

"The lands claimed by the State are within the meander lines of the United States survey on each side of the Little Calumet River, being a tract about six miles in length and from about three quarters of a mile to about a mile and a quarter in width. In the original field notes of the survey the region is referred to as a 'lake,' while on the plat it is marked 'Impassable Marsh.' At the time of the United States survey, in 1834, the territory was completely covered with water, in which, outside the river proper, there was a heavy growth of cat tails, wild rice and other swamplike products."

The plaintiff, deriving title from the patents of the United States covering the fractional lots outside of the meander line, claimed to be the owner of the marsh land inside of the meander up to the thread of the stream marked on the plat as a river.

The court followed its ruling in *Tolleston Club* v. *State*, and said:

"It is plain that the lots described, being lot one and parts of lots two and three, in section 19, and lots one, two, three and four, in section 20, all extend north to the north section lines of their respective sections."

By this ruling the lots abutting on the meander were made to cross that line, embrace the marsh land lying between them and the river, and would have extended across the river, so as to include practically the entire river in those sections, except where in the sinuosity of the river it crossed the section line. As, however, the court found that the owner of the lots abutting on the meander had only claimed to the bed of the river, it limited his rights in consequence of the pleadings to that extent, thus preventing the acquisition of the entire section where the section line was beyond the bed of the river.

I now come to the case of *Kean* v. *Roby*, (1896) 145 Indiana, 221, upon the authority of which case the Supreme Court of Indiana affirmed the judgment of the trial court in the case at bar. *Kean* v. *Roby* was an action brought by the owner of lands abutting on Wolf Lake, to quiet her title to land once part of the bed of the lake. The plaintiff claimed title to the border lots as well as to the lake bed land by virtue of the survey made in 1834 and a patent from the United States to the State, made in 1853, under the swamp land act. The defendants claimed title under patents, based upon the Walcott survey of 1875, of lands once part of the bed of the lake. Despite the fact that on the plat of survey the lake was meandered and there were no sectional corners to which the lines could be protracted, the court held that the case was covered by the *Tolleston Club* decision, because it was deemed that the field notes showed that it would be possible to protract the lines so as to make regular and complete sections,

and it was therefore held that the owner of the border lots was entitled to the adjacent land under water as well.

It therefore results that the doctrine embodied in the case of *Kean* v. *Roby*, and the previous cases commencing with *Stoner* v. *Rice*, was the rule applied in the decision of the case now under review, and by which the beds of the lakes were given to the owner of the border lots.

All the cases which have been recapitulated, I submit, divide themselves into two classes, the first, those prior to *Stoner* v. *Rice;* the second, the case of *Stoner* v. *Rice*, and those subsequent to it, including the ruling therein made. Without pausing to ascertain whether the cases in the first class are reconcilable with each other, or those in the second class can be made to harmonize with those in the first, one thing it seems to me is apparent: that is, that all the cases in both the classes, including the decision in the case at bar, indubitably held—

1. That the government of the United States owned the soil under all bodies of non-navigable water lying within the public domain of the United States, and that the title thereto remained in the United States until it had parted with it pursuant to the laws of the United States; and

2. That in determining whether the United States had parted with title to such lands the Indiana court always decided that question, not upon the controlling effect of any supposed rule of state or local law, but by what it deemed to be the proper construction of the laws of the United States governing the survey and disposition of the public domain.

The right of the defendants under patents of the United States, which they specially set up, having been denied, because it was conceived by the court below that no title vested in them under the laws of the United States, it would seem that the question arising for decision is this: Did the court correctly interpret the statutes of the United States?

This is a Federal question. But it is pressed that what title to the beds of the lakes passed to the State from the United States, either under the swamp land act or in virtue of the patents issued to the State, is to be determined, not by the law of the United States, but solely by the state or local law; hence it

is insisted the case must be decided by the law which is rightfully applicable to it and not by the law of the United States, which the Supreme Court of Indiana erroneously deemed was essential to its decision. If I entertained the opinion that the state or local law governed, and in consequence that this case was to be disposed of by considerations inherently local, I would, of course, be obliged to conclude that the controversy must be judged by that law which properly controlled it and not by the law of the United States, which was mistakenly applied by the lower court. In that view my mind would be driven to the conclusion that this case should be dismissed for want of jurisdiction, since here there is no authority to review the action of the state court in a cause inherently depending upon the state or local law. Nor would this result be changed because the defendants asserted rights to the beds of the lakes under patents of the United States issued subsequent to those relied upon by the plaintiff, as its ultimate source of title. This follows, since the claim of the plaintiff was that title had passed to it and out of the United States by the swamp land act or the patents issued prior to those upon which the defendants relied. Now, if the question whether the land claimed by both parties had passed to the plaintiff or its grantors, prior to the issue of the patents to the defendants, is to be determined solely by the state or local law, it would follow that a decision of the state court in favor of the right of the plaintiff involved only a conclusion of state or local law broad enough to sustain the judgment, wholly irrespective of the Federal rights asserted by the defendants, and also entirely without reference to the soundness of the reasoning by which the court had reached its all-sufficient and non-Federal conclusion. Before therefore coming to consider the correctness of the ruling of the state court concerning the United States law which that court deemed to be decisive, it becomes necessary for me to ascertain whether, as asserted, the question as to the extent of the title derived from the United States by the plaintiff or its grantors is to be determined by the state or local law.

The issue which first arises then is, by what law is the quantity of land which passed to the State under the statutes of the

United States and its patents to be determined, by the law of the United States which conferred on the State whatever rights it acquired or solely by the state or local law, which had no agency or influence in passing rights from the United States to the State? In solving this question it is at once conceded that there are two cases—decided by this court on the same day, one resting upon the other, and therefore virtually but one case—announcing the doctrine that where the United States has conveyed land bordering on the meander line of a non-navigable body of water the question of what rights in the land under water passed from the United States to its grantee is to be determined solely by the state or local law.

The cases referred to are *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, reported respectively in 140 U. S. 371 and 406. Both cases were actions of ejectment, and the judgments reviewed were rendered by the Circuit Court of the United States for the Northern District of Illinois. The plaintiff in each case was the owner, by mesne conveyances, under patents of the United States, based upon surveys made in 1834 of fractional lots abutting on the portion of Wolf Lake situated in the State of Illinois, and they claimed as such abutting owners title to land once forming part of the bed of the lake. The defendants asserted title to the lake bed lands upon the survey made in 1874 by the United States, and patents issued to them founded upon such survey. The trial court had held that the title of the owners of the border lots extended only to low water mark and found in favor of the defendants as to the land under water. The ground upon which the decision of the court reversing the trial court in both cases was based is shown in the following excerpts from the opinion in *Hardin* v. *Jordan*, pages 379, 380, 381 and 384:

"The government surveys made in 1834–35 upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake;' and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'Navigable lake,' although the fact

found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.

* * * * * * * *

"It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

* * * * * * * *

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois.

* * * * * * * *

"It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

* * * * * * * *

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

What was the law of Illinois with regard to such grants was

next considered, and it was determined "that the law of Illinois in this regard is the common law, and nothing else," and that the title of the owners of border lots on a non-navigable body of water extended to the middle of the water.

If the doctrine announced in the cases referred to is to be here applied, then, as I have said, there is an end to this case and the writ should be dismissed for want of jurisdiction, since in that view there is no substantial Federal contention in this record, for the reason, as I have previously remarked, that the decision of the state question would be broad enough to sustain the judgment without reference to the Federal rights asserted by the defendants. The doctrine, however, of *Hardin* v. *Jordan*, as it is given me to understand it, is not only unsound in reason but incompatible with many cases decided in this court prior to and since its announcement, and besides is in conflict with the legislation of Congress and the practice of the government from the beginning. Impressed with the correctness of these views, and entertaining the conviction that the enforcement of the doctrine will lead to the gravest consequences in the future, it is proposed to consider its correctness as an original question, before agreeing that its application in the case at bar is proper. If the result of my investigation be the conclusion that the state or local law should not be applied, contrary to the ruling in *Hardin* v. *Jordan*, I shall then proceed to ascertain what are the rights of the parties, when measured by the law of the United States. If that investigation develops that the court below erroneously interpreted the law of the United States, and therefore wrongfully denied the title of the plaintiffs in error, it will be left for me to consider whether it is my duty, under the principle of *stare decisis*, to give my assent to the legal wrong which, under the views stated, was below committed.

It is unnecessary to elaborately demonstrate the elementary proposition that the United States, under the Articles of Confederation, was the owner of the public domain, however acquired, and that, since the adoption of the Constitution, the United States had also possessed, in full proprietorship, the public domain, from whatever source its title has been derived.

The doctrine on the subject was summarized by Chancellor Kent, Com. vol. 1, p. 257, in the following language:

"Upon the doctrine of the court in *Johnson* v. *McIntosh*, (1823) 8 Wheat. 543, and *Fletcher* v. *Peck*, (1810) 6 Cranch, 142, 143, the United States own the soil as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and of all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual States."

The matter was aptly epitomized in *Irvine* v. *Marshall*, (1858) 20 How. 558, where it was said (p. 561):

"It cannot be denied, that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous to the public fisc, or in other respects most politic."

It is also elementary that land covered by water within the public domain of the United States is as much a part thereof as the dry land. Thus, in *Illinois Central R. R. Co.* v. *City of Chicago*, (1900) 176 U. S. 646, speaking through Mr. Justice Brown, it was said:

"We do not question the general principle that the word 'lands' includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in *Regina* v. *Leeds & Liverpool Co.*, 7 Ad. & El. 671, 685: 'Lands are not the less land for being covered with water.'"

But whilst the ownership of the United States, under the Confederation and under the Constitution, both of the dry land and that covered with water in the public domain, cannot be controverted, from the beginning it was conceded that the owner-

ship of the public domain did not carry with it navigable waters or the land constituting the beds thereof, as such waters were considered within the class of public waters to be forever devoted to the public use. This was recognized by a provision of the ordinance of 1787 for the government of the Northwest Territory, as follows:

"The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor."

And, early in the history of Congress, prior to the adoption in 1805 of a general system for the survey of the whole public domain of the United States, the same principle was expressed in the act of May 18, 1796, 1 Stat. 464, the ninth section of which act was as follows:

"SEC. 9. *And be it further enacted*, That all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways. And that in all cases, where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both."

And because navigable waters were thus from the beginning recognized as public highways and have ever since been then treated as sacredly devoted to the public use, they were always in principle excluded from the sales of the public domain. But the contrary rule has from the beginning prevailed as respected non-navigable waters, which have always been surveyed and sold and paid for. I shall take occasion hereafter in reviewing the legislation of Congress to demonstrate this fact, and therefore to point out that the statement to the contrary in the passage from the opinion in *Hardin* v. *Jordan*, which I have already quoted, must have been the result of confounding the general practice not to sell public waters with the universal practice to survey and sell non-navigable or private waters. No better illustration of the truth of this statement is required than is shown by this case, where the United States sold and

surveyed the beds of the non-navigable waters to the defendants below long after the grant of the border lots; and the same condition of things is evidenced by other of the Indiana cases which have been reviewed, and it is to be observed that in two of the cases the grant or direction to sell the land covered by non-navigable waters was made by special acts of Congress long after the border lots had been disposed of.

Doubtless as the result of the provisions treating navigable waters as public highways and from a consideration of the nature and extent of the powers vested by the Constitution in the Federal government and those reserved to the States, and by a consideration of the doctrine of public and private waters known to the common law, it was early decided and has been repeatedly reiterated that the navigable waters and the land under them belonged to the States—as well the new as the old—in virtue of their sovereignty, to be held in trust for their people subject to the power of Congress to regulate commerce. And in harmony with the principle just stated, it has been decided that such navigable waters and the land under them in the public domain of the United States within the Territories, while subject to be disposed of by Congress, under the trust for public use, were yet held by the United States to be transmitted to the new States to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original States. A list of the cases in which this doctrine is stated is appended in the margin.[1]

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[1] *Martin* v. *Waddell*, (1842) 16 Pet. 367, 410; *Pollard* v. *Hagan*, (1845) 3 How. 212; *Goodtitle* v. *Kibbe*, (1850) 9 How. 471; *Doe* v. *Beebe*, (1851) 13 How. 25; *United States* v. *Pacheco*, (1864) 2 Wall. 587; *Mumford* v. *Wardwell*, (1867) 6 Wall. 423; *Smith* v. *Maryland*, (1855) 18 How. 71, 74; *Weber* v. *Harbor Commissioners*, (1873) 18 Wall. 57; *Barney* v. *Keokuk*, (1876) 94 U. S. 324; *McCready* v. *Virginia*, (1877) 94 U. S. 391; *St. Louis* v. *Myers*, (1885) 113 U. S. 566; *Manchester* v. *Massachusetts*, (1891) 139 U. S. 240; *Packer* v. *Bird*, (1891) 137 U. S. 661; *St. Louis* v. *Rutz*, (1891) 138 U. S. 226; *San Francisco* v. *Le Roy*, (1891) 138 U. S. 656, 671; *Knight* v. *Land Association*, (1891) 142 U. S. 161, 183; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.*, (1891) 142 U. S. 255; *Illinois Central R. R. Co.* v. *Illinois*, (1892) 146 U. S. 387; *Shively* v. *Bowlby*, (1894) 152 U. S. 1; *Grand*

The doctrine of the cases was clearly stated in the opinion delivered by Mr. Justice Field, speaking for the court, in *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 435, where it was said:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57.

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And as a necessary consequence of the ownership by the States, in trust, of the navigable waters and the land under them within their territorial jurisdiction, it came to be decided that rights in and incident to such navigable waters or the land under them were to be determined solely with reference to the law of the State in which such navigable waters were situated. *Barney* v. *Keokuk*, (1876) 94 U. S. 324; *St. Louis* v. *Myers*,

Rapids & I. R. R. Co. v. *Butler*, (1897) 159 U. S. 87; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.*, (1897) 168 U. S. 349, and *Mobile Transportation Co.* v. *Mobile*, (1903) 187 U. S. 479.

(1885) 113 U. S. 566; *Packer* v. *Bird*, (1891) 137 U. S. 661, 690; *St. Louis* v. *Rutz*, (1891) 138 U. S. 226, 242; *Shively* v. *Bowlby*, (1894) 152 U. S. 1, 40; *Grand Rapids & I. R. Co.* v. *Butler*, (1897) 159 U. S. 87; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.*, (1897) 168 U. S. 349. But, resting as this last rule necessarily does upon the ownership of such waters by the States, it can have no application to the proposition that rights in and to the land beneath the non-navigable waters of the public domain which belong to the United States, are to be determined solely by the law of the States. On the contrary, the decision that the right to the property belonging to the States is to be determined by the state law, because of the state ownership, involves the converse proposition that the effect of a grant of land and waters in the public domain of the United States, which are not navigable, and, therefore, belong to the United States, is to be determined by the law of the United States.

The ownership by the United States of the public domain being thus unquestionable, there can be no room for the contention that the quantity and character of property in the public domain which passes by grant from the United States is not to be exclusively measured by the law of the United States, because of want of power in the United States over the subject matter of sale of the public domain. Such a contention would be obviously without merit, in view of the express delegation of authority concerning the property of the United States, contained in the third section of the fourth article of the Constitution, whereby Congress was vested with power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The comprehensive system of legislation, beginning with the very birth of the government, providing for the survey and sale of the public domain, the administrative machinery devised for executing these laws and the multitude of decisions of this court concerning questions which have arisen thereunder, which have ever been deemed proper to be determined solely from a consideration of the laws of the United States, to my mind serve to demonstrate the unsoundness of the proposition that

any other law than that of the United States measures the nature and extent of title to the public domain conveyed by authority of the laws of the United States.

Besides the implication resulting from the general legislation of Congress concerning the sale and disposition of the public domain, the special statutes granting rights in and regulating the use of the non-navigable waters upon the public lands are very conclusive. Act of July 26, 1866, 14 Stat. 253; Act of March 3, 1877, 19 Stat. 377; Act of March 3, 1891, 26 Stat. 1095; Act of June 17, 1902, 32 Stat. 388. See, in this connection, *Gutierres* v. *Albuquerque Land & Irrigation Co.*, 188 U. S. 545, and *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 704, *et seq.*

I refer to a few cases in which the complete and efficient power of the United States and the controlling effect of its laws have been considered and lucidly stated.

In *Bagnell* v. *Broderick*, (1839) 13 Pet. 436, it was held that a state legislature was not competent to declare a certificate of purchase of equal dignity with a patent; and it was observed (p. 450):

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States."

Wilcox v. *Jackson*, (1839) 13 Pet. 498, was an action in ejectment, brought in a state court of Illinois, to recover property which had at one time been part of a military post. The plaintiff based his claim upon a register's certificate, which the laws of Illinois declared to be evidence of title sufficient to support an action in ejectment. In reversing the judgment for the plaintiff, the court, in the course of the opinion, speaking through Mr. Justice Barbour, said (p. 516):

"It has been said, that the State of Illinois has a right to declare by law, that a title derived from the United states, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give effect to her statute. . . . We hold the true principle to be this, that whenever the question in any court, state or Federal, is, whether a title to land which had once been the

property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to the state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Irvine v. *Marshall*, (1858) 20 How. 558, was an action originally brought in a court of the Territory of Minnesota. It was alleged that the defendant Marshall, as the agent of the plaintiff, had purchased certain public lands with funds belonging to plaintiff and a co-defendant; that Marshall thereafter took a patent certificate in his own name and refused to convey an undivided half of the land to the plaintiff. The bill of complaint was demurred to upon the ground that the action could not be maintained because of certain provisions of the territorial statute relating to resulting trusts. Applying its previous ruling in *Wilcox* v. *Jackson*, the court, in the course of the opinion, speaking through Mr. Justice Daniel, said (p. 563):

"Within the provisions prescribed by the Constitution, and by the laws enacted in accordance with the Constitution, the acts and powers of the government are to be interpreted and applied so as to create and maintain a *system*, general, equal, and beneficial as a whole. By this rule, the acts and the contracts of the government must be understood as referring to and sustaining the rights and interests of all the members of this Confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such policy. The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. This system is therefore peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment is the seat of the Federal government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone."

In *United States* v. *Gratiot*, (1840) 14 Pet. 526, 537, considering an objection that Congress was without power to lease the public lands, it was said (p. 537):

"Congress has the same power over the public lands as over any other property belonging to the United States; and this power is vested in Congress without limitation."

In *Gibson* v. *Chouteau*, (1872) 13 Wall. 92, a state statute of limitations was held ineffective as against a patent from the United States. The court, speaking through Mr. Justice Field, said (p. 100):

"The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

In *Fink* v. *O'Neil*, (1882) 106 U. S. 272, 283, Mr. Justice Matthews delivering the opinion of the court, considering the fourth section of the homestead act of May 20, 1862, which provided that no lands acquired thereunder should, in any event become liable to any debt contracted prior to the issuing of the patent therefor, it was declared that Congress by such provision had made the exemption of such lands from sale on execution a *permanent* part of the national policy.

In *Packer* v. *Bird*, (1891) 137 U. S. 661, the court passed on the extent of the grant contained in a patent of the United States, to land in California, one portion whereof abutted on the Sacramento River. The patent was issued upon a decree of confirmation on a previously existing right or equity of the patentee to the lands, and the survey made pursuant to the

decree was incorporated in the patent. In the course of the opinion, speaking through Mr. Justice Field, the court said (p. 669):

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

In *Shively* v. *Bowlby*, (1894) 152 U. S. 1, 44, Mr. Justice Gray delivering the opinion, the language just quoted was approvingly referred to; and Mr. Justice Peckham, speaking for the court, in *St. Anthony Falls Water Power Co.* v. *Water Commissioners*, (1897) 168 U. S. 349, 362, again approvingly referred to the statement.

How completely these authorities apply to this case becomes, I think, manifest when it is borne in mind that the question is whether the United States by the conveyance which it made of the land abutting on the water parted with the title which it confessedly owned prior to the conveyance, to the beds of the lakes themselves. The reservation as to rights and incidents referred to in the excerpt made above from the opinion in *Packer* v. *Bird*, is but a reiteration of the doctrine enunciated by the court in the concluding sentences of the opinion in *Irvine* v. *Marshall*, *supra*, and its import is further shown by the opinion in *Barney* v. *Keokuk*, 94 U. S. 324. In the latter case, the question presented was what rights in the beds of navigable streams attached to abutting lands conveyed by grants of the United States, and the court said that as the beds of navigable waters within a State were the property of the State, by virtue of its sovereignty, no rights in the bed of such a stream could be conferred by a conveyance from the United States, unless the state law vested such rights in the owners of the upland without reference to the source from which the title to the upland had been derived. If such be the power of the States as to navigable waters which they hold in trust, it necessarily follows

that what rights pass by a conveyance from the United States to land under non-navigable waters must be determined by the laws of the United States, to whom such land and water when situated in the public domain belong in absolute ownership.

The ownership in the United States and its exclusive power under the Constitution to administer and control its property being thus demonstrated, it follows that the state law is not the proper criterion by which to ascertain what the United States conveyed, and, therefore, there is a Federal question to be examined.

The court below held although the United States survey had not, in fact, been extended beyond the meander line and the lots conveyed by the United States were described as fractional on the plat and in the patents, that the patentees yet took full subdivisions. The principle applied was this: Where marsh land or non-navigable waters were within a meander line upon which fractional lots abutted, the conveyance of such lots by the United States carries also the marsh land or non-navigable water beyond the meander to the extent of a full subdivision. And in order to accomplish this result the marsh land and water inside of the meander will be considered to have been surveyed, and the lines of the survey be hence protracted across the meander so as to embrace a full subdivision. Whilst this theory was plainly irreconcilable with the construction given to the United States law by the Supreme Court of Indiana in cases decided by it prior to *Stoner* v. *Rice*, *ub. sup.*, that case announced the rule, and the subsequent cases in Indiana have sanctioned it down to and including *Kean* v. *Roby*, upon which the decision in this case was rested. In *Hardin* v. *Jordan* the doctrine of *Stoner* v. *Rice* was criticised as an unwarranted departure from the common law, and it was observed—as was undoubtedly the case—that the Indiana court in *Stoner* v. *Rice* but adopted the rule announced by the Supreme Court of Michigan in *Clute* v. *Fisher*, 65 Michigan, 48, decided in 1887, shortly before the decision in *Stoner* v. *Rice*. Now, the opinion in *Clute* v. *Fisher* shows that the Michigan court in that case but followed a prior ruling made by it at the same term, in *Palmer* v. *Dodd*, 64 Michigan, 474. The latter case involved title to land within a

section made fractional by a meandered lake or marsh, and the controversy turned upon whether under the law of the United States the rights of the owner of the fractional section extended beyond the meander line. The Supreme Court of Michigan, in deciding the question, said:

"When the United States grants by patent land described by a legal subdivision, the grantee is entitled to all the land embraced within the legal subdivision contained in his grant, and is not limited by the number of acres specified in the patent or upon the government plat. The meanders have no significance as boundaries, and are not intended as such. They are run simply to afford a means of computing the area contained in the fraction which the United States requires payment for on sale of the public domain. But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson* v. *Hoffman*, 54 Michigan, 246; *Keyser* v. *Sutherland*, 59 Michigan, 455, which were based upon the decision of the Supreme Court of the United States in *Brown's Lessees* v. *Clements*, 3 How. 650."

It is hence apparent that the rule in *Clute* v. *Fisher* was based upon the construction of the law of the United States expounded by this court in *Brown* v. *Clements*, 3 How. 650. But long prior to the decision in *Clute* v. *Fisher* this court, in *Gazzam* v. *Phillips*, (1857) 20 How. 372, had reviewed the case of *Brown* v. *Clements*, and decided that the sale of a fractional lot did not convey a full subdivision; and in consequence of this view the case of *Brown* v. *Clements* was expressly overruled. In subsequent cases in Michigan the fact that that court had mistakenly predicated its conclusion in *Clute* v. *Fisher* on a case which this court had overruled, has been conceded. *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Michigan, 227. But whilst the Michigan court has thus recognized the error into which it inadvertently fell in *Clute* v. *Fisher*, the Indiana court has continued to apply that rule, although the sole authority upon which it rests has been repudiated.

Besides the error in the ruling below which is thus shown to

exist, the principle applied is moreover in conflict with decisions of this court since the ruling in *Gazzam* v. *Phillips*.

In *Horne* v. *Smith*, 159 U. S. 40, certain fractional lots appeared by the plat of survey to be bounded on the west by the meander line of the Indian River. It was, however, found as a fact that the water line which was surveyed and made the boundary of the lots was the line of a bayou or savannah, and that there had been an omission to make a survey of the land west of the bayou and between it and the main bed of the Indian River. The court, speaking through Mr. Justice Brewer, said (p. 45):

"Although it was unsurveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

In *Niles* v. *Cedar Point Club*, 175 U. S. 300, it appeared that a survey was made in 1834–1835 of fractional townships in the northern part of Ohio, adjacent to Lake Erie. By the field notes and plat certain sections were shown as fractional, because a tortuous meander line was shown upon the plat of survey upon which the fractional lots abutted. Across this meander line there was a region of country described as a marsh, and agreed in the statement of facts to be a body of low, swamp land, partly boggy and partly dry, stretching beyond to the shores of Lake Erie. The claim of the owner of the abutting lands was that his boundary was not the meander at the edge of the marsh, but Lake Erie. By referring to the plat previously excerpted in reviewing one of the *Tolleston Club* cases, showing the situation of the land which was in controversy in those cases, it will be seen that the precise condition passed upon in those cases was involved in *Niles* v. *Cedar Point Club*, *supra*. With the exact situation confronting it, instead of applying the erroneous rule announced in Indiana, this court held that the purchaser of the fractional lots abutting on the meander did not take a complete subdivision, but was

confined by the meander line and got only the land which he bought and paid for. The court, speaking through Mr. Justice Brewer, said (p. 306):

"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 aud plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh.

* * * * * * * *

"It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the government was offering for sale."

And the same meaning was attributed to a meander line in *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54.

But it is said the State of Indiana was entitled to the land under the beds of the lakes in and by virtue of the act of Congress of September 28, 1850, known as the swamp land act, and, therefore, the error committed below, as to the meaning of the survey and patents, is without importance. But the State could not acquire a legal title to land under the swamp land act except by patent, *Niles* v. *Cedar Point Club*, 175 U. S. 309; *Brown* v. *Hitchcock*, 173 U. S. 473; *Rogers' Locomotive Machine Works* v. *American Emigrant Company*, 164 U. S. 559, 574; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 592, and such patent must have been based upon a survey, as the statute clearly contemplated the selection and patenting only of "legal subdivisions." Act September 28, 1850, 9 Stat. 519. The survey having stopped at the bank, and the bed of the lake not having been surveyed, platted or subdivided, or the area thereof ascertained,

no right of the State had attached to the lake bed land under the swamp land act. Indeed, whilst some of the earlier cases in Indiana construed the swamp land act in direct conflict with the meaning of that act as interpreted by this court in the cases above cited, in a later case, *Tolleston Club* v. *State*, the Indiana court, on the rehearing, pointed out that under a correct construction of the swamp land act a survey and a patent were essential prerequisites to the passing of rights to the State under the swamp land act. And the confirmatory act of March 3, 1857, 11 Stat. 251, clearly has no application, as patents had issued in 1853 upon all the selections made for the State.

The mind cannot fail at once to perceive the serious disturbance to vested rights which must follow from the suggestion that title passed to the State of Indiana, under the swamp land act, to land belonging to the United States, which at the time of the issue of the patents to the State had not been surveyed or selected by the Secretary of the Interior for account of the State, and which was not parcelled into legal subdivisions until 1875, when the lake bed land in question was surveyed as the property of the United States.

I am brought, then, to these questions: Did the United States, by running meander lines, lose her title to the lands within such lines? and did she, by issuing patents for the fractional lots abutting on lakes which were thus meandered, convey to her grantees title to the center of the lakes?

It cannot be successfully controverted that from the beginning, both under the Confederation and since the adoption of the Constitution, the laws for the survey and sale of the public domain have contemplated as well the survey and sale of both dry land and land covered by water, except that under navigable waters. This so clearly results from the text of the statutes that I content myself with making reference to the sections of the Revised Statutes relating to the subject and to a citation in the margin of some of the earlier statutes.[1]

[1] Ordinances of Confederation: May 20, 1785, 1 Birchard's Land Laws, p. 11; July 13, 1787, art. 4, 1 Birchard, p. 18; July 23, 1787, 1 Birchard, p. 24; June 20, 1788, 1 Birchard, p. 29; and July 9, 1788, 1 Birchard, p. 33. Acts of Congress: April 21, 1792, 1 Stat. 257; May 5, 1792, 1 Stat. 266;

The fact that land under non-navigable waters was subject to survey and sale, and the settled practice of meandering navigable streams and making fractional abutting lots, is aptly illustrated by the case of *Surgett* v. *Lapice*, (1850) 8 How. 48. The question presented in that case arose under the act of March 3, 1811, 2 Stat. 662, relating to the mode of surveying public lands in the Territory of Orleans. By the second section of that act power was conferred to depart from the rectangular mode of survey as respected lands abutting on certain waters in the Territory. Such lands were to be laid out into tracts as near as practicable of a specified frontage and depth on a river or bayou, and to be bounded by such lines as the nature of the country would render practicable and most convenient. By the fifth section of the act certain rights of preëmption or double concessions in the lands back of tracts fronting on such waters were created under described conditions in favor of the front proprietors, it being provided in the act that double concessions should in no event extend so far in depth as to include lands fit for cultivation "bordering on another river, creek, bayou or water course." Within the area of a double concession involved in the controversy in the case named there was a bayou, and the claim on one side was that the double concession should extend back and embrace the lands on the bayou on the theory that it was non-navigable, while, on the other hand, it was contended that the bayou should be treated as navigable, and that the double concession could not be extended back to embrace the lands bordering on the bayou. Considering the contention that the waters of the bayou in question, though non-navigable, came within the description of water courses recited in the act, the court said (p. 69):

"To what description of water course did the legislature re-

May 18, 1796, 1 Stat. 464; May 10, 1800, 2 Stat. 73; March 3, 1803, 2 Stat. 233; March 26, 1804, 2 Stat. 277; February 11, 1805, 2 Stat. 313; March 2, 1805, 2 Stat. 324; March 3, 1811, 2 Stat. 662; April 24, 1820, 3 Stat. 566; April 5, 1832, 4 Stat. 503. Revised Statutes: Title XXXII, The Public Lands, particularly chapter four (Preëmptions), chapter five (Homesteads), chapter seven (Sale and Disposal of the Public Lands), and chapter nine (Survey of the Public Lands).

fer? The enacting clause provides that every person who owns a tract of land 'bordering' on any river, creek, bayou, or water course, shall have the right of preëmption to the back land. The act of 1811 has been construed, in the Department of Public Lands, for nearly forty years, to mean that those owners whose lands fronted on a navigable stream were only provided for; and that the word 'border,' both in the enacting clause and in the exception, meant to front on a navigable water course; that is to say, such waters as are described in the third section of the act of February 20, 1811, by which Louisiana was authorized to form a state constitution and government, by which act the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, were declared to be common highways, and forever free, as well to the inhabitants of the said State, as to other citizens of the United States.

"Similar provisions as respects navigable waters are common to other States where there are public lands, and the practice has been uniform to survey and sell the lands 'bordering' on navigable streams as fractional sections; nor is the channel ever sold to a private owner. Of necessity, it had to be left almost exclusively to the Department of Lands executing the public surveys to ascertain what stream was navigable, and should be bordered by fractions and reserved from sale; and, on the other hand, what waters were not navigable, and should be included in square sections, and the channel sold."

Whilst, of course, the case arose under the act of 1811, the opinion points to the general rule obtaining for years in the Land Department on the subject of the sale of land under non-navigable waters and the exclusion of land forming the beds of navigable or public waters from survey and sale.

Without presently developing this subject further, I append in the margin[1] a reference to acts of Congress, rules of the

[1] Act of July 1, 1870, 16 Stat. 187; Act of January 11, 1873, 17 Stat. 409; Act of February 19, 1874, 18 Stat. 16; Act of December 21, 1874, 18 Stat. 293; Manual of Surveying Instructions, February 22, 1855, approved by Congress, May 30, 1862, 12 Stat. 409; Instructions of Commissioner of General Land Office of July 13, 1874, Copp's Public Land Laws, p. 765; Report of Commissioner of General Land Office, 1868, p. 131; Manual of

Land Department governing surveys and reports of the executive officers charged with the survey and disposition of the public domain, which beyond peradventure show that from the very beginning of the government up to the decision in *Hardin* v. *Jordan*, the general practice was to treat the land under non-navigable waters as the property of the United States, and to survey and sell the same as part of the public domain. Indeed, the proposition just stated is established by the facts disclosed in the various cases decided by the Supreme Court in Indiana which I have at the outset reviewed.

Whilst, as pointed out in *Surgett* v. *Lapice*, the existence of a navigable stream was the reason which usually occasioned a meander line, and hence fractional subdivisions, the provisions of the surveying laws, both under the Confederation and since, contemplated such a meander line also wherever there existed an Indian reservation or private land claim which at the time of the survey was made prevented the extension of the public surveys. But it is apparent that from an early day meander lines and resulting fractional sections came to be established not only when occasioned by navigable rivers, Indian reservations or private land claims, but from other causes. Thus where the deputy surveyor encountered a morass or swamp which he deemed impassable or such a body of non-navigable water as in his judgment it would not be profitable then to survey, a meander line would be run and fractional sections created. When this practice first originated, and whether the surveyor general of the respective surveying districts applied uniform rules concerning it, the official documents of which I can take judicial notice do not enable me to determine. But certain it is that the practice prevailed prior to 1827. This is evidenced

Surveying Instructions, May 3, 1881, p. 34, January 1, 1890, p. 33, and June 30, 1894, p. 57, which last was approved by act of August 15, 1894, 28 Stat. 285; Report of the Commissioner of the General Land Office, 1877, p. 11; Letter of Secretary of Interior in response to a resolution of the House of Representatives respecting the survey of Lakes Wolf and George in Indiana and Illinois, H. R. Ex. Doc. No. 83, 45th Congress, 2d session; Report of the Commissioner of the General Land Office, in response to Senate resolution of January 14, 1896, giving information relative to certain lakes in Louisiana, Sen. Doc. No. 101, 54th Congress, 1st session.

by a communication from the Land Department to the surveyor general at Washington, Mississippi, dated January 30, 1827, 2 Birchard's Comp. p. 862, and also by a letter from the Commissioner to the surveyor general at Cincinnati, Ohio, dated March 11, 1836, 2 Birchard's Comp. p. 962. That complaint was sometimes made that deputy surveyors had mistakenly meandered marsh land, which it was asserted should have been surveyed, subdivided and platted, is also indicated by the official communication last referred to. The practice as to non-navigable lakes above alluded to is moreover shown by the meandering of the very lakes here in controversy (Wolf and George) as early as 1835, of Beaver Lake and the lands adjacent to the Calumet River about the same time, as shown by the Indiana decision in the *Portsmouth Bank* and *Tolleston Club* cases, and of Cross, Soda, Clear and Fairy Lakes in Louisiana in 1839. Sen. Doc. 101, 54 Cong. 1st session.

The general practice as to meandering lakes and ponds prevailing in the surveying districts created prior to 1850 is, however, conclusively shown by the "Manual of Instructions" dated February 22, 1855, issued by the Land Department for the guidance of the surveyors and deputy surveyors. In a letter transmitting this manual, the Commissioner of the General Land Office directed attention to the fact that it was a revised edition of the previous instructions on the subject. Among the instructions contained in this manual was the following, 1 Lester Land Laws, p. 714:

"3. You are also to meander, in manner aforesaid, all *lakes* and deep ponds of the area of twenty-five acres and upwards; also navigable bayous; *shallow* ponds, readily to be drained, or likely to dry up, are not to be meandered."

This manual was approved by Congress on May 30, 1862, 12 Stat. 409. Like manuals, reiterating the instructions above referred to, were issued on May 3, 1881, January 1, 1890, and June 30, 1894 (p. 57); and the manual of 1894 was approved by Congress on August 15, 1894, 28 Stat. 285.

Whilst the statements already made are sufficient to demonstrate that the rule contained in the manuals but substantially expressed the practice prevailing from the beginning, such

fact is additionally demonstrated by the report of the Commissioner of the General Office for 1868, (p. 131,) wherein, referring to the rule, he said that in substance it but reiterated the practice always followed in the Land Department.

There is in reason then no support for the proposition announced in some cases decided by state courts—presumably on the authority of the rule in *Hardin* v. *Jordan*—that the stopping of a survey at the margin of a non-navigable body of water and the meandering of the same operate to deprive the United States of the title to land within the meanders, which the United States had owned before the meander lines were run. To say this would be only to declare that power existed in the executive officers of the government to strip the United States of its property by a mere method of survey, when from the beginning no authority to that effect had been conferred, and no such purpose was contemplated. The practice of the government and the decisions of this court, it seems to me, leave no room for controversy on this subject. Thus, where a navigable stream was meandered, and within the meander lines were unsurveyed islands forming part of the public domain of the United States, and a request was subsequently made under the provisions of the statutes of the United States for their survey, 12 Stat. 410, the practice of the department was to comply with the request and survey and dispose of the islands as parts of the public domain. Report Land Office, 1868, p. 121. And, as said in the same report, in referring to the rule prevailing from the beginning concerning the meandering of lakes and ponds, where, subsequently to such meandering, lake beds were reported as dry, they "were surveyed and brought into the market. In all these instances the United States has but exercised the ordinary right of proprietorship."

The decisions of this court already referred to conclusively establish at the same time that the mere running of a meander line did not affect the title of the United States to the land within such meanders. Without going over all the cases, it suffices to call attention on this point to *Gazzam* v. *Phillips*, 20 How. 372, and *Niles* v. *Cedar Point Club*, 175 U. S. 300.

Quite recently the subject was again passed upon in *United States* v. *Mission Rock Company*, 189 U. S. 391. In that case there existed in navigable waters a small island, and whilst the title of the State to the land under the navigable waters was sustained, the title of the United States to the island was upheld.

The prior title of the United States being unaffected by the meander, did the conveyance by the United States of a specified quantity of land contained in described fractional lots abutting on a meander, the land under water within the meanders being unsurveyed and unplatted, convey by legal intendment more than the grant purported to embrace?

It cannot be controverted that at common law, as elaborately pointed out in *Hardin* v. *Jordan*, the owner of land abutting on an unnavigable body of water, by conveying the upland as bounding on the water, without restriction or reservation in the deed, in legal effect caused the center of the stream to be the boundary of the land conveyed. But, it seems to me, it cannot be questioned that the statutes of the United States relating to the disposal of the public domain confer no power whatever to sell unsurveyed public land nor do such statutes invest courts with the authority to enlarge the grants actually specified in the patents of the United States. A grant by the United States is to be interpreted by the statutes of the United States, and therefore is not subject to be enlarged by any principle of conveyance beyond the express intendment of the statute under the authority of which the grant is made. The difference between the rules of construction applicable to grants made by a government and the grant made by an individual is that grants of the government are to be strictly construed in its favor and against the grantee; in other words, that nothing passes by the grant but that which is necessarily and expressly embraced in its terms.

The doctrine on this subject was aptly stated by the court in *Shively* v. *Bowlby*, speaking through Mr. Justice Gray, where it was said (152 U. S. 10):

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded

by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' *The Rebeckah*, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544–548; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49."

Applying this doctrine to the lands in question, as the law of the United States conferred no authority to transfer unsurveyed land and confined the patentee to the land actually described in the patent as strictly construed, it follows that by the issue of its patents for fractional lots abutting on the water the United States did not transfer the title to the beds of the lakes in question within the meander lines.

And the Land Department in executing the acts of Congress and Congress itself in dealing with the subject have so uniformly manifested the purpose that the grants of the United States to land bordering on a non-navigable body of water should not convey the land under the water belonging to the United States beyond the limits of the land actually expressed in the patent as conveyed, that it seems to me the statutes for the disposition of the public domain should be read as if they contained an express provision to that effect.

I have already shown the rule prevailing from the earliest day for the meandering of non-navigable lakes and ponds, and in doing so called attention to the report of the Commissioner of the General Land Office made in 1868, in which he stated

that it had been the constant practice from the beginning, after lakes had been meandered and on the lakes becoming dry, to survey and dispose of the beds thereof. As evidencing this practice, I call attention to the following:

The Land Department, on July 13, 1874, Copp's Public Land Laws, 1875, p. 765, issued directions which were to govern the survey of the beds of non-navigable lakes and other like bodies of water which had been meandered at the time of the original survey and which had become suitable for survey and sale. As the circular of instructions related only to districts where the office of surveyor general had been abolished and could not have been intended to create a rule in such districts different from that obtaining in other districts, the legitimate inference from the instructions is that it was intended to put in effect in such districts the practice usual in other districts where the office of surveyor general had not been done away with. This view finds support in the prelude to the letter forwarding the circular of instructions, which says: "As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of surveyor general has been discontinued, the following is communicated," etc. The instructions which followed authorized the survey of the beds of such lakes as the property of the United States, when the waters had "so permanently receded or dried up as to leave within the unsurveyed area dry land fit, in ordinary seasons, for agricultural purposes." The remainder of the instructions dealt with the mode of proceeding to have a survey made and title obtained by individuals.

Here, again, as in the case of the rule of 1855, concerning the meandering of non-navigable lakes, the fact that it but in substance formulated the practice prevailing from the beginning, is shown by the report of the Commissioner of the General Land Office made in 1877, Report, Land Office, p. 11, where, referring to the practice of the department as to surveying islands situated in navigable waters within a meander and the circular in respect thereto issued in 1868, and also referring to the circular of July 13, 1874, above referred to, it was said:

"The regulations embraced in these circulars were not new

in their substance, but were simply a formulation of the pre-existing practice of the office theretofore administered with reference to the class of lands to which they were applicable."

It is then established that from the very beginning of the government, until at least the date of the circular just referred to, the practice was, after non-navigable bodies of water had been meandered, when the beds thereof became uncovered, to dispose of such beds as the property of the United States, separately from the former border lots. As the record does not disclose the number of instances in which this practice was observed during nearly one hundred years prior to *Hardin* v. *Jordan*, I may not state them, but, as no single instance to the contrary appears, it seems to me that the statement in *Hardin* v. *Jordan*, that the contrary rule had always prevailed, is left without any support whatever, and must have arisen from confounding the uniform practice not to sell the channel of navigable rivers, which belonged to the States, with the uniform practice to the contrary as to non-navigable waters, which belonged to the United States. But, the acts of Congress on the subject are so clear that they leave no room for substantial controversy, and they, in effect, amount to a legislative approval of the construction of the laws of the United States affixed by the administrative officers to those laws from the very foundation of the government. Thus, on July 1, 1870, 16 Stat. 187, after the sale of border lots abutting on the meander of a marsh and the Little Calumet River, Congress provided for the survey and sale of the lands within the meanders. So, also, after the patenting to the State of Indiana of the fractional lots abutting on Beaver Lake, Congress, by act of January 11, 1873, 17 Stat. 409, granted the bed of the lake to the State. Again, by the act of February 19, 1874, 18 Stat. 16, the bed of a meandered lake, known as Tarkio Lake, situated in Holt County, Missouri, was conveyed to the county, with a reservation, however, that the county should make title to such person as might have settled upon any portion of the land once part of the bed of the lake, under the homestead and preëmption laws. Yet a further illustration, which, because of its brevity and importance, is ex-

cerpted in full. Congress passed an act, approved on December 21, 1874, 18 Stat. 293, which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That so much of the bed of the marsh or pond in sections fourteen, twenty-three, and twenty-six, in township sixteen north, of range twenty east of the fourth principal meridian, in the county of Sheboygan, in the State of Wisconsin, as shall or may be reclaimed by draining the water from the same, shall be owned and held, so far as any rights or interests of the United States are concerned, by the owners of the lands abutting upon said marsh or pond, and draining the same to the center or thread thereof, and divided among the several owners adjoining and abutting said marsh or pond, according to the rules of law, upon payment by said adjoining owners into the Treasury of the United States of one dollar and twenty five cents per acre for the amount of land that has been or may be so reclaimed."

But, it is said, although it be conceded that the patentee, under the law of the United States, was confined to the land within the actual boundaries of the fractional lots conveyed, nevertheless if, as a matter of conveyancing, a grant by an individual would be construed under the state law as extending beyond the dry land to the center of the water, such construction should be applied to the patents of the United States. This, however, but asserts the same proposition which I have already fully considered, and whilst seemingly accepting the true meaning of the law of the United States and the interpretation given to it from the beginning, proceeds to overthrow it.

To argue that because conveyances made by individuals are controlled by the law of the States, therefore conveyances made by the United States are likewise so controlled, involves, as I see it, not only a *non sequitur*, but besides amounts to denying, so far as the public domain is concerned, that there is a government of the United States having complete ownership and supreme power in the premises. The suggestion that courts as a matter of convenience will determine by the state

law the extent of a grant made by the United States is without force, since courts have no power upon their conception of convenience to deprive the United States of its property by resorting to the laws of a State in order to divest the title of the United States in and to property which it owns, and which it has never voluntarily parted with if its own laws be applied. Moreover, the argument of convenience, when inherently considered, is without merit, since it rests on the assumption that for the purpose of convenience it will be held that what property passed by a grant of the United States is to be measured by a variable standard, the divergent laws of the several States, instead of the law of the United States operating generally throughout the United States, thus creating uncertainty and confusion by causing it to come to pass that a grant made by the United States in virtue of the authority conferred by the statutes of the United States will mean one thing in one State and a wholly different thing in another.

As pointed out by this court in *Irvine* v. *Marshall*, 20 How. 558, 563, one of the very objects of the provision of the Constitution conferring ample power upon Congress with respect to the property of the United States was to prevent this very condition of things. In other words, the proposition is that for the sake of assumed convenience a rule of interpretation should be resorted to to bring about the very condition of inconvenience which it was the purpose by the constitutional provision in question to guard against.

Conceding, however, *arguendo*, that a grant by the United States should be construed as a matter of conveyancing by the local law prevailing in a particular State, it nevertheless seems to me clear that the conclusion which the court reaches is erroneous. As has been shown in the *Portsmouth Bank* case the Supreme Court of Indiana expressly decided that a conveyance of border lots by the State was to be governed, not by the rules of conveyancing applicable to private individuals, but that the power of the state officers was to be ascertained from the statutes of the State alone; consequently, it was decided that where the State had conveyed the lots abutting

on Beaver Lake by the exact description contained in the patents of the United States, such conveyances gave no right to the bed of the lake, because power existed in the officers of the State only to sell lands which had been regularly surveyed and platted. In other words, the local decisions in Indiana establish the exact distinction between the rule of conveyancing applicable to individuals and those controlling the grant by a government, which was pointed out by this court in the passage from the opinion in *Shively* v. *Bowlby*, previously quoted.

Surely, if it be the rule in Indiana that the construction of a grant made by the State of its public lands is to be controlled by the state statutes, it should not now be held that a grant by the United States of its lands situated in Indiana is not to be construed by the statutes of the United States, but by the rules of conveyancing applicable to private grants. In other words, that in dealing with the lands of the United States the government is to be subjected to the local law of Indiana and yet at the same time be deprived of the rights which are accorded by that law to the State, regarded as a government. To now so hold, it seems to me, is but to declare that it is within the province of the local law to strip the United States of its governmental attributes and reduce it to the condition of a mere private individual. This difficulty cannot be avoided by suggesting that in this particular case the Indiana courts have decided that the transfer of the border lots carried the beds of the lakes, and hence it must be construed that such land passed by the local law. As has been previously demonstrated, the decision of the Supreme Court of Indiana in this case was in effect predicated on its previous rulings in *Stoner* v. *Rice* and the *Tolleston Club* cases. In those cases it was declared that the doctrine previously announced in the *Portmouth Bank* case was not overruled, but the court proceeded upon the theory that that case was inapplicable, because it held in the subsequent cases that there had been in those cases a survey of the land under water at the time the border lots were conveyed by the United States. This was based not upon any local law, but upon the law of the United States as construed by the state court. That

construction being overthrown by the decision of this court in *Gazzam* v. *Phillips* and the many other cases in this court which have followed it, it results *that by the Federal law, upon which the court based its decision, the beds of the lakes did not pass.* And that this result was understood by the Supreme Court of Indiana is shown by the opinion on the rehearing in the *Tolleston Club* case, where it was expressly declared that if the theory of survey announced by the court was incorrect, it was its opinion that the bed of the lake did not pass and title thereto remained in the United States. The decision now announced, therefore, holds that the question whether the beds of the lakes passed is to be determined by the local law as a matter of conveyancing. When it develops by the decision of the Indiana court that under the local law, as a matter of conveyancing, the beds of the lakes did not pass it is then in effect decided that the beds did pass, because it has been decided by the Supreme Court of Indiana that there had been a survey under the law of the United States, although the fact that there had been none conclusively results from a line of decisions of this court which are not now questioned. It comes then, as my mind sees it, to this: The beds of the lakes did not pass by the local law, and they did not pass by the Federal law correctly construed; but, although passing by neither the Federal nor the local law, they must yet be held to have passed because of a principle of law which it is impossible for me to state, because my mind does not perceive it.

Pretermitting, however, this view, and considering the case as controlled by the rule of *Hardin* v. *Jordan*, it only remains to determine whether, under the principle of *stare decisis*, my duty is to assent to its application in the case at hand. Undoubtedly, since *Hardin* v. *Jordan* was decided rights of property may have accrued predicated on the ruling made in that case, but it is also unquestionable that rights of property which had vested prior to that ruling under the acts of Congress, and the settled construction and practice of the government prevailing for almost a century would be divested if that case were applied. Indeed, the case in hand is but an illustration of this fact, since patents of the United States to land once forming

part of the beds of the lakes which are in controversy in this case were issued prior to the decision in *Hardin* v. *Jordan*. Two classes of rights of property then must be considered—the one resting on the true rule existing from the foundation of the government, and the other upon the mistaken theory of *Hardin* v. *Jordan*. I do not feel at liberty to indulge in the conjecture that the rights which were brought into existence during a century are less important than those which may have arisen in the comparatively short period since the decision in *Hardin* v. *Jordan*. Putting this view aside, if only the rights of those who had actually received the patents of the United States for the beds of the lakes which had once been meandered were concerned, it might be that I should consider it my duty to accept as controlling, under the rule of *stare decisis*, the decision in *Hardin* v. *Jordan*, and thus deprive the plaintiffs in error, whose rights are here at issue, of their property, and this upon the assumption that the legislative department of the government would rectify the wrong which would be thus inflicted. My mind, however, cannot escape the conviction that the consequence of adhering to the doctrine of *Hardin* v. *Jordan* cannot be limited merely to the rights of those who may have in the past actually acquired from the United States title to land once forming the beds of meandered lakes. On the contrary, that doctrine strips the United States of the title to the bed of every pond or lake which was meandered during nearly a century which preceded the decision in *Hardin* v. *Jordan*, where the lots bordering on such meandered lakes had been disposed of by the United States. This shows the inadequacy of the suggestion that the United States may, by a change of the form of conveyancing, obviate the doctrine now maintained. Whatever be the change in the rules of conveyancing, whenever the bed of a meandered lake hereafter becomes fit for sale, the question must recur and call for a reiteration of the ruling now made. Under these circumstances, the line upon which I should act seems to me to have already been plainly pointed out by the court in *Gazzam* v. *Phillips*, 20 How. 372, *supra*. There the court, as I have said, having been called upon to consider the correctness of the rule announced by it twelve years

before in *Brown* v. *Clements*, 3 How. 650, and having concluded that that case had been wrongly decided, was required to determine whether it was its duty under the rule of *stare decisis* to perpetuate an erroneous principle or apply a correct one. In deciding to follow the latter course, the reason which controlled to the conclusion is so directly applicable to the subject matter of this case, and was so frankly and ably stated, that I excerpt a passage from the opinion, as follows (p. 378):

"It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years. Any one familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision or apply its principles in rendering the judgment of the court in this case."

Concluding that the patents of the United States to the State of Indiana for the fractional lots abutting upon Wolf Lake and Lake George did not convey title to land under the water, and that the patents subsequently issued by the United States, based upon the Walcott survey of 1875, purporting to pass the title land to once a part of the beds of the lakes were valid, I dissent.

I am authorized to say that MR. JUSTICE MCKENNA joins in this dissent.

HARDIN *v.* SHEDD.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 56. Argued January 12, 1903.—Decided May 18,* 1903.

When the United States conveys land bounded on a non-navigable lake it assumes the position, so far as such conveyances are concerned, of a private owner, subject to the general law of the State in which the land is situate.

Since *Hardin* v. *Jordan*, 140 U. S. 371, the law of Illinois has been settled that conveyances of the upland on such lakes do not carry adjoining lands below the water line.

When land is conveyed by the United States on a non-navigable lake the rules of law affecting the conveyance are different from those affecting a conveyance of land bounded on navigable waters.

The common law as understood by this court and the local law of Illinois with regard to grants bounded by navigable waters are the same.

THE case is stated in the opinion of the court.

Mr. Thomas Dent for plaintiffs in error.

I. The case involves a question of title under patents from the United States for public lands in Illinois.

One of such patents was to John Holbrook. It was dated May 20, 1841, and was based upon an entry by Mr. Holbrook at the land office in Chicago, December 24, 1838. The other patent was to William B. Egan, and dated August 1, 1853.

Three of the tracts described in the patent to Holbrook bordered on a lake. The patent to Egan was also for a tract that bordered on the lake. The two tracts of the defendant in error were also on the lake. All the tracts were fractional.

It was claimed in the pleadings by the plaintiffs in error that the tracts bordering on the lake extended to the center of the lake, such lake being non-navigable, and having belonged to the United States at the time of the survey and platting, and not having been reserved in or in any way excluded from the grant.

1. That the lake was non-navigable is an unquestioned fact in the case. It was so found in the decree to be reviewed. There was a like finding in the earlier decree, with which, in

* Petition for rehearing filed June 1, 1903.

this particular, the Supreme Court of Illinois agreed. *Fuller* v. *Shedd*, 161 Illinois, 462, 473.

2. The title to the lake or submerged lands therein was in the United States at the time of such survey and platting. Act of Virginia of October 20, 1783, and the deed of cession thereunder of March 1, 1784; 1 Kent's Com. *258, 259; *Johnson* v. *McIntosh*, 8 Wheat. 543, 586; *President &c. of Commons* v. *McClure*, 167 Illinois, 23, 35; *Rogers* v. *Jones*, 1 Wendell, *237, 256; *Roe* v. *Strong*, 107 N. Y. 350.

3. The grant to Virginia and from that State to the United States was, as to land and water alike, as broad as that to William Penn, which was construed in *Coovert* v. *O'Conner*, 8 Watts, 470, 477; *Trustees of Schools* v. *Schroll*, 120 Illinois, 509.

The doctrine which this court recognized in *Hardin* v. *Jordan*, 140 U. S. 371, was therefore applicable to the patents which were in the usual form.

4. In the nature of the case, the usual common law principles applicable to grants or conveyances, work the same result. 3 Kent's Com. *428; Elphinstone on Interpretation of Deeds, 182; *Middleton* v. *Pritchard*, 3 Scam. 510; *Beckman* v. *Kreamer*, 43 Illinois, 447; *Bristol* v. *County of Carroll*, 95 Illinois, 84; *Paine* v. *Woods*, 108 Massachusetts, 160–169; *Hogg* v. *Beerman*, 41 Ohio St. 81; and see *Niles* v. *Cedar Point Club*, 175 U. S. 300, 308, as to this class of waters non-navigable in fact, being "generally the property of riparian owners."

II. Upon the question whether the state court should have declared the title to the lake under consideration to be in the State, as was done by the decree under review, it is submitted:

1. Such finding ignored or disregarded the classification or division of waters. The distinction between public or navigable waters and those which are private or non-navigable is reasonable, and is well established. When the State of Illinois was admitted into the Union it entered the same "upon the same footing with the original States, in all respects;" and it is not denied that the State thereupon acquired, without any other specific grant from the United States, the dominion and sovereignty over and ownership of lands under its navigable waters, the ownership being in trust for the people. *Martin*

v. *Waddell*, 16 Peters, 410; *Pollard* v. *Hagan*, 3 How. 212; *I. C. R. R. Co.* v. *The People*, 146 U. S. 387; *Genesee Chief* v. *Fitzhugh*, 12 How. 443; *Barney* v. *Keokuk*, 94 U. S. 324.

But such cases as *St. Paul & Pacific R. R. Co.* v. *Shurmeier*, 7 Wall. 272, and *Packer* v. *Bird*, 137 U. S. 661, make note of the distinction observed in the acts of Congress between streams navigable and those not navigable.

The effectiveness of grants from the United States of lands on waters not navigable in fact was not intended to be thereby impaired, but it was considered that if any of the western States, like Illinois, for example, chose "to assign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Mr. Justice Field thus quoting in the latter case from *Barney* v. *Keokuk*, *supra*.

But it would require an express grant from the United States, to pass the title to a non-navigable body of water situated in the public domain in any part of the Northwest Territory, *Healy* v. *Joliet & Chicago R. R. Co.*, 116 U. S. 191; *Hubbard* v. *Bell*, 54 Illinois, 110; and when it was found, as a matter of fact, that the lake in this case was not navigable, no inference of a grant of the same from the United States otherwise than by the patents put in evidence, could be indulged. The fact of non-navigability was of itself evidence that the United States held the submerged lands, or the lake itself, while the bordering lands remained unsold.

2. What then was the ground upon which the Supreme Court of Illinois adjudged the ownership of this non-navigable lake to be in the State? It was upon a supposition that the law of boundary as applied to rivers is inapplicable to lakes; and the question whether a lake should be held to be the property of the State was made to turn upon the question whether it was "meandered in the original survey," 161 Illinois, 489, which was in effect saying, that if in the original survey a lake was meandered, such lake became the property of the State. The meandered line is not evidence of a grant to the State.

The Supreme Court of Illinois attributed to the meander in the present instance an effect entirely different from its views

of a meander in all other cases involving waters within its borders, belonging, in the first instance, to the general government, and subject to sale according to the acts of Congress.

Among such other cases to be noticed as maintaining a rule different from the result maintained by that court in this case may noted: *Middleton* v. *Pritchard*, 3 Scam. 510; *Canal Trustees* v. *Haven*, 5 Gilm. 548; *City of Chicago* v. *Laflin*, 49 Illinois, 172; *Houck* v. *Yates*, 82 Illinois, 179; *Washington Ice Co.* v. *Shortall*, 101 Illinois, 46; *Fuller* v. *Dauphin*, 124 Illinois, 542.

It is true that the expressions of the court, in its first opinion in this case, 161 Illinois, 481, were not in the form of a disapproval of those cases, in their affirmance of the doctrine that a meander in surveying government land bounded by a stream or body of water is with reference to ascertaining the quantity of land in a fraction; yet the court attributed to the running of the meander a larger effect, in the present instance, because a lake and not a stream was the object under consideration, in the territory surveyed.

In the matter of title, an examination of the cases or authorities cited to sustain the proposition will show that they did not search for nor follow common law guidance in the matter. The real question, as this court held in *Hardin* v. *Jordan*, *supra*, "had regard to the ownership of the beds of inland lakes, not of such size as to be classed with the great navigable lakes and rivers of the country;" and it also held, as to the difficulty of determining titles, "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law." And see also *Gouverneur* v. *National Ice Co.*, 134 N. Y. 355; *Lamprey* v. *The State*, 52 Minnesota, 181; *Kirkpatrick* v. *Yates*, 45 Missouri App. 335; *Grand Rapids Ice Co.* v. *S. Grand Rapids Ice Co.*, 102 Michigan, 227; *Olson* v. *Huntamer*, 6 So. Dak. 364; *Shell* v. *Matteson*, 81 Minnesota, 38; *Kanouse* v. *Slockbower*, 48 N. J. Eq. 42.

It should be further remarked that in observing the history of land titles in different States it will be borne in mind that in the older States on the Atlantic borders the primary source of titles was from the crown and then passed under the States

themselves. But as to the public lands in the Northwest Territory, or in any of the States therein, these belonged to the United States, and were under the power and control, not of the States, but of the Congress; and hence if legislation similar to the Massachusetts ordinances, having the effect of changing the common law as affecting titles or the construction of patents or conveyances, had been thought to be desirable, resort to Congress, to declare or provide for such changes, would have been necessary.

3. The influence of cases based on ordinances adopted as early as 1741 in Massachusetts will be recognized in the decision of the state Supreme Court. These ordinances became "the foundation of a local common law in Massachusetts, including Maine, which led to a course of decisions with regard to the title of lakes and ponds at variance with the common law, and which have been followed in New Hampshire and some other States." *Hardin* v. *Jordan*, *supra*, and see *Shively* v. *Bowlby*, 152 U. S. 1.

4. If the policy favored by the state court had been in the public mind when the government had the public domain, or any great part of it, in the Northwest Territory, why was not Congress memorialized to enact laws to withdraw lakes of a certain size, or meandered lakes, from sale, as being reserved for the benefit of the States respectively, or the people thereof?

5. The government, while it was proprietor, was, of course, at full liberty to have a resurvey made, with reference to replatting, if the original survey was made at an unfavorable time, on account of the stage of water being too great, or if a subsidence from any cause left too much dry land to go with the fractions originally platted; and the books undoubtedly show a number of instances of this having been done. One such instance is shown by *Bristol* v. *County of Carroll*, 95 Illinois, 84.

This is but equivalent to saying that the lake did not lose its non-navigable character, and did not pass from the proprietorship or control of the United States, by anything that was done by the surveyor or the surveyor general in surveying and platting the fractional township embracing a great part of

the lake; and such again is the effect of *Iowa* v. *Rood*, 187 U. S. 87.

III. The plenary power of Congress over the public lands, of which this fractional township was a part, is too clear to be questioned. Constitution, Art. IV, § 3, par. 2; *Wilcox* v. *Jackson*, 13 Pet. 498; *Bagnell* v. *Broderick*, 13 Pet. 436; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92.

1. Under the Ordinance of 1787, art. 4, the legislatures in the new States which it was expected would be formed out of the Northwest Territory were never to "interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may (might) find necessary for securing the title in such soil to the *bona fide* purchasers." Nor could the state courts so interfere, and stamp any part of the public domain as state property, or property not subject to be conveyed by the government.

The question as to the effect of the surveying, platting and sale by the United States, including the construction of the patents is to be resolved by the laws of the United States, and the decisions of this court in regard thereto should be held to be binding on the state courts. *Gilmore* v. *Sapp*, 100 Illinois, 297; *Seymour* v. *Landers*, 3 Dillon, 440; *Paige* v. *Peters*, 70 Wisconsin, 178.

The state court should therefore have followed the decision of this court in *Hardin* v. *Jordan*, and *Mitchell* v. *Smale*, and not have disregarded the same.

As the common law prevailed in Virginia when the territory was ceded, the grants from the United States followed it, and it was not within the power even of the legislature of a State to change it in respect to the rights of patentees of lands bordering on non-navigable lakes. *Shell* v. *Matteson*, *supra*.

Upon the question what the common law was this court had a full right to speak, authoritatively too, especially in regard to the public lands, under patents therefor. *Yates* v. *Milwaukee*, 10 Wall. 497; *Nelson* v. *City of Madison*, 3 Biss. 244.

The fact that this court has revisory power over the judgment of the state court, because of the right claimed under the Constitution and laws of the United States but denied by the

state court, leads to the conclusion, also, that the state court should have followed the decisions of this court in the special matter involved. *Green* v. *Lessee of Neal*, 6 Pet. 291, 298; *Dower* v. *Richards*, 151 U. S. 659; *Republican River Bridge Co.* v. *Kansas Pac. Ry. Co.*, 92 U. S. 315, 317.

The first decree in the state court, having been reversed, has no binding force or effect, and when the second decree is found to have been based upon error of law, as to the effect of the meander and the rights of the State, there is manifest and eminent propriety in the exercise of the power in this court to give the same effect to the writ of error as if the judgment or decree complained of had been rendered or passed in a court of the United States.

2. What, then, should be the judgment? It should correct the fundamental error, to wit: The declaration of title in the State, and the limiting of the title of the plaintiffs in error to the water's edge, as if the supposed meander line governed, taking the water's edge as of a fancied "ordinary stage." It should follow the decisions of this court in *Hardin* v. *Jordan* and *Mitchell* v. *Smale*. The plat should govern, as no error therein is shown.

IV. As to the apportionment of the lake bed:

1. The decisions in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* should have prevailed, and should be applied in this case. The findings in the state court do not bind; for those made by the final decree were upon an erroneous view of the law. There being error in the fundamental proposition of the state court, the right of this court is not restricted or limited by the judgment of the state court, but the whole of such judgment is subject to be reversed. The case is resolved into a question of law —What title had the plaintiffs in error in respect to the lake, or lands originally submerged?—and upon that question the whole record is open for revision by this court. *Lytle* v. *Arkansas*, 22 Howard, 193; *Dower* v. *Richards*, 151 U. S. 659; *Republican River Bridge Co.* v. *Kansas Pacific Railway Co.*, 92 U. S. 315, 317. This is a case involving title and not merely boundaries in the ordinary sense as was *Moreland* v. *Page*, 20 How. 523, cited by appellees.

The question is whether the state court could rightfully declare the title to the lake to be in the State, and make the boundary of the government grant the water's edge, and therefore changeable, and subject to the winds, the seasons and the march of public improvement. The question is whether from supposed state policy the court should withdraw from the operation of the grant any land remaining submerged, continuing the withdrawal, it may be, as long as an inch of water covers the rather level surface of the lake bed. The plat and the field notes should be considered, along with the patents, in the matter of legal construction. Such plat and field notes are to be presumed to be correct until the contrary is shown. *O'Gilvie* v. *Copeland*, 145 Illinois, 98; *Town of Kane* v. *Farrelly*, 192 Illinois, 521. No objection thereto in the present case remains.

What there was of the lake as platted is therefore subject to be apportioned. *Forsyth* v. *Smale*, 7 Biss. 201; *Webber* v. *Pere Marquette Boom Co.*, 62 Michigan, 626; *Houck* v. *Yates*, *supra*; *Middleton* v. *Pritchard*, *supra*; *Grand Rapids &c. R. R. Co.* v. *Butler*, 159 U. S. 85; Schultes on Aquatic Rights, 138; Tyler on Boundaries, 94.

Each fractional subdivision situated on the lake should be allowed its proper extension, as of the time when it was made ready for sale by the United States. *Jones* v. *Lee*, 77 Michigan, 35, 42. The extension would be laterally, or by the side, having regard to the water frontage. *Moore* v. *The Willamette Transportation Co.*, 7 Oregon, 355; Webster's Dictionary, definition of "laterally."

The side lines should run from the established corners.

The line between sections 29 and 30 was by the surveyor run to the lake. The notes say the remainder of the line was or would be in the lake.

The question of title is not controlled by what is sometimes called "state law." It is one of general law, applicable to patents for lands in the territory which was known as the Northwestern Territory, or it is a common law question when applied to titles emanating from the United States, and as to such titles free from state legislation, and of course exempt from domination by the state courts.

Those courts have in the main expressed views in harmony with those announced by this court in *Hardin* v. *Jordan*, and *Mitchell* v. *Smale*, *supra*, as to what is the common law on the subject. It is not reasonable to apply to non-navigable waters of this class the general rules to accretions. They properly pertain only to navigable waters which are more permanent.

V. As to the question of jurisdiction:

Such jurisdiction is given by U. S. Rev. Stat. § 709.

The judgment of the Supreme Court of Illinois first given was one of reversal in part, but with a remand to the Circuit Court of Cook County for further proceedings, and without specific directions, and hence was not reviewable here. *McComb* v. *Co. Com. of Knox Co.*, 91 U. S. 1.

Until the later and final decision by the Supreme Court of the State was made, the case could not be brought here for review. *Fisher* v. *Perkins*, 122 U. S. 522; *Davis* v. *Crouch*, 94 U. S. 514.

The claim of title by the plaintiffs in error was presented on the record in a variety of forms from first to last, by the pleadings and otherwise, and at each hearing in the Supreme Court of the State.

The certificate of the Chief Justice of that court that the Federal question arose in the state court is evidence of that fact, corroborative of the record itself. *Armstrong* v. *Treas. of Athens Co.*, 16 Pet. 281, 286.

The pleadings show that the question arose, and this fact may be observed. *Medberry* v. *Ohio*, 24 How. 413; *Buel* v. *Van Ness*, 8 Wheat. 313, 324.

Mr. Harry S. Mecartney for defendant in error.

I. No Federal question was specially raised in the state courts. *Spies* v. *Illinois*, 121 U. S. 131; *Maxwell* v. *Newbold*, 18 How. 511; *Hoyt* v. *Thompson*, 1 Black, 521; *Columbia W. P. Co.* v. *Columbia Elec. Str. Ry. Co.*, 172 U. S. 476; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Zadig* v. *Baldwin*, 166 U. S. 485; *Kipley* v. *Illinois*, 170 U. S. 182; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 649; *Telluride Power &c. Co.* v. *Rio Grande &c. R. R. Co.*, 175 U. S. 642; *Chapin* v. *Fye*, 179 U. S. 127.

The certificate of the Chief Justice of the Illinois Supreme Court does not give this court jurisdiction. *Powell* v. *Supervisors*, 150 U. S. 433.

II. The decision of the Illinois Supreme Court complained of involved a question of local law purely, upon which its judgment was final. The pivotal question in this case is that the local law of the State in which lands patented by the United States lie governs the construction to be given to grants of lands bordering upon waters, whether navigable lake, navigable stream, or non-navigable lake or stream. *Hardin* v. *Jordan*, 140 U. S. 371, and see cases cited in dissenting opinion; *St. Louis* v. *Rutz*, 138 U. S. 226; *Barney* v. *Keokuk*, 94 U. S. 324; *St. Louis* v. *Myers*, 113 U. S. 566; *Packer* v. *Bird*, 137 U. S. 661. See also *Shively* v. *Bowlby*, 152 U. S. 1; *St. Anthony Falls Water Power Co.* v. *Board of Water Commissioners*, 168 U. S. 349.

It was decided in *Hardin* v. *Jordan* that the shore owners took to the center of the lake, and this decision was based upon the theory that it was in accordance with decision of the Illinois Supreme Court. Since then the Supreme Court of Illinois has decided that shore owners do not take to the center but only to the water's edge. *Hammond* v. *Shepard*, 186 Illinois, 235. This court, however, is not bound to follow the latest decisions under such circumstances. *Yates* v. *Milwaukee*, 10 Wallace, 497; *Pease* v. *Peck*, 18 Howard, 595; *Town of Roberts* v. *Bolles*, 101 U. S. 119; *Morgan* v. *Cortenius*, 20 Howard, 1; *Gibson* v. *Lyon*, 115 U. S. 439; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Wade* v. *Travis Co.*, 174 U. S. 499; *Green* v. *Neal's Lessee*, 6 Peters, 291.

III. This court will not inquire into the alleged errors of practice. Even if a Federal question were involved it would examine such question alone. *Ashley* v. *Ryan*, 153 U. S. 436; *Mallett* v. *North Carolina*, 181 U. S. 589; *Cleveland &c. Co.* v. *Backus*, 154 U. S. 439; *Central Pac. &c. Co.* v. *California*, 162 U. S. 91.

IV. No such errors of practice, however, were in fact committed.

V. The character of Wolf Lake and the State's title to the

bed thereof, and its jurisdiction thereover are all within the scope of local law and are by the state court's decision foreclosed from inquiry here.

VI. The apportionment of accretions under the decree is accurate and just. For definition of accretion and right thereto, see 1 Am. & Eng. Ency. 2d ed. 462, 474; *Municipality No. 2* v. *New Orleans Cotton Press*, 9 Louisiana, 437; *Kehr* v. *Snyder*, 114 Illinois, 313; *Benson* v. *Morrow*, 61 Missouri, 345; *Cooly* v. *Golden*, 117 Missouri, 33; *Buse* v. *Russell*, 86 Missouri, 209; *Bigelow* v. *Hoover*, 85 Iowa, 161; *Naylor* v. *Cox*, 114 Missouri, 232.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding under the Burnt Records Act of the State of Illinois, by which the defendant in error, Shedd, seeks to establish his record title to certain land adjoining and under a non-navigable lake called Wolf Lake, lying partly in Illinois and partly in Indiana. The plaintiff in error, Hardin, also owns land adjoining the same lake, by succession to a title under patents from the United States, and under these patents makes claims to land now or originally under the lake, which conflict with the claim of Shedd and with the decree of the court. The other plaintiff in error is a grantee of Hardin. The decree having been affirmed by the Supreme Court of the State, 177 Illinois, 123; *S. C.*, 161 Illinois, 462, the case is brought here by writ of error. *Mitchell* v. *Smale*, 140 U. S. 406, 410; *Shively* v. *Bowlby*, 152 U. S. 1, 9, 10. It seems unnecessary to go into details of the difference, as the main question here goes to the foundation of Hardin's case, and we are against her on that. Her title and a plan of the territory in which lies the disputed land will be found set out in *Hardin* v. *Jordan*, 140 U. S. 371.

The claim of the plaintiffs in error to the land below the original water line depends on its having passed by the patent of the United States. The patent to Holbrook, from which they derive an important part of their title, was dated May 20, 1841, long before the Swamp Land Act. At that time the land under the lake, as well as that surrounding it, belonged to the United

States, and if grants of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed. When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. *Hardin* v. *Jordan*, 140 U. S. 371; *Shively* v. *Bowlby*, 152 U. S. 1, 45; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 90, 93; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 363. (Such cases are not affected by Rev. Stat. §§ 2476, 5251.) When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore. The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point.

The law of Illinois has been settled since *Hardin* v. *Jordan*, 140 U. S. 371, and it now is clear, by the decision in this case and later, that conveyances of the upland do not carry adjoining land below the water line. *Fuller* v. *Shedd*, 161 Illinois, 462; *Hardin* v. *Shedd*, 177 Illinois, 123; *Hammond* v. *Shepard*,

186 Illinois, 235. Following these decisions, we must hold that the title set up by the plaintiffs in error fails. Even accepting the principles of the common law, it may be a question whether one consideration in this case was not overlooked in *Hardin* v. *Jordan*. It was noted that the conveyance was by reference to the official plat. The plat of the Illinois portion, unlike that of the part in Indiana, describes the lake as a " navigable lake." It is true that this was a mistake, but it might be urged that the description must be taken to have the same effect as if it were true when we are determining the effect of a conveyance adopting it. It would seem that if a conveyance of land bounded by navigable water would not pass land below the water line, a conveyance purporting to bound the land by navigable water does not purport to pass land below the water line. The common law as understood by this court and the local law of Illinois with regard to grants bounded by navigable water are the same. *Shively* v. *Bowlby*, 152 U. S. 1, 43, 47, 51; *Seaman* v. *Smith*, 24 Illinois, 521.

Of course, it would result from the Illinois ruling that the survey of the submerged land in 1874, referred to in *Hardin* v. *Jordan*, and the conveyances in pursuance of it, may have been good on the Illinois side of the state line, unless the State had got a title before that date under the Swamp Land Act. Whether it did so or not, it is unnecessary to consider in this case.

The land which Shedd gets under the decree of the state court he gets, not in derogation of the foregoing principles, but on findings of fact as to what land was above water at the date of the patents from the United States, 161 Illinois, 469, 470, and as to accretions to that land by the gradual drying up of the water at a later date. 161 Illinois, 473, 494. We perceive no need for considering the decree in detail.

Decree affirmed.

MR. JUSTICE WHITE, with whom concurs MR. JUSTICE MCKENNA, dissenting.

This case, in some aspects, involves contentions supposed to have been finally decided by this court in *Hardin* v. *Jordan*,

140 U. S. 371, and *Mitchell* v. *Smale*, 140 U. S. 406. In those cases there was a controversy between persons holding the patents of the United States to fractional lots abutting on the meander line of Wolf Lake in Illinois and those holding the patents of the United States subsequently issued to the bed of the lake. The latter patents were based upon a survey made of the bed, approved after contest in the Land Department. It was held in the cases referred to that the rights of the claimants to the bed of the lake were to be determined by the local law of Illinois. Ascertaining what the local law was, it was decided that the abutting lot owners took to the center of the lake, and hence the subsequent patents to the bed were void.

The controversy presented by this record originated from conflicting claims made in two suits (subsequently consolidated) to the bed of Wolf Lake, between Mrs. Hardin (who was the plaintiff in *Hardin* v. *Jordan*) and one of her grantees, as owners of the border lots, Shedd, (grantee of Mitchell, the plaintiff in *Mitchell* v. *Smale*,) also as an owner of border lots, and various claimants under patents of the United States based upon the survey of the bed of the lake. Although the judgment below was against the second patentees, they have not prosecuted error. The Supreme Court of Illinois declined to apply the rule laid down by this court because it held that this court had in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* misconceived the state law. By the local law it was held that the lot owners by the conveyance to them of lots abutting on the meander line took no title whatever to the bed of the lake. It was, however, decided that the effect of the conveyance by the United States to private persons of the border lots was to transfer the title of the bed of the lake to the State of Illinois. The doctrine of the Supreme Court of Illinois on the subject is not only shown in the opinion of that court in this case, *Fuller* v. *Shedd*, 161 Illinois, 462, but also in the subsequent case of *Hammond* v. *Shepard*, 186 Illinois, 235. In the first case, *Fuller* v. *Shedd*, after expressly deciding that the State of Illinois did not acquire title to the bed of the lake under the swamp land act, the court declined to hold "that the grant to the riparian owner conveys the bed of non-navigable (meander) lake, and make its waters mere private waters;"

and, further, said that, "so long as such meander lakes exist, over their waters, and bed when covered with water, the State exercises control, and holds the same in trust for all the people, who alike have benefit thereof, in fishing, boating, and the like." In the second case, *Hammond* v. *Shepard*, the Supreme Court of Illinois said (p. 241):

"The law of this State, as repeatedly announced, is that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the State.

* * * * * * * *

"No shore owner can take away from the State its title to the former bed of the lake unless he can establish by proof that the dry land was formed by the water receding from his shore line."

Under the doctrine thus stated, having treated the bed of the lake as the property of the State, the court determined the rights of the parties by reference to principles of accretion which it deemed applicable to the property in the bed of the lake owned by the State. Now, in *Kean* v. *Calumet Canal & Improvement Company*, *ante*, p. 452, quite recently decided by this court, the doctrine announced in *Hardin* v. *Jordan* was re-examined, and it was in effect held that that case, whilst recognizing that the ownership of the beds of non-navigable lakes on the public domain was in the United States, simply decided that when the United States sold lots bordering on such a lake the question whether or not the bed of the lake passed by the grant of the border lots was to be determined by the principles of conveyancing in force under the local law of the State where the lake was situated. Now, as the settled rule in Illinois is that under the principles of conveyancing prevailing in that State no title to the bed of a lake passes to the patentees of the United States by the sale of border lots, I do not perceive how the United States has been divested of its title to the bed of Wolf Lake. To say that, although on the principles of conveyancing under the local law, the bed did not pass, nevertheless, because the United States sold the border lots, the State of Illinois thereby became the owner of the bed of the lake, is,

as I understand it, to declare that it is in the power of the State of Illinois to appropriate the property of the United States.

The suggestion that the considerations just stated are immaterial, because, even although by the local law, the United States did not convey to the patentees of the border lots title to the bed of the lake, it may have parted with its title to the bed by the swamp lands act, involves a departure from the settled construction of the swamp lands act to which attention was called in the dissent in *Kean* v. *Calumet Canal & Improvement Company*, *ante*, p. 452. Besides the disturbance of vested rights to which it seems to me such a suggestion must give rise, it must be remembered that it is directly in conflict with the opinion of the Supreme Court of Illinois in this very case, where it was expressly declared that the State did not take title to the bed of Wolf Lake under the swamp lands act, because as a matter of fact the converse had been explicitly decided by the Secretary of the Interior in a contest before the Land Department to which the State of Illinois was a party. The result of the suggestion as to the swamp lands act then, as I see it, is to cause the State of Illinois to become the owner of the bed of the lake under the swamp lands act, in derogation of the act of Congress, contrary to the rulings of this court and of the Supreme Court of the State, and in disregard of the express findings of fact made by the Secretary of the Interior when he approved the second survey, and also when he rendered the decision on the contest to which the State of Illinois was a party.

I fail to perceive if, as a matter of conveyancing under the local law, the title to the bed of the lake did not pass with the sale of the border lots, how the United States has lost its title. If it be conceded that the view of the local law, announced by this court in *Hardin* v. *Jordan*, was a mistaken one, and that the local law must be taken to be what the lower court held it to be in this case, then it seems to me the only foundation upon which the title of the United States to the bed of the lake can be disputed has disappeared, since in my opinion the theory of accretion which the court below applied cannot be

sustained either by reason or authority. I content myself with merely stating this view, which involves the merits, and do not elaborate, because, in my opinion, if it be—as the court now decides—that the question whether the title of the United States to the bed of Wolf Lake passed to the State of Illinois is to be determined solely by the local law of Illinois, as construed by the courts of that State, I do not perceive how a Federal question arises on this record, since I find it impossible to think that there can be a Federal question depending exclusively for its solution upon non-Federal or state law.

I am authorized to say that MR. JUSTICE MCKENNA concurs in this dissent.

COLOMBIA *v.* CAUCA COMPANY.

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

No. 259. Argued April 23, 24, 1903.—Decided May 18, 1903.

There is a distinction between foreign States and foreign citizens. Congress did not mean to exclude a sovereign power which sees fit to submit its case to our courts from the right to appeal to the court of last resort. Under section 6 of the act of 1891 the decree of the Circuit Court of Appeals is not made final where one of the parties is a foreign State.

Where the parties to a controversy have submitted the matter to a commission of three who have the power to, and do resolve that all decisions shall be by majority vote, an award by a majority is sufficient and effective.

In an arbitration between a sovereign State and a railroad company and affecting public concerns, whatever might be the technical rules for arbitrators dealing with a private dispute, neither party can defeat the operation of the submission after receiving benefits thereunder, by withdrawing, or by adopting the withdrawal of its nominee, after the discussions have been closed.

Where a foreign State grants a concession to build a railroad to an individual who assigns it and other contracts connected therewith to a corporation and thereafter the State forfeits and cancels the concession but agrees, as a compromise, to take over the road as far as built and pay the actual expense of construction, it is proper in estimating such expenses to

allow the office and traveling expenses and salaries of the officers, but not the cash paid by the corporation for the contract and concession or the amounts paid to the officers of the corporation for securing the agreement to submit the matter to arbitration.

THE case is stated in the opinion of the court.

Mr. William G. Johnson for appellant.

Mr. John W. Beaumont and *Mr. John K. Cowen* for appellees. *Mr. Edward H. Murphy* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal by the Republic of Colombia from a decree of the Circuit Court of Appeals, 113 Fed. Rep. 1020, affirming a decree of the Circuit Court, 106 Fed. Rep. 337, upon a bill brought by the Republic and a cross bill by the defendant, The Cauca Company. The bill is a bill to set aside an award under a submission entered into by the above-mentioned parties. The cross bill is to establish the award as valid, notwithstanding the withdrawal of the representative named by the plaintiff, and prays specific performance. The decree confirms the award after rejecting certain items. Of course it does not attempt to order specific performance.

Before going further with the statement of facts we must dispose of an objection to the jurisdiction of this court to entertain this appeal. As a foreign government has seen fit to submit its case to the courts of the country with whose citizens its controversy exists, it would be unfortunate if through any mistake it was prevented from carrying questions of law to the court of last resort. We are of opinion that it had the right to appeal. The Circuit Court had jurisdiction under the Constitution, article 3, section 2, and the act of August 13, 1888, c. 866, § 1, 25 Stat. 434, as the suit is "a controversy between citizens of a State and foreign States, citizens, or subjects," within the words and meaning of the act. *The Sapphire*, 11 Wall. 164, 167. The right to appeal from the decree of the Circuit Court of Appeals is given by the act of March 3, 1891,

c. 517, § 6, 26 Stat. 826, 828, "in all cases not hereinbefore, in this section, made final." The only words of the section relied upon as making the decree of the Circuit Court of Appeals final are those which declare it so "in all cases where the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States." We see no reason to doubt that Congress was as well aware of the distinction between foreign States and foreign citizens when it passed the act of 1891 as when it passed the act of 1888, and that when it spoke of aliens it meant foreign citizens alone. We are confident that it did not dream of excluding sovereign powers that chose to sue here from the right to an appeal. The word aliens could be given that effect only by straining it beyond its natural meaning and away from the indications of the context. As the decree of the Circuit Court of Appeals is not made final by § 6, an appeal lies to this court.

Whether technically proved or not, we assume the commission making the award to have found the facts hereafter stated, and we think that they were fully warranted in doing so. The subject matter of the award was a railroad intended to run from Buenaventura to the Pacific, via Cali, to the city of Manizales, and partly built. In 1890 one Cherry received a concession to build and operate this road, with land grants and various guaranties from the government, and with the right to transfer the concession, but all subject to the condition of the work being done in four years. Thereupon the Cauca Company was incorporated in West Virginia for the purpose, among other things, of building and operating the road, and Cherry transferred his concession to it, stipulating that he should be employed to do the work, receive all the company's stock and bonds and various benefits of the concession. On the same day the Colombian Construction and Improvement Company also was incorporated, for many purposes, including that of building the road, and Cherry forthwith assigned to it his contract with the Cauca Company, stipulating that he should receive in return a large amount of full-paid stock of the company and one hundred and thirty-five thousand dollars in cash. Cherry was to be employed as chief constructor

of the road, and the company was to take his place under the Cauca Company's contract.

The time for building the road went by, the road was not built, and the government claimed a forfeiture. On the other hand, the Cauca Company set up that the failure was due to the fault of the government, and other justifications, and the matter became a subject of diplomatic discussion between this country and Colombia. With the merits of this controversy we have nothing to do. As a result, a submission to a special commission, as it was termed, was agreed upon and signed. The essential features of the agreement were that the company by the second article surrendered the railroad, and that Colombia agreed to pay a just indemnity, the scope of which will be considered later, and which was to be determined by the commission. The commission consisted of three—one appointed on behalf of Colombia, one on behalf of the company and the third by agreement between the Secretary of State of this country and the Colombian Minister at Washington. The commission, spoken of in the agreement in the singular, was to "determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and as to the proceedings of the parties." In pursuance of this power it resolved that all decisions should be by majority vote. Thereafter the case was tried, and several items were allowed to the company which it was contended by the representatives of Colombia were not within the scope of the submission. At the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest which have been disallowed, the Colombian commissioner announced his resignation to the commission.

The agreement gave Colombia thirty days to appoint a new member, and on its failure the Secretary of State for the United States and the Colombian Minister were to appoint him. But the commission was allowed only one hundred and fifty days "from its installation," which might be extended sixty days more for justifiable grounds. It had sat two hundred and three days when the resignation was announced. Manifestly it was possible, if not certain, that its only way of saving the proceed-

ings from coming to naught was to ignore the communication and to proceed to the award. This it did. Colombia by its bill and argument now lays hold of the resignation of its commissioner as a ground for declaring the award void.

Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission. It is fair to add that the bill offers to pay the undisputed sum, but not to rescind the submission and return the railroad. We shall spend little argument upon this part of the case. Of course, it was not expected that a commission made up as this was would be unanimous. The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as the result of, diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign State and a railroad, declared by a law of Colombia to be a work of public utility. In short, it was dealing with matters of public concern. It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was the only possible way, as each party appointed a representative of its side. We are satisfied that an award by a majority was sufficient and effective. We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed. See *Cooley* v. *O'Connor*, 12 Wall. 391, 398; *Kingston* v. *Kincaid*, 1 Wash. C. C. 448; *Ex parte Rogers*, 7 Cowen, 526; *Carpenter* v. *Wood*, 1 Met. 409; *Maynard* v. *Frederick*, 7 Cush. 247; *Kunckle* v. *Kunckle*, 1 Dall. 364; *Cumberland* v. *North Yarmouth*, 4 Greenl. 459, 468; *Grindley* v. *Barker*, 1 Bos. & P. 229, 236; *Dalling* v. *Mattchett*, Willes, 215, 217. In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demand.

We pass now to the main and serious question of the case,

which is, whether the scope of the submission was exceeded by any of the items of the award. The submission was in Spanish only, and there is a dispute about the translation of the most important words. In exchange for the surrender of the concession and the railroad with all of its fixed plant, rolling stock, obras, etc., Colombia is to pay to the company "a just indemnity por las obras y trabajos, (literally, the works and labors,) which the company may have executed during the time in which the undertaking has been in its charge, and for the rolling stock," etc. So in the following article, "The Government of Colombia and the company recognize in advance as just and sole indemnity a sum which shall equal that which the company shall prove that it has expended en los trabajos y obras ejecutados por ella en la construccion de la expressada via ferrea y en los materiales rodantes, herramientas, etc., etc., introducidos con destino a la misma via."

It is argued for Colombia that the untranslated words limit the indemnity to the immediate cost on the ground of the works and labors executed there. On the other side it is argued, especially in view of the previous dealings, that indemnity for the total cost of the enterprise was intended. Our opinion falls between these two extremes. The company, to be sure, was claiming the larger amount, but Colombia had asserted a forfeiture. The submission was a compromise, and presumably the company meant the most and Colombia the least which the words used were capable of meaning. The only fair way is to take the language in its natural sense, not straining it either way. In article 5 it is contemplated, as the means of reaching the indemnity mentioned, that the commission shall appraise obras trabajos y materiales aforesaid; that it shall examine the books and accounts of the Cauca Company in New York, and that it shall inspect on the ground los obras y trabajos of the railroad and the rolling stock. In article 10 it is said that Colombia calculates approximately that the Cauca Company has disbursed in the obra of the railroad a sum of two hundred thousand dollars, (somewhat less than the cost on the ground as agreed before the commission,) while the company considers that sum as much below the just price of the obras y trabajos por ella ejec-

utados. And the sum named is paid on account in advance for the purpose of obtaining the immediate delivery of the railway. Whether the preliminary negotiations be considered or not, it seems to us to carry out the import of the words used if we limit the indemnity to expenditures which fairly could be found to have contributed in a direct way to the result on the surface of the earth, but extend it to such expenditures, even when they took place at a distance. If the latter were not included, there was no sufficient reason for a commission meeting in New York.

It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers. But when its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down. On this footing, subject to a further point to be mentioned, the salaries of executive officers of the Colombian Construction and Improvement Company ($108,181.42), the traveling expenses of these officers ($29,386.30), and the office expenses of the New York office ($21,727.58), properly were allowed, so far as appears. Although the facts were gone into with superfluous detail, it cannot be said as a matter of law that those items might not have been necessary in order to lay the tracks upon the ground. The company devoted itself wholly to the business of building the road. The initial expense naturally would be the greatest, and the company's contention was that but for Colombia the work would have been done.

It is said that the last named company was not a party to the submission, which is true. But, as we have said, it reasonably might have been found by the commission that it was assignee of the contract between Cherry and the Cauca Company, by which Cherry was to build the road and to receive the Cauca Company's stock and bonds. Therefore the work done by the construction company had to be paid for by the Cauca Company, and the result of its work was the railroad which the company surrendered. Under such circumstances we can listen to no hair splitting as to whether work done upon the road by the construction company can be called the Cauca Company's " obras y trabajos." We certainly should not disturb a

finding by the commission that the cost of building, by whomsoever incurred, was part of the Cauca Company's work.

On the other hand, we cannot uphold the award of $135,000, for cash paid for purchase of the concession. If, as would seem, this was the sum which the construction company was to pay Cherry for the assignment of the Cauca Company contract, it requires a layman's superiority to form in the interest of substance to connect this with the Cauca Company at all. But assuming that connection established, the expense is too remote from cost of construction to be allowed under the words used in this submission. It was contemplated by the concession that it might come to the hands of a corporation having its headquarters elsewhere, and the expenses which we have allowed might have been found necessary, if a Virginia or New York corporation were to begin the construction of this road in Colombia. But the purchase of the right to do the job was an accident. The cost of it would not have been incurred, so far as appears, if the concession had been made to the company direct. Therefore it is not to be paid for unless we adopt the view that the company is to be made whole for all that it paid in connection with the enterprise, rather than for what it paid to get the tracks laid, assuming that it had the right to lay them. As we have said, we adopt the latter view. We think it unlikely and not within the clear meaning of the words that the government undertook to pay an additional sum because its own concession had changed hands.

It is much more obvious that the submission did not warrant charging Colombia with an extra sum of $29,200, voted by the construction company to its officers for services in securing the agreement of submission. We have indicated our reasons sufficiently above.

The award was for a single sum, which the report of the proceedings of the commission shows to have been made up of items, some of which we have considered. These items were discussed by the courts below, seemingly at the instance of Colombia, and without objection on the part of the company, and some of them were disallowed without appeal. If they are open to consideration they show that the award was made up of several

items, some of which may be disallowed without affecting the rest. If they should not be considered, the only course would seem to be to presume that the commission followed its authority, and to sustain the award for the whole original amount. Certainly they could not be given a partial consideration and be taken account of so far as to invalidate the award, and yet be denied examination on the further question whether they could not be stricken out without affecting the residue of the award.

In addition to the oral arguments, we have considered every detail of the elaborate briefs submitted and the record, but have not thought it necessary to mention many of those details or to protract our judgment to an equal length. The amount allowed by the Circuit Court of Appeals is reduced as stated by $164,200, but in our opinion the following items must stand:

Agreed cost of work on the ground and rolling stock	$233,909 14
Salaries of executive officers	108,181 42
Traveling expenses of officers	29,385 88
Expenses and incidentals New York office	21,727 58
	$393,204 02
Deduct paid on account	200,000 00
Amount of award	$193,204 02

Decree reversed and cause remanded to the Circuit Court with directions to enter a decree confirming the award for and up to the sum of $193,204.02.

RANDOLPH v. SCRUGGS.

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

No. 272. Argued April 23, 24, 1903.—Decided May 18, 1903.

1. A claim for professional services rendered to a bankrupt in the preparation of a general assignment, valid under the law of the State where made, is not entitled to be paid as a preferential claim out of the estate in the hands of a trustee in bankruptcy when the adjudication in involuntary bankruptcy was made within four months after the making of the assignment and the assignment was set aside as in contravention of the bankrupt law.
2. A claim for professional advice and legal services rendered such an assignee prior to the adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, is not entitled under the deed to be proven as a preferential claim against the bankrupt estate, but so far as the assignee would be allowed for payment of the claim, it may be preferred in the right of the assignee.
3. On the facts in this case a claim against such an assignee for legal services rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor is not allowable as a preferential claim, when the necessary effect of the adjudication would be to set aside the assignment under which the assignee was acting.
4. The claim for services to the assignor for the preparation of the deed of trust to the assignee may be proved in the bankruptcy proceedings as an unsecured claim.

THE case is stated in the opinion of the court.

Mr. William M. Randolph, *Mr. George Randolph* and *Mr. Wassell Randolph* for appellants.

No appearance for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

The certificate in this case is as follows:

"This is an appeal from the District Court for the Western District of Tennessee, sitting as a court of bankruptcy, disal-

lowing a claim filed by the appellants against the bankrupt estate exceeding five hundred dollars in amount. From the transcript of the record it appears:

"(1.) That the Langstaff Hardware Company is a mercantile corporation, organized under the general law of Tennessee, providing for the organization of such corporations, which was engaged in carrying on a general hardware business at Memphis, in the Western District of Tennessee.

"(2.) Being embarrassed, it, on the 13th day of August, 1900, made a general deed of assignment, under the general assignment law of Tennessee, by which it conveyed to one C. W. Griffith, as assignee, all its corporate property of every kind, for the equal benefit of all its creditors. The assignee accepted the trust and qualified by executing bond and taking the oath prescribed by the Tennessee statute, and entered into possession of all the assigned estate. This deed of assignment provided that the assignee should pay 'reasonable counsel and attorneys' fees for preparing this deed and for advice and service to be furnished and rendered him in the course of the administration of the trust hereby created.' Within four months after this deed of assignment the Langstaff Hardware Company, upon a petition by its creditors, was adjudicated a bankrupt, and this deed set aside as in contravention of the bankrupt law. A trustee was duly chosen, who has taken possession of the assigned assets of the bankrupt.

"(3.) The appellants filed a claim against the bankrupt estate for professional services rendered the bankrupt in preparing the said deed of general assignment, and the assignee thereunder in advising and counseling him in respect of his duties and in defending a suit brought to wind up the corporation in a state chancery court, and for services rendered the assignee in resisting the adjudication of bankruptcy.

"The items of this claim were as follows:

(*a.*) For servicesr endered the corporation in preparing the general assignment . . .	$500 00
(*b.*) For general advice and counsel to the assignee in respect to the duties of his trust .	250 00

(*c.*) For legal services in defence of a suit brought in a state court wherein it was sought to have the corporation wound up as an insolvent corporation, and its assets distributed under the orders and decrees of the court $100 00

(*d.*) For services rendered by employment of the assignee in resisting an adjudication of bankruptcy against the Langstaff Hardware Company 300 00

"The appellants asserted and claimed that each of said items constituted a prior charge upon the assets and asked to have same paid by the trustee in preference to the unsecured creditors. The trustee and certain creditors excepted to each item of this account.

"The referee, upon the evidence, found and certified that the services had been rendered as claimed and were reasonably worth the amount claimed, but that the same did not constitute expenses allowable as a preference and were not otherwise a lien. He allowed the item of $500.00 as an unsecured claim against the bankrupt, but disallowed the other items as not being debts of the bankrupt. His order was duly excepted to and the questions certified to the court in due form. The district judge sustained the referee so far as he held the claim to be non-preferential and adjudged that none of the items constituted a debt, provable for any purpose against the bankrupt estate. From this judgment the appellants have appealed and assigned error.

"Upon this state of facts this court desires the instruction of the Supreme Court, that it may properly decide the questions of law thus arising:

"(1.) Is a claim for professional services rendered to a bankrupt corporation in the preparation of a general assignment, valid under the law of Tennessee, entitled to be paid as a preferential claim out of the estate of the corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary bankrupt within four months after the

making of the assignment, and the assignment set aside as in contravention of the bankrupt law?

"(2.) Is a claim for professional advice and legal services rendered such an assignee, prior to an adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, entitled to be proven as a preferential claim against the bankrupt estate?

"(3.) Is a claim against such an assignee for legal services rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor allowable as a preferential claim when the necessary effect of the adjudication would be to set aside the assignment under which the assignee was acting?

"(4.) If not entitled to be allowed as preferential claims, may either of the items described in the foregoing questions be proven as unsecured debts of the bankrupt corporation?"

It is admitted that a general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against the trustee in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied. *West Company* v. *Lea*, 174 U. S. 590, 595; *Boese* v. *King*, 108 U. S. 379, 385; *Bryan* v. *Bernheimer*, 181 U. S. 188. It hardly is necessary to discuss whether such an assignment should be held to be embraced in the express avoidance of conveyances made with intent to hinder, delay or defraud creditors in § 67 *e*, of the bankruptcy law. It is possible to say that constructively a general assignment falls under that description. *In re Gutwillig*, 90 Fed. Rep. 475; *S. C.*, 92 Fed. Rep. 337; *Davis* v. *Bohle*, 92 Fed. Rep. 325. One ground for such a construction would be that making the assignment is declared an act of bankruptcy by § 3. As it could not have been intended that the very conveyance which warranted putting the grantor into bankruptcy should withdraw all his property from distribution there, it seems sufficient to rely upon the necessarily implied effect of § 3. At all events, if such a conveyance be called constructively fraudulent, it would be severe to deduce consequences as

to the validity of the appellants' claim from that circumstance alone.

The assignment was not illegal. It was permitted by the law of the State, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every event, whether proceedings were instituted or not. *In re Sievers*, 91 Fed. Rep. 366; *In re Romanow*, 92 Fed. Rep. 510. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. At the time when it was made the institution of such proceedings was uncertain. It seems to us that it would be a hard and subtle construction to say, as seems to have been thought in *Bartlett* v. *Bramhall*, 3 Gray, 257, 260, that when they were instituted they not only avoided the assignment but made it illegal by relation back to its date, when, if they had not been started, it would have remained perfectly good. No doubt the corporation had notice of the bankruptcy law, but it could not go into bankruptcy by voluntary petition, and there is no objection to a debtor's distributing his property equally among his creditors of his own motion, if bankruptcy proceedings do not intervene. The view we take is that which has been taken by state decisions with reference to similar questions raised by creditors or under state insolvent laws. *Biglow* v. *Baldwin*, 1 Gray, 245, 247; *White* v. *Hill*, 148 Massachusetts, 396; *Clark* v. *Sawyer*, 151 Massachusetts, 64; *Wakeman* v. *Grover*, 4 Paige, 23, 43; *S. C.*, 11 Wend 187, 226. See also *Mayer* v. *Hellman*, 91 U. S. 496, 500, 501.

The appellants do not stop here, however, but argue that the avoidance of the voluntary assignment goes only to the administration of the property and not to the title; that the trustee simply succeeds the privately chosen assignee in the administration of the trust under the deed. Of course the object of this contention is to uphold the provision in favor of the appellants for preparing the deed and for service to be rendered the assignee. It does not seem to us to need much argument to show that this artificial refinement cannot stand. If by declaring the assignment an act of bankruptcy, the statute means that the conveyance shall not be effectual against the bank-

ruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be avoided as a whole when the trustee takes the goods. The cases which we have cited and others under insolvent and bankruptcy laws evidently take that view. It follows that the appellants can assert no preference by way of lien under the deed.

It does not follow, however, from the avoidance of the deed that the service of preparing it did not raise a valid debt. There is no sufficient reason why it should not when once it is decided that the service for which the debt is alleged was lawful when it was rendered. *In re Lains*, 16 N. B. R. 168, 170.

The more difficult question is how to deal with the services rendered to the voluntary assignee. The claim for them must be worked out through the assignee, and cannot be put higher than his claim for allowances, supposing that they had been paid. We may assume that there is no question of form before us, and that whatever the appellants properly might have been paid by the assignee they may prove for now. See *Central Railroad & Banking Co. of Georgia* v. *Pettus*, 113 U. S. 116, 124, 125; *Mason* v. *Pomeroy*, 151 Massachusetts, 164, 167. But it has been held that the assignee, even of a corporation, cannot be allowed anything for his services before the filing of the petition in bankruptcy. See *e. g.*, *In re Peter Paul Book Co.*, 104 Fed. Rep. 786. So far as this opinion rests on constructive fraud we have indicated above that it does not command our assent. The case would be different if the assignee were party to an actual fraud. *Hastings* v. *Spenser*, 1 Curtis, 504, 507; *Smith* v. *Wise*, 132 N. Y. 172, 178; *Perry-Mason Shoe Co.* v. *Sykes*, 72 Mississippi, 390, 401. But the assignee is acting lawfully in what he does before proceedings in bankruptcy are begun, and although it may be assumed that the avoidance of the assignment relates back to the date of the deed, still so far as his services, or services procured by him, tend to the preservation or benefit of the estate the mere fiction of relation is not enough to forbid an allowance for them. See *Lynch* v. *Bernal*, 9 Wall. 315, 325, 326. This is the doctrine of the state courts with reference to the operation of insolvent laws upon voluntary assignments and of the better considered decisions under

the bankrupt laws. *Platt* v. *Archer*, 13 Blatchf. 351; *Havemeyer* v. *Loeb*, 5 Abb. N. C. 338, 345; *Macdonald* v. *Moore*, 15 N. B. R. 26; *Wald* v. *Wehl*, 6 Fed. Rep. 163, 169; *Hunker* v. *Bing*, 9 Fed. Rep. 277; *In re Kurth*, 17 N. B. R. 573; *In re Scholtz*, 106 Fed. Rep. 834; *White* v. *Hill*, 148 Massachusetts, 396; *Clark* v. *Sawyer*, 151 Massachusetts, 64; *Wakeman* v. *Grover*, 4 Paige, 23, 43; *S. C.*, 11 Wend. 187; *Collumb* v. *Read*, 24 N. Y. 505, 515; *T. T. Haydock Carriage Co.* v. *Pier*, 78 Wisconsin, 579; *Perry-Mason Shoe Co.* v. *Sykes*, 72 Mississippi, 390. See *Williams* v. *Gibbes*, 20 How. 535; *Trustees* v. *Greenough*, 105 U. S. 527, 532; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 294, 295; *Woodruff* v. *New York, Lake Erie & Western Railroad*, 129 N. Y. 27. If beneficial services are allowed for they are to be regarded as deductions from the property which the assignee is required to surrender, and in that way they gain a preference. *Platt* v. *Archer*; *In re Scholtz*; *White* v. *Hill*; *Clark* v. *Sawyer*, *ubi supra*.

We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen.

It does not appear how far the services to the assignee were beneficial. Therefore the questions of the Circuit Court of Appeals cannot be answered in full. But the principles as to which it desired instruction may be stated sufficiently for the disposition of the case upon a subsequent finding of facts. None of the claims is entitled to preference under the deed. The charge for the preparation of the assignment properly may be proved as an unpreferred debt of the bankrupt. The services to the voluntary assignee may be allowed so far as they benefited the estate, and inasmuch as he would be allowed a lien on the property if he had paid the sum allowed, the appellants may stand in his shoes and may be preferred to that extent. No ground appears for allowing the item for services in resisting an adjudication of bankruptcy. See *Platt* v. *Archer*, 13 Blatchf. 351, 354; *Perry-Mason Shoe Co.* v. *Sykes*, 72 Miss-

issippi, 390, 398; *T. T. Haydock Carriage Co.* v. *Pier*, 78 Wisconsin, 579, 582; *Clark* v. *Sawyer*, 151 Massachusetts, 64.

We answer the questions as follows: (1.) No. (2.) Not under the deed, but so far as the assignee would be allowed for payment of the claim, the claim may be preferred in the right of the assignee. (3.) Not on the facts appearing in the certificate. (4.) The charge for the preparation of the deed may be proved as an unsecured claim.

Certificate accordingly.

GLOBE REFINING COMPANY *v.* LANDA COTTON OIL COMPANY.

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

No. 241. Submitted April 16, 1903.—Decided June 1, 1903.

In case of a breach of contract a person can only be held responsible for such consequences as may be reasonably supposed to be in contemplation of the parties at the time of making the contract, and mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods.

Where the amount of damages for breach of contract is made to appear to be more than $2000, the judge of the Circuit Court may, on exceptions properly taken, try the question of jurisdiction separately and if the damages have been purposely and fraudulently magnified he may dismiss the cause. The grounds upon which he bases his decision are reviewable in this court.

THE case is stated in the opinion of the court.

Submitted by *Mr. C. W. Odgen* and *Mr. J. D. Guinn* for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of contract brought by the plaintiff in error,

a Kentucky corporation, against the defendant in error, a Texas corporation, for breach of a contract to sell and deliver crude oil. The defendant excepted to certain allegations of damage, and pleaded that the damages had been claimed and magnified fraudulently for the purpose of giving the United States Circuit Court jurisdiction, when in truth they were less than two thousand dollars. The judge sustained the exceptions. He also tried the question of jurisdiction before hearing the merits, refused the plaintiff a jury, found that the plea was sustained and dismissed the cause. The plaintiff excepted to all the rulings and action of the court, and brings the case here by writ of error. If the rulings and findings were right there is no question that the judge was right in dismissing the suit, *North American Transportation & Trading Co.* v. *Morrison*, 178 U. S. 262, 267, but the grounds upon which he went are reëxaminable here. *Wetmore* v. *Rymer*, 169 U. S. 115.

The contract was made through a broker, it would seem by writing, and at all events was admitted to be correctly stated in the following letter:

"Dallas, Texas, 7/30/97.

"Landa Oil Company, New Braunfels, Texas.

"Gentlemen: Referring to the exchange of our telegrams today, we have sold for your account to the Globe Refining Company, Louisville, Kentucky, ten (10) tanks prime crude C/S oil at the price of 15¾ cents per gallon of 7½ pounds f. o. b. buyers' tank at your mill. Weights and quality guaranteed.

"Terms: Sight draft without exchange b/ldg. attached. Sellers paying commission.

"Shipment: Part last half August and balance first half September. Shipping instructions to be furnished by the Globe Refining Company.

"Yours truly,

"Thomas & Green, *as Broker.*"

Having this contract before us, we proceed to consider the allegations of special damage over and above the difference between the contract price of the oil and the price at the time of the breach, which was the measure adopted by the judge. These

allegations must be read with care, for it is obvious that the pleader has gone as far as he dared to go and to the verge of anything that could be justified under the contract, if not beyond.

It is alleged that it was agreed and understood that the plaintiff would send its tank cars to the defendant's mills, and that the defendant promptly would fill them with oil, (so far simply following the contract,) and that the plaintiff sent tanks. "In order to do this the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the cars from said Louisville to said New Braunfels in the sum of nine hundred dollars," which sum plaintiff had to pay, "and was incurred as an advancement on said oil contract." This is the first item. The last words quoted mean only that the sum paid would have been allowed by the railroad as part payment of the return charges had the tanks been filled and sent back over the same road.

Next it is alleged that the defendant, contemplating a breach of the contract, caused the plaintiff to send its cars a thousand miles, at a cost of a thousand dollars; that defendant cancelled its contract on the second of September, but did not notify the plaintiff until the fourteenth, when, if the plaintiff had known of the cancellation, it would have been supplying itself from other sources; that plaintiff (no doubt defendant is meant) did so wilfully and maliciously, causing an unnecessary loss of two thousand dollars.

Next it is alleged that by reason of the breach of contract and want of notice plaintiff lost the use of its tanks for thirty days—a loss estimated at seven hundred dollars more. Next it is alleged that the plaintiff had arranged with its own customers to furnish the oil in question within a certain time, which contemplated sharp compliance with the contract by the defendant, "all of which facts, as above stated, were well known to the defendant, and defendant had contracted to that end with the plaintiff." This item is put at seven hundred and forty dollars, with a thousand dollars more for loss of customers, credit and reputation. Finally, at the end of the petition it is alleged generally that it was known to defendant and in contemplation of the con-

tract that plaintiff would have to send tanks at great expense from distant points, and that plaintiff "was required to pay additional freight in order to rearrange the destination of the various tanks and other points." Then it is alleged that, by reason of the defendant's breach, the plaintiff had to pay three hundred and fifty dollars additional freight.

Whatever may be the scope of the allegations which we have quoted, it will be seen that none of the items was contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer's tanks should be at the defendant's mill. Under such circumstances the question is suggested how far the express terms of a writing, admitted to be complete, can be enlarged by averment and oral evidence, and if they can be enlarged in that way, what averments are sufficient. When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage* v. *Genning*, 1 Roll. R. 368; *Hulbert* v. *Hart*, 1 Vern. 133. It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance,

in the present case the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken the measure of damages generally is the same, whatever the cause of the breach. We have to consider therefore what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.

This point of view is taken by implication in the rule that "a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract." *Grébert-Borgnis* v. *Nugent*, 15 Q. B. D. 85, 92; *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583, 591; *Hadley* v. *Baxendale*, 9 Exch. 341, 354; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 456; *Howard* v. *Stillwell & Bierce Manufacturing Co.*, 139 U. S. 199, 206; *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, 32. The suggestion thrown out by Bramwell, B., in *Gee* v. *Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract.

The question arises then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore* v. *New York Shot & Lead Co.*, 40 N. Y. 422. See *Sawdon* v. *Andrew*, 30 Law Times, N. S., 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, in *Elbinger Actien-Gesellschaft* v. *Armstrong*, L. R. 9 Q. B. 473, 478, "it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, with-

out going on to show that he was told that he would be answerable for them, and consented to undertake such a liability?" Mr. Justice Willes answered this question, so far as it was in his power, in *British Columbia Saw-Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499, 508: "I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. . . . If [a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival] had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." The last words are quoted and reaffirmed by the same judge in *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583, 591; *S. C.*, L. R. 8 C. P. 131. See also Benjamin, Sale, 6th Am. ed. § 872.

It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods. With that established we recur to the allegations. With regard to the first it is obvious that the plaintiff was free to bring its tanks from where it liked—a thousand miles away or an adjoining yard—so far as the contract was concerned. The allegation hardly amounts to saying that the defendant had notice that the plaintiff was likely to send its cars from a distance. It is not alleged that the defendant had notice that the plaintiff had to bind itself to pay nine hundred dollars, at the time when the

contract was made, and it nowhere is alleged that the defendant assumed any liability in respect of this uncertain element of charge. The same observations may be made with regard to the claim for loss of use of the tanks and to the final allegations as to sending the tanks from distant points. It is true that this last was alleged to have been in contemplation of the contract, if we give the plaintiff the benefit of the doubt in construing a somewhat confused sentence. But having the contract before us we can see that this ambiguous expression cannot be taken to mean more than notice, and notice of a fact which would depend upon the accidents of the future.

It is to be said further with regard to the foregoing items that they were the expenses which the plaintiff was willing to incur for performance. If it had received the oil these were deductions from any profit which the plaintiff would have made. But if it gets the difference between the contract price and the market price it gets what represents the value of the oil in its hands, and to allow these items in addition would be making the defendant pay twice for the same thing.

It must not be forgotten that we are dealing with pleadings, not evidence, and with pleadings which, as we have said, evidently put the plaintiff's case as high as it possibly can be put. There are no inferences to be drawn, and therefore cases like *Hammond* v. *Bussey*, 20 Q. B. D. 79, do not apply. It is a simple question of allegations which, by declining to amend, the plaintiff has admitted that it cannot reinforce. This consideration applies with special force to the attempt to hold the defendant liable for the breach of the plaintiff's contract with third persons. The allegation is that the fact that the plaintiff had contracts over was well known to the defendant, and that "defendant had contracted to that end with the plaintiff." Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.

The only other allegation needing to be dealt with is that

the defendant maliciously caused the plaintiff to send the tanks a thousand miles, contemplating a breach of its contract. So far as this item has not been answered by what has been said, it is necessary only to add a few words. The fact alleged has no relation to the time of the contract. Therefore it cannot affect the damages, the measure of which was fixed at that time. The motive for the breach commonly is immaterial in an action on the contract. *Grand Tower Co.* v. *Phillips*, 23 Wall. 471, 480; Wood's Mayne on Damages, § 45; 2 Sedgwick, Damages, 8th ed. § 603. It is in this case. Whether under any circumstances it might give rise to an action of tort is not material here. See *Emmons* v. *Alvord*, 177 Massachusetts, 466, 470.

The allowance of the exceptions made the trial of the plea superfluous. If the question of fact was to be tried as to whether the amount of damages that fairly could be claimed was sufficient to give the court jurisdiction, the court had authority to try it. *Wetmore* v. *Rymer*, 169 U. S. 115, 121; Act of March 3, 1875, c. 137, § 5, 18 Stat. 472. In coming to his conclusion, apart from what was apparent on the face of the pleadings, the judge no doubt was influenced largely by a letter from the plaintiff to the defendant, enclosing an itemized bill for one thousand and twenty-one dollars and twenty-eight cents. This letter suggested no further claim except for "any additional mileage we may have to pay." Of course, if the judge accepted the plaintiff's own view of its case as expressed here, the pretence of jurisdiction was at an end. Some attempt was made to make out this was an offer of compromise, and inadmissible. But the letter did not purport to be anything of the sort, it was an out and out adverse demand.

Judgment affirmed.

QUEENAN *v.* OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 246. Argued April 16, 17, 1903.—Decided June 1, 1903.

1. A witness for the defence in a murder trial, who is not an expert, but who knew the prisoner before the killing, may state the opinion he formed at the time as to the mental condition of the prisoner, and sum up his impressions received at the time he saw the prisoner before the killing, but, except under special circumstances, he may not state an opinion formed since the killing.
2. It is not error to instruct the jury that under § 1852 of the Oklahoma Statutes of 1893 they should acquit if they found the accused was not able to know that the act of taking his victim's life was wrongful, and was not able to comprehend and understand the consequences of such act, if the jury also was instructed that in order to find him guilty they must find that he knew and understood that it was wrong to take the life and was able to comprehend and understand the consequences of such act.
3. When, during the course of a murder trial in Oklahoma it transpires that a juror, contrary to his statements on the voir dire, is disqualified and the prisoner has an opportunity to have him excused and the trial begun anew and his counsel refrain from making any objection at that time, it is too late for him to complain after the verdict of guilty has been rendered.

THE case is stated in the opinion of the court.

Mr. Stillwell H. Russell for plaintiff in error. *Mr. J. W. Johnson*, *Mr. C. B. Ames* and *Mr. H. H. Howard* were on the brief.

Mr. J. C. Robberts, attorney general of the Territory of Oklahoma, for defendant in error. *Mr. C. H. Woods* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment for murder upon which the plaintiff in error has been found guilty, and has been sentenced to be hanged. It comes here by writ of error to the Supreme Court of the Territory of Oklahoma, that court having decided that there

was no error in the proceedings and having affirmed the judgment. 11 Oklahoma, 261. The errors assigned will be taken up in the order in which they were argued.

1. The only defence was insanity. A lawyer, called as a witness for the defendant, stated that he knew the prisoner quite well; that the prisoner was his barber for some years, and that he saw him on the day before the killing. He then described the appearance and conduct of the prisoner, and said that at the time he did not notice any difference from the prisoner's usual demeanor. He then was asked if since the killing he had formed an opinion as to the prisoner's mental condition at that time. This opinion he was not allowed to state, and this is alleged as error. It will be seen that the witness was allowed to sum up his impressions received at the time. The court said in terms that he might state any condition that existed then or any impression that it made upon the witness's mind as to the prisoner's condition. That is all that was decided in *Connecticut Mutual Life Insurance Company* v. *Lathrop*, 111 U. S. 612. Some States exclude such opinions, even when formed at the time. But, as is pointed out in the case cited, it is impossible for a witness to reproduce all the minute details which he saw and heard, and most witnesses make but a meagre and halting effort. Therefore, in this as in many other instances, after stating such particulars as he can remember, generally only the more striking facts, an ordinary witness is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced. To allow less may deprive a party of important and valuable evidence that can be got at in no other way. But, on the other hand, to allow more, to let a witness who is not an expert state an opinion upon sanity which he has formed after the event, when a case has arisen and become a matter of public discussion, must be justified, if at all, on other grounds. It is unnecessary to lay down the rule that it never can be done, for instance, when the opinion clearly appears to sum up a series of impressions received at different times. *Hathaway* v. *National Life Insurance Co.*, 48 Vermont, 335, 350. It is enough to say that, at least, it should be done with caution and not without special

reasons. In this case the only knowledge shown by the witness was the familiarity of a man with his barber. So far as the evidence went, his present opinion might have been the result of interested argument, and, leaving such suggestions on one side, no reason of necessity or propriety was shown for the statement that would not have applied to any other man who had had his hair cut in the prisoner's shop. It does not appear that there was error in the ruling of the court.

2. The next error alleged is in the following instruction of the court:

"Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong and to comprehend and understand the consequences of his act is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one from the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane, and holds him responsible for such acts; and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life and was able to comprehend and understood the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

By § 1852 of the Oklahoma Statutes of 1893, "All persons are capable of committing crimes, except . . . all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." It was argued very earnestly that the latter part of the instruction added a second condition to ac-

quittal by directing it if the jury found that the prisoner was not able to know that the act was wrongful, "and was not able to comprehend and understand the consequences of such act." But, on the other hand, the condition of a verdict of guilty was made to be a finding that the prisoner knew and understood that it was wrong to take the life, "and was able to comprehend and understood the consequences of such act." So that the most material part of the charge, that relating to conviction, was favorable to the prisoner. If it be supposed that such abstract language was remembered and was nicely considered and analyzed by the jury, the total effect of the charge was that, unless the two conditions concurred, the prisoner must be acquitted. We do not mean to imply that any part of the instruction, fairly understood, was wrong, but for purposes of decision it is enough to say what we have said. The instructions asked and refused were covered by that which was given as stated above.

3. In the course of the trial the government announced that since the last adjournment it had been informed that one of the jurors, named, had been convicted in Nebraska of what, by the law of that State, was a felony, grand larceny, at a time and place mentioned, contrary to the statement of the juror on the voir dire. We assume, for purposes of decision, that this disqualified the juror from serving in any case. Stat. Oklahoma, §§ 3093, 5182, 5183. The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection were pressed the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It now is argued that the defendant was deprived of a constitutional right, which he could not waive. *Thompson* v. *Utah*, 170 U. S. 343. The contrary plainly is the law as well for the Territories as for the States. See *Kohl* v. *Lehlback*, 160 U. S. 293, 299 *et seq.*; *Raub* v. *Carpenter*, 187 U. S. 159, 164.

It is argued that the court could not have permitted a challenge at that time, because the statutes of Oklahoma, § 5177, provided that "the court for good cause shown may permit a

juror to be challenged after he is sworn to try the cause, but not after the testimony has been partially heard." This statute cannot be construed as going merely to the order of procedure—as depriving a party of the right to challenge pending the trial, but as preserving the right for the purpose of a motion for a new trial. Either it does not apply to the case of a disqualification discovered, as this was, after a part of the evidence was in, or it purports to take away the right altogether. Whatever may be the true construction of the last clause, the court seems to have been ready to stop the trial. But if the court's view was wrong, if the statute is constitutional—as to which we do not mean to express a doubt—the prisoner had no right to complain, and if it is not, it was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.

Judgment affirmed.

HUTCHINSON *v.* OTIS.

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

No. 634. Submitted May 4, 1903.—Decided June 1, 1903.

A creditor obtained attachments against one who within four months thereafter was adjudged a bankrupt and attached debts, which, upon entry of judgments, were paid over to the attaching creditor who thereupon satisfied the judgments guaranteeing the garnishees against loss. The trustee in bankruptcy demanded payment of the debts from the garnishees and under its guarantee the creditor who had collected them paid the amount over.

Held, that the action of the trustee undid the satisfaction of record of the judgments and they were not a bar which would prevent the creditor from proving its claim against the estate in the hands of the trustee.

THE case is stated in the opinion of the court.

Mr. Freedom Hutchinson and *Mr. Frederic D. McKenney* for appellant.

Mr. Roland Gray for appellees.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals affirming on appeal a decree of the District Court, which allowed a proof of a claim in bankruptcy by the appellees. 115 Fed. Rep. 937. The appeal to this court was allowed by a justice of this court under the bankruptcy act, § 25 *b*, 1, and rule 36, 2, on grounds to be explained, and now is before us on a motion to dismiss or affirm. The facts, shortly stated, are as follows: Otis, Wilcox & Co., having an admitted claim for $4421.64, sued the bankrupts in New York and Illinois, and attached debts due to them, by trustee process. This was within four months before the filing of the petition in bankruptcy, and therefore was ineffectual as against the appellant by § 67 of the act. But Otis, Wilcox & Co., supposing that they had valid attachments, took judgments by default, and collected their debt from the parties trusteed, agreeing to save the latter harmless from liability to others. Satisfaction was entered of record in each suit. Subsequently the trustee in bankruptcy demanded payment of these debtors of the bankrupt, and as they had no defence, Otis, Wilcox & Co. paid over to the trustee the full amount of the respective debts. Otis, Wilcox & Co. filed a claim in bankruptcy, and were allowed to prove their claim.

The trustee in bankruptcy took the ground before the referee, and seems to have adhered to it, that full faith and credit to the record of satisfaction forbade the allowance of the proof. It was because of this contention that the writ of error was allowed. The jurisdiction of this court is established and the motion to dismiss must be overruled. But so little attention was paid to the question and the contention seems to us so unmeritorious that we think that there was color for the motion, and we therefore take up the motion to affirm.

No one denies the fact or effect of the record of satisfaction. N. Y. Code of Civil Proc. § 1264; *Crotty* v. *McKenzie*, 42 N. Y. Super. Ct. Rep. 192, 201. What is said is that although it is

true that on a certain day a judgment on the appellees' claim was satisfied, since that time the satisfaction had been undone and the money restored. It is objected that Otis, Wilcox & Co. did not purport to restore to the appellant what they had received from the parties indebted to the bankrupt estate, but simply paid the debts of those parties. But names make no difference in this case. There was no identified fund. When Otis, Wilcox & Co. paid the debts out of which they had received satisfaction, they undid the satisfaction, and the trustee in bankruptcy knew it. We see no sufficient ground on which he can deny the consequence that the right to prove revived. That right cannot be made to depend on the views which the New York and Illinois courts may entertain as to the propriety of correcting the record of satisfaction to conform to present conditions, it having been right when it was made. Whether the record is corrected or not, it cannot be conclusive as to events of a later date. If it had been vacated, it would have restored the rights of the creditors by relation. *Taylor* v. *Ranney*, 4 Hill, 619, 623, 624.

The only difficulty is this: The adjudication of bankruptcy was on April 27, 1900. A petition and the original proof of claim of Otis, Wilcox & Co. were filed on March 9, 1901. At this time the trustee in bankruptcy was suing for the debts in question, but by agreement time was given to the counsel for Otis, Wilcox & Co. to look into the matter. The payment to the trustee by the last named firm, although agreed upon before, was not made until April 29, 1901, more than a year after the adjudication, so that technically the record of satisfaction really was a bar until the time for proof had gone by. Subsequently, on November 12, 1901, an amended proof was filed by consent of the trustee, and was allowed as of November 4. We are of opinion that when the trustee accepted payment from Otis, Wilcox & Co. in pursuance of his previous agreement, with this proof on file, and in this way undid the satisfaction of record, he must be taken to have done so on the understanding that he accepted the consequence that the bar to the proof was removed. We follow the interpretation of the Circuit Court of Appeals, that the admitted belief of Otis, Wilcox & Co.,

that they had been paid, was due to a mistake of fact, and the agreement to settle seemingly having been made within the year, the delay of actual payment for a day or two beyond, for convenience of counsel, ought not to affect the result.

The appeal being here, the trustee argues two other questions. The first concerns the amended proof. The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within § 57 *n* forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad. *Sanger* v. *Newton*, 134 Massachusetts, 308. See *In re Parkes*, 10 N. B. R. 82; *In re Baxter*, 12 Fed. Rep. 72; *In re Glass*, 119 Fed. Rep. 509. The proceedings remained in the District Court, notwithstanding the appeal, and the amendment properly was allowed there. It was little more than a form, as the facts had been agreed of record, and the filing was assented to by the trustee.

A petition was filed by Otis, Wilcox & Co., asserting a lien on the proceeds of a seat in the New York Stock Exchange, which formerly belonged to the bankrupts. This lien had not been insisted on by Otis, Wilcox & Co., because of their impression that they had been paid effectually. No one having changed his position on the faith of their waiver, the District Court allowed the lien. The Circuit Court of Appeals held that this portion of the decree of the District Court was not subject to an appeal to the Circuit Court of Appeals. The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court, and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim, *Cun-*

ningham v. *German Insurance Bank*, 101 Fed. Rep. 977; *S. C.*, 4 Am. Bank. Rep. 192, and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25 regulating appeals in bankruptcy proceedings, and that the decree upon it was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," within § 25 *a*, 3, and was not an independent ground of appeal. See *In re Whitener*, 105 Fed. Rep. 180, 186; *In re Worcester County*, 102 Fed. Rep. 808, 813; *In re Rouse, Hazard & Co.*, 91 Fed. Rep. 96; *In re York*, 4 N. B. R. 479, 483. If the question should be held to come up as incident to the appeal on the proof, *Cunningham* v. *German Insurance Bank*, *supra*, we see no error in the decree of the District Court. It allowed Otis, Wilcox & Co. to correct a mistake expressly made the ground of their waiver, no new rights having intervened. We deal somewhat summarily with this point, because the merits were brought before the Circuit Court of Appeals by a petition for revision under § 24 *b*, and were disposed of very satisfactorily so far as appears on that petition. We find no error in the decree.

Decree affirmed.

OPINIONS PER CURIAM, ETC., FROM MAY 4 TO JUNE 2, 1903.

No. 279. MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* DAVID D. GANO ET AL. In error to the Supreme Court of the State of Iowa. Submitted May 1, 1903. Decided May 4, 1903. *Per Curiam.* Judgment affirmed with costs and interest, on the authority of *Electric Company* v. *Dow*, 166 U. S. 489; *Railroad Company* v. *Matthews*, 174 U. S. 96; *St. Louis etc. Railway Company* v. *Paul*, 173 U. S. 404. See 114 Iowa, 713. *Mr. Albert E. Clarke* for plaintiff in error. No brief filed for defendants in error.

No. 285. GEORGE E. GEE, PLAINTIFF IN ERROR, *v.* HENRY D. GEE. In error to the Supreme Court of the State of Minnesota. Submitted May 1, 1903. Decided May 4, 1903. *Per Curiam.* Writ of error dismissed for the want of jurisdiction, on the authority of *Beaupré* v. *Noyes*, 138 U. S. 402; *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130. See 84 Minnesota, 384. *Mr. Thomas G. Frost* for plaintiff in error. *Mr. Leon E. Lum* and *Mr. J. L. Washburn* for defendant in error.

No. —. Original. *Ex parte.* IN THE MATTER OF HELEN POST, PETITIONER. Submitted May 4, 1903. Decided June 1, 1903. *Per Curiam.* Motion for leave to file petition for a writ of *habeas corpus* denied, on the authority of *Ex parte Mirzan*, 119 U. S. 584; *In re Chapman*, 156 U. S. 211; *In re Belt*, 159 U. S. 95. *Mr. H. Bisbee* and *Mr. George C. Bedell* for petitioner. *Mr. Assistant General Purdy* opposing.

Decisions on Petitions for writs of Certiorari.

From May 4 to June 2, 1903.

No. 671. A. NELSON LEWIS, PETITIONER, *v.* CHARLES H. TROW-

BRIDGE, TRUSTEE, ETC. May 4, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. A. Nelson Lewis pro se. Mr. Edmund Wetmore*, *Mr. John K. Beach* and *Mr. Frank W. Hackett* for respondents.

No. 673. FULLER & JOHNSON MANUFACTURING COMPANY, PETITIONER, *v.* A. J. SEILER. May 4, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William R. Bagley* and *Mr. Robert M. Bashford* for petitioner. *Mr. Charles M. Peck* for respondent.

No. 678. WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, PETITIONER, *v.* HENRI M. DE FARCONNET ET AL. May 4, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harrington Putnam* for petitioner. *Mr. Wilhelmus Mynderse* for respondents.

No. 680. AMERICAN NATIONAL BANK OF DENVER, PETITIONER, *v.* SAMUEL W. WATKINS. May 4, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. T. J. O'Donnell* for petitioner. No appearance for respondent.

No. 674. SUPREME COUNCIL AMERICAN LEGION OF HONOR, PETITIONER, *v.* AUGUSTA E. ORCUTT. May 18, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. A. J. Carr*, *Mr. Robert Newbegin* and *Mr. Henry Newbegin* for petitioner. *Mr. Alexander L. Smith* for respondent.

No. 681. ANGLO-AMERICAN PROVISION COMPANY, PETITIONER, *v.* UNITED STATES. May 18, 1903. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James C. McShane* for petitioner. *Mr. Solicitor General Hoyt* for respondent.

No. 685. Ocean Steamship Company, Petitioner, *v.* John Richard Crooks. May 18, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Julien T. Davies* and *Mr. Frederic D. McKenney* for petitioner. *Mr. Henry Galbraith Ward* for respondent.

No. 686. William B. Gurney, Jr., et al., Petitioners, *v.* Steamboat John H. Starin, etc. May 18, 1903. Petition for a writ of ceriiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Park* and *Mr. James K. Symmers* for petitioners. *Mr. Henry G. Newton* for respondent.

No. 688. Elbert R. Robinson, Petitioner, *v.* Chicago City Railway Company et al. May 18, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Gray Lucas* for petitioner. *Mr. Thomas A. Banning* and *Mr. Ephraim Banning* for respondents.

No. 697. Farmers' Loan and Trust Company, Trustee, Petitioner, *v.* Lake Street Elevated Railroad Company. June 1, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. I. K. Boyesen* for petitioner. *Mr. Charles H. Aldrich* and *Mr. Clarence A. Knight* for respondent.

No. 701. W. O. Johnson, Petitioner, *v.* Southern Pacific Company. June 1, 1903. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Solicitor General Hoyt* and *Mr. L. A. Shaver* for petitioner. *Mr. Maxwell Evarts* and *Mr. M. L. Clardy* for respondent.

No. 683. James H. Gilbert, Sheriff, Petitioner, *v.* American Surety Company of New York et al. June 1, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lynden Evans* and *Mr. Frederic D. McKenney* for petitioner. *Mr. T. A. Moran*, *Mr. Levy Mayer* and *Mr. Alfred S. Austrian* for respondents.

No. 693. American Sales Book Company et al., Petitioners, *v.* Josephus Bullivant, Jr. June 1, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leon Tobriner* and *Mr. T. J. Geisler* for petitioners. *Mr. C. H. Duell* and *Mr. W. A. Megrath* for respondent.

No. 698. Reid, Murdoch & Co., Petitioners, *v.* United States. June 1, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles Curie* and *Mr. W. Wickham Smith* for petitioners. *Mr. Solicitor General Hoyt* for respondent.

No. 699. John Holmes et al., Petitioners, *v.* Ship Queen Elizabeth. June 1, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert D. Benedict* for petitioners. *Mr. Wilhelmus Mynderse* for respondent.

No. 700. F. P. Olcott et al., Petitioners, *v.* Columbus Cartwright et al. June 1, 1903. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Maxwell Evarts* and *Mr. T. D. Cobbs* for petitioners. *Mr. M. L. Crawford* and *Mr. Edwin St. Clair Thompson* for respondents.

No. 709. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PETITIONER, *v.* ESTON E. DEVORE, ETC. June 1, 1903. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William D. Guthrie* and *Mr. Walter W. Ross* for petitioner. *Mr. William M. Offley* for respondent.

Cases Disposed of Without Consideration by the Court.

From May 4 to June 2, 1903.

No. 294. H. HOLLIS HUNNEWELL, PLAINTIFF IN ERROR, *v.* EDWARD W. PRESHO ET AL., STREET COMMISSIONERS, ETC. In error to the Supreme Judicial Court of the State of Massachusetts. May 18, 1903. Dismissed with costs per stipulation. *Mr. Felix Rackemann* for plaintiff in error. *Mr, Thomas M. Babson* for defendants in error.

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ACTION.

Continuation.

A proceeding for the appointment of a receiver, based upon a judgment obtained against an insurance company by service of process on the insurance commissioner, as provided by statute, is not a new and independent suit, but a mere continuation of the action already passed into judgment, and in aid of the execution thereof, and can be initiated by the filing of an amended or supplementary petition. When such an amended petition is filed the action cannot be removed to the Federal courts, as the time prescribed therefor by the statute has already passed. Nor has the Federal court jurisdiction in an equity action to enjoin proceedings under the supplementary petition, as it is a mere continuation of an action at law. Where a proceeding is not warranted by the law of a State, relief must be sought by review in the appellate court of the State and not by collateral attack in the Federal courts. *Mutual Reserve Fund Life Association* v. *Phelps*, 147.

See REMOVAL OF CAUSES.
STATUTES, 5.

ACTS OF CONGRESS.

See BANKRUPTCY.
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CONGRESS, INTENTION OF;
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See JURISDICTION;
PRACTICE, 1;
STATUTES, 2.

ARBITRATION AND AWARD.

1. *Defeat of operation of submission precluded.*

In an arbitration between a sovereign State and a railroad company and

affecting public concerns, whatever might be the technical rules for arbitrators dealing with a private dispute, neither party can defeat the operation of the submission after receiving benefits thereunder, by withdrawing, or by adopting the withdrawal of its nominee, after the discussions have been closed. *Colombia* v. *Cauca Company*, 524.

2. *Sufficiency of award by majority.*

Where the parties to a controversy have submitted the matter to a commission of three who have the power to, and do resolve that all decisions shall be by majority vote, an award by a majority is sufficient and effective. *Ib.*

ATTORNEYS.

See BANKRUPTCY, 3, 4;
CONTEMPT OF COURT.

BAIL.

See EXTRADITION, 2.

BANKRUPTCY.

1. *Claim on judgment revived by action of trustee.*

A creditor obtained attachments against one who within four months thereafter was adjudged a bankrupt and attached debts which upon entry of judgments were paid over to the attaching creditor who thereupon satisfied the judgments guaranteeing the garnishees against loss. The trustee in bankruptcy demanded payment of the debts from the garnishees and under its guarantee the creditor who had collected them paid the amount over. *Held*, that the action of the trustee undid the satisfaction of record of the judgments and they were not a bar which would prevent the creditor from proving its claim against the estate in the hands of the trustee. *Hutchinson* v. *Otis*, 552.

2. *Discharge—Contract not affected by.*

After obtaining a divorce on the ground of his wife's desertion, she not opposing the decree, the husband executed and delivered a written contract by which he agreed to pay the wife a specified sum annually for her own support during her life or so long as she remained unmarried, and also to pay her a specified sum annually for the support of their minor children whose custody was awarded by the decree to the wife. Subsequently the husband was adjudged a bankrupt and discharged. The wife sued for amounts accrued prior to the discharge both for her own support and for that of her children. *Held*, that as to the amount payable for her own support it was not a contingent liability provable under the bankruptcy act, and the contract was not of such a nature as would permit the obligor to be discharged from the obligations thereunder by a discharge in bankruptcy; and, that as to the amount payable for the minor children, the contract was a recognition of liability on the part of the father to support them and, as it does not appear that the amount was unreasonable, the contract to do so could not be affected by a discharge in bankruptcy; and the fact that the money was

BONDS.

CASES FOLLOWED.

1. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, followed in *Geer* v. *Mathieson Alkali Works*, 428.
2. *Cummings* v. *City of Chicago*, 188 U. S. 410, followed in *Montgomery* v. *Portland*, 89.
3. *Goldey* v. *Morning News*, 156 U. S. 518, followed in *Conley* v. *Mathieson Alkali Works*, 406.
4. *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, followed in *Texas & Pacific Ry. Co.* v. *Watson*, 287.
5. *Hardin* v. *Jordan*, 140 U. S. 371, followed in *Kean* v. *Calumet Canal and Improvement Co.*, 452, and *Hardin* v. *Shedd*, 508.
6. *Holmes* v. *Hurst*, 174 U. S. 82, followed in *Mifflin* v. *R. H. White Company*, 260.
7. *Mifflin* v. *R. H. White Company*, 190 U. S. 260, followed in *Mifflin* v. *Dutton*, 265.
8. *Mitchell* v. *Smale*, 140 U. S. 406, followed in *Kean* v. *Calumet Canal and Improvement Co.*, 452.
9. *Robbins* v. *Shelby Taxing District*, 120 U. S. 439, 492, followed in *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 160.
10. *Smythe* v. *Fisk*, 23 Wall. 374, followed in *Hawaii* v. *Mankichi*, 197.
11. *Williamette Bridge Co.* v. *Hatch*, 125 U. S. 1, followed in *Montgomery* v. *Portland*, 89.

CITIZENSHIP.

Diverse—Foreign corporation affected by local law.

Although a statute of North Carolina provides that a foreign railroad company desiring to own property or carry on business, or exercise any corporate franchise within the State, must comply with certain specified provisions of the statute, and on complying therewith shall become a domestic corporation, such fact does not affect the character of the original corporation, and it does not thereby become a citizen of North Carolina so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship. *Southern Railway Co.* v. *Allison*, 326.

See CONGRESS, POWERS OF, 2;
STATUTES, A, 2;
WRIT AND PROCESS.

CLAIMS.

French Spoliation Claims—Distribution of appropriation.

An administratrix of one who in 1818 became a member of a firm which had in 1798 sustained losses, resulting in what are known as French Spoliation Claims, presented the claims under the act of 1885 to the Court of Claims and obtained awards therefor. The findings clearly showed that the Court of Claims proceeded on the assumption that her intestate was a member of the firm when the losses were sustained. In 1899, Congress appropriated money to pay certain claims which had been favorably passed on by the Court of Claims including those awarded to

CONGRESS.

ACTS OF.

See BANKRUPTCY;
CLAIMS;
CONGRESS, INTENTION OF;
CONGRESS, POWERS OF, 3;
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INTERSTATE COMMERCE;
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LAND DEPARTMENT, 1, 5;
MARITIME LAW;
PUBLIC LANDS, 2, 4;
REVENUE LAWS;
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INTENTION OF.

1. *Navigable waters.*

While section 12 of the act of Congress of September 19, 1890, forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the secretary of war, in navigable waters of the United States, "except under such regulations as may be prescribed from time to time by him," it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. *Montgomery* v. *Portland*, 89.

2. *Resolution annexing Hawaii—Intent to impose provisions of Constitution.*

In inserting in the Resolution of July 7, 1898, annexing Hawaii, a provision that municipal legislation not inconsistent with the Constitution of the United States should remain in force until Congress otherwise determined, Congress did not intend to impose upon the islands every clause of the Constitution, and to nullify convictions and verdicts which might, before the legislature could act, be rendered in accordance with existing legislation of the islands but not in accordance with the provisions of the Constitution, nor was such the intention of Hawaii in surrendering its autonomy. *Hawaii* v. *Mankichi*, 197.

See CLAIMS;
LAND DEPARTMENT, 3;
STATUTES.

POWERS OF.

1. *Commerce—Regulation of—Enforcement of seamen's contracts.*

Contracts for seamen's wages are exceptional in character and may be subjected to special restrictions, and whenever they relate to commerce not wholly within a State, legislation enforcing such restrictions comes within the domain of Congress under the commerce clause of the Constitution, and such legislation is not contrary to the Fourteenth or Thirteenth Amendment. *Patterson* v. *Bark Eudora*, 169.

2. *Commerce—Protection of seamen.*

When Congress prescribes such restrictions, no one within the jurisdiction of the United States can escape liability for a violation thereof on a

plea that he is a foreign citizen or an officer of a foreign merchant vessel. The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which such vessels belong respectively may be withdrawn, and it is within the power of Congress to protect all sailors shipping within our ports on vessels engaged in foreign or interstate commerce, whether foreign or belonging to citizens of this country. *Ib.*

3. *Elections—Legislation to control.*

Although section 5507, Rev. Stat., which provides for the punishment of individuals who hinder, control or intimidate others from exercising the right of suffrage guaranteed by the Fifteenth Amendment, purports on its face to be an exercise of the power granted to Congress by the Fifteenth Amendment, it cannot be sustained as an appropriate exercise of such power. That amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. While Congress has ample power in respect to elections of Representatives to Congress, § 5507 cannot be sustained under such general power because Congress did not act in the exercise of such power. On its face the section is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, State and Federal, and not in pursuance of the general control by Congress over particular elections. It would be judicial legislation for this court to change a statute enacted to prevent bribery of persons named in the Fifteenth Amendment at all elections, to one punishing bribery of any voter at certain elections. Congress has the power to punish bribery at Federal elections, but it is all important that a criminal statute should define clearly the offence which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. *James* v. *Bowman*, 127.

4. *Indians—Jurisdiction of courts over.*

The moral obligations of the government towards the Indians are for Congress alone to recognize, and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them. *Blackfeather* v. *United States*, 368.

5. *Interstate commerce—Exclusive power to regulate.*

The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects are national in their character, or admit only of one uniform system or plan of regulation. (*Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492.) *Atlantic and Pacific Telegraph Co.* v. *Philadelphia*, 160.

6. *Taxation on right to succession.*

This court has determined that Congress has power to tax successions; that the States have the same power, and that such power of the States extends to bequests to the United States; it follows that Congress has the same power to tax the transmission of property by legacy to States or to their municipalities. The exercise of that power in neither case

CONSTITUTIONAL LAW.

CONSTRUCTION OF STATUTES.

CONTEMPT OF COURT.

CONTRACTS.

COURT OF CLAIMS.

COURT AND JURY.

INTERSTATE COMMERCE.

Rates—Competition—Long and short haul—Unreasonableness.

1. When competition which controls rates prevails at a given point a dissimilarity of circumstances and conditions is created justifying a carrier in charging a lesser rate to such point, it being the longer distance than it exacts to a shorter distance and non-competitive point on the same line. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 273.
2. A nearer and non-competitive point on the same line is not entitled to lower rates prevailing at a longer distance and competitive place on the theory that it could also be made a competitive point if designated lines of railway carriers by combinations between themselves agreed to that end. The competition necessary to produce a dissimilarity of conditions must be real and controlling and not merely conjectural or possible. *Ib.*
3. Where a charge of a lesser rate for a longer than a shorter haul over the same line is lawful because of the existence of controlling competition at the longer distance place the mere fact that the less charge is made for the longer distance does not alone suffice to cause the lesser rate for the longer distance to be unduly discriminatory. *Ib.*
4. The Commission having found a rate to be unreasonable solely because it was violative of the act which forbids a greater charge for a lesser than for a longer distance under stated conditions and which prohibits undue discrimination, *held* that as the grounds upon which such holding was based resulted from an error of law it was proper not to conclude the question of the inherent unreasonableness of the rates, but to leave it open for further action by the Commission to be considered free from the errors of law which had previously influenced the Commission. *Ib.*
5. A carrier, in order to give particular places the benefit of their proximity to a competitive point and thereby afford them a lower rate than they would otherwise enjoy, may take into consideration the rate to the point of competition and make it the basis of rates to the points in question. To give a lower rate as the result of competition does not violate the provisions of the act to regulate commerce. *Ib.*
6. *Held*, that where a rate was based on an error of fact, which was not complained of before, or acted on by, the Commission, and had been corrected by the carriers long before the decision below, and the corrected rate had been in force for a long period, it was not necessary to revise the decree of the court below, which was in all other respects correct, so as to secure a continuance of the corrected rate. *Ib.*

See CONGRESS, POWERS OF, 1, 5;
CORPORATIONS;
TAXATION, 1, 2, 3.

JUDGMENT.

Of board of equalization not subject to collateral attack.

Proceedings before a board of equalization are *quasi*-judicial, and if an

C. COURTS IN BANKRUPTCY.

Exclusive.

The jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive. *In re Watts and Sachs*, 1.

See BANKRUPTCY, 4.

D. OF COURT OF CLAIMS.

Indians—Tribes, not individuals.

Under the act of October 1, 1890, 26 Stat. 636, jurisdiction was conferred upon the Court of Claims to hear and determine the rights in law or equity of the tribes of the Shawnee and Delaware Indians arising out of the subject matter referred to in the act, and there is no grant of jurisdiction to hear or determine the rights of individual members of those tribes. The claims of the Shawnee Indians which under the act of July 1, 1892, were to be presented to the Court of Claims are those of a tribe or band of Indians and not of individual members thereof. *Blackfeather* v. *United States*, 368.

See STATUTES, 6.

E. OF LAND DEPARTMENT.

See LAND DEPARTMENT.

F. GENERALLY.

See ACTION; CLAIMS; CITIZENSHIP; COURTS, 1.

JURY.

See CONSTITUTIONAL LAW; INSTRUCTIONS TO JURY; COURT AND JURY; TRIAL.

LAND DEPARTMENT.

1. *Jurisdiction—Forest Reserve Act.*

The general administration of the Forest Reserve Act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for lands selected under the provisions of the act, are vested in the Land Department. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 301.

2. *Jurisdiction—Questions determinable.*

Whether it is necessary under the Forest Reserve Act for the selector, at the time of making his selection, to file in addition to his non-mineral affidavit, an affidavit that the land is not occupied in fact, is a question of law for the Land Department to determine, although such decision might not be binding on the court if such question properly arose in future litigation. It is also for the Land Department to determine whether, if the land were not known to be mineral at the time of the selection, the fact that mineral in paying quantities was found thereafter would vitiate the selection. *Ib.*