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VOLUME 116

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1885

J. C. BANCROFT DAVIS

REPORTER

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1885.

HANLEY & Another *v.* DONOGHUE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

Argued November 18, 19, 1885.—Decided December 14, 1885.

Under art. 4, sec. 1, of the Constitution, and § 905 of the Revised Statutes, a judgment recovered in one State against two joint defendants, one of whom has been duly summoned and the other has not, and which is valid and enforceable by the law of that State against the former alone, will support an action against him in another State.

This court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it.

In an action brought in one State upon a judgment recovered against the defendant jointly with another person in another State, an averment that the judgment, by the law of the State in which it was rendered, is valid and enforceable against this defendant and void against the other person is an allegation of fact, which is admitted by demurrer.

This was an action brought by Michael Hanley and William F. Welch against Charles Donoghue in the Circuit Court for Baltimore County, in the State of Maryland, upon a judgment for $2000, recovered by the plaintiffs on June 4, 1877, in an action of covenant against the defendant, Charles Donoghue, together with one John Donoghue, in the Court of Common

UNITED STATES SENATE COMMITTEE COPY

Pleas of Washington County in the State of Pennsylvania, and there recorded.

The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said Court of Common Pleas, and alleged that it was still in force and unreversed. The second count contained similar allegations, and also alleged that in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that State valid and enforceable against Charles Donoghue and void as against John Donoghue," and that "by the law of Pennsylvania any appeal from the judgment so rendered to the Supreme Court of Pennsylvania (which is the only court having jurisdiction of appeals from the said Court of Common Pleas) is required to be made within two years of the rendition of the judgment, nevertheless no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them."

The defendant filed a general demurrer to each and all of the counts, which was sustained, and a general judgment rendered for him. Upon appeal by the plaintiffs to the Court of Appeals of the State of Maryland, the judgment was affirmed. 59 Maryland, 239. The plaintiffs thereupon sued out this writ of error, on the ground that the decision was against a right and privilege set up and claimed by them under the Constitution and laws of the United States.

Mr. Frederick J. Brown for plaintiff in error.

Mr. Edward C. Eichelberger for defendant in error.

Mr. Justice Gray delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The question presented by this writ of error is whether the

judgment of the Court of Appeals of the State of Maryland has denied to the plaintiffs a right and privilege to which they are entitled under the first section of the fourth article of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof;" and under § 905 of the Revised Statutes, which re-enacts the act of May 26, 1790, ch. 11, 1 Stat. 122, and prescribes the manner in which the records and judicial proceedings of the courts of any State shall be authenticated and proved, and enacts that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

By the settled construction of these provisions of the Constitution and statutes of the United States, a judgment of a State court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered. *Maxwell* v. *Stewart*, 22 Wall. 77; *Insurance Co.* v. *Harris*, 97 U. S. 331; *Green* v. *Van Buskirk*, 7 Wall. 139; *Cooper* v. *Reynolds*, 10 Wall. 308. And it is within the power of the legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. *Mason* v. *Eldred*, 6 Wall. 231; *Eldred* v. *Bank*, 17 Wall. 545; *Hall* v. *Lanning*, 91 U. S. 160, 168; *Sawin* v. *Kenney*, 93 U. S. 289.

Much of the argument at the bar was devoted to the discussion of questions which the view that we take of this case renders it unnecessary to consider; such as the proper manner

of impeaching or avoiding judgments in the State in which they are rendered, for want of due service of process upon one or all of the defendants; or the effect which a judgment rendered in one State against two joint defendants, one of whom has been duly summoned and the other has not, should be allowed against the former in the courts of another State, without allegation or proof of the effect which such a judgment has against him by the law of the first State.

No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. *Talbot* v. *Seeman*, 1 Cranch, 1, 38; *Church* v. *Hubbart*, 2 Cranch, 187, 236; *Strother* v. *Lucas*, 6 Pet. 763, 768; *Dainese* v. *Hale*, 91 U. S. 13, 20. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State. In *Buckner* v. *Finley*, 2 Pet. 586, in which it was held that bills of exchange drawn in one of the States on persons living in another were foreign bills, it was said by Mr. Justice Washington, delivering the unanimous opinion of this court: "For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the States are necessarily foreign to and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." 2 Pet. 590.

Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Buckner* v. *Finley*, 2 Pet. 592; *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 324; *D'Arcy* v. *Ketchum*, 11 How. 165, 176; *Christmas* v. *Russell*, 5 Wall. 290, 305; *Thompson* v. *Whitman*, 18 Wall. 457.

Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one State to entitle them to be proved in the courts of another State, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Knowles* v. *Gaslight & Coke Co.*, 19 Wall. 58; *Settlemier* v. *Sullivan*, 97 U. S. 444. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the State in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority, (as is shown by the cases collected in the margin,*) whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other matter of fact. The opposing decisions in *Ohio* v. *Hinchman*, 27 Penn. St. 479, and *Paine* v. *Schenectady Ins. Co.*, 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one State upon the faith and credit to be allowed to a judgment rendered in another State, always takes notice of

* *Scott* v. *Coleman*, 5 Littell, 349; *Thomas* v. *Robinson*, 3 Wend. 267; *Shelden* v. *Hopkins*, 7 Wend. 435; *Van Buskirk* v. *Mulock*, 3 Harrison (N. J.) 184; *Elliott* v. *Ray*, 2 Blackford, 31; *Cone* v. *Cotton*, 2 Blackford, 82; *Snyder* v. *Snyder*, 25 Indiana, 399; *Pelton* v. *Platner*, 13 Ohio, 209; *Horton* v. *Critchfield*, 18 Illinois, 133; *Rape* v. *Heaton*, 9 Wisconsin, 328; *Crafts* v. *Clark*, 31 Iowa, 77; *Taylor* v. *Barron*, 10 Foster, 78, and 35 N. H. 484; *Knapp* v. *Abell*, 10 Allen, 485; *Mowry* v. *Chase*, 100 Mass. 79; *Wright* v. *Andrews*, 130 Mass. 149; *Bank of United States* v. *Merchants' Bank*, 7 Gill, 415, 431; *Coates* v. *Mackey*, 56 Maryland, 416, 419.

the laws of the latter State; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort.

When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of the National Government, doubtless takes notice, without proof, of the laws of each of the United States.

But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here.

In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. *Course* v. *Stead*, 4 Dall. 22, 27, note; *Hinde* v. *Vattier*, 5 Pet. 398; *Owings* v. *Hull*, 9 Pet. 607, 625; *United States* v. *Turner*, 11 How. 663, 668; *Pennington* v. *Gibson*, 16 How. 65; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 230; *Cheever* v. *Wilson*, 9 Wall. 108; *Junction Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226, 230; *Lamar* v. *Micou*, 114 U. S. 218.

But on a writ of error to the highest court of a State, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws or treaties of the United States has been erroneously decided by the State court upon the facts before it—while the law of that State, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the State court the laws of another State are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in *Green* v. *Van Buskirk*, 7 Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to

the statement made in the court below, cannot be questioned." *Talbot* v. *Seeman*, 1 Cranch, 1, 38.

Where by the local law of a State, (as in Tennessee, *Hobbs* v. *Memphis & Charleston Railroad*, 9 Heiskell, 873), its highest court takes judicial notice of the laws of other States, this court also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the Court of Appeals has not only affirmed the general rule that foreign laws are facts, which, like other facts, must be proved before they can be received in evidence in courts of justice; but has held that the effect which a judgment rendered in another State has by the law of that State is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that State is admitted by demurrer. *Baptiste* v. *De Volunbrun*, 5 Har. & Johns. 86, 98; *Wernwag* v. *Pawling*, 5 Gill & Johns. 500, 508; *Bank of United States* v. *Merchants' Bank*, 7 Gill, 415, 431; *Coates* v. *Mackey*, 56 Maryland, 416, 419.

From these considerations, it follows that the averment, in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that State against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that State, and void against John, who had not been so served, must be considered, both in the courts of Maryland, and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer.

Upon the record before us, therefore, the plaintiff appears to be entitled, under the Constitution and laws of the United States, to judgment on this count. It having been admitted at the bar that the other counts are for the same cause of action, it is unnecessary to consider them. The general judgment for the defendant is erroneous, and the rights of both parties will be secured by ordering, in the usual form, that the

Judgment of the Court of Appeals of Maryland be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

BRIDGEWATER IRON COMPANY *v.* LISSBERGER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued December 3, 4, 1885.—Decided December 14, 1885.

A transfer for valuable consideration of shares in a Massachusetts manufacturing corporation, not recorded as required by the statute of Massachusetts of 1870, ch. 224, § 26, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer.

This was an action of tort, brought by a citizen of New York against a manufacturing corporation established under the laws of Massachusetts, for refusing to issue to him a certificate of twenty shares of its capital stock.

At the trial, the plaintiff introduced evidence tending to show that the defendant corporation in 1874 accepted a new charter from the Legislature of Massachusetts, (Mass. Stat. 1874, ch. 26), which made it subject to the provisions of the general act of 1870, ch. 224; that on August 10, 1877, George B. Stetson, being the owner of these shares, executed to the plaintiff a transfer of them, absolute in form, but intended as collateral security for a debt due from him to the plaintiff, and annexed the transfer to his certificate, and delivered both to the plaintiff; and that on December 15, 1878, the plaintiff tendered them to the defendant corporation, and duly demanded that the transfer be recorded on its books and a new certificate issued to him.

The defendant corporation introduced competent and uncontroverted evidence that on May 24, 1878, it brought an action against George B. Stetson on a debt due to it from him, and duly attached these shares on mesne process, and afterwards obtained judgment and execution, under which the shares were levied on and sold to the defendant in November, 1878.

To meet this, the plaintiff offered evidence tending to show that, before the attachment, an agent of the plaintiff informed a director of the defendant corporation of the transfer to the plaintiff, and that the plaintiff wanted the corporation to know

it; and the director mentioned it to Nahum Stetson, the defendant's treasurer, clerk, and business agent.

The defendant took no objection to the admission or sufficiency of this evidence, otherwise than by requesting the court to instruct the jury that "if said evidence was competent to prove a notice to said Nahum, or to put him on the inquiry whether said shares had been transferred to the plaintiff, yet no such notice was effectual to deprive the defendant of the right as creditor to attach said shares as the property of said George B. Stetson, under the statutes of the State of Massachusetts."

The court declined so to rule; and instructed the jury "that if they, upon the evidence, believed that said Nahum, being the treasurer, clerk and business agent of the company, knew or had notice that said George B. Stetson had conveyed said shares to the plaintiff, prior to said attachment, the plaintiff was entitled to recover."

To this instruction the defendant excepted, and, after verdict and judgment for the plaintiff, tendered a bill of exceptions, which was allowed.

Mr. Charles A. Welch for plaintiff in error.

Mr. Darwin E. Ware for defendant in error.

Mr. Justice Gray delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The principal question argued by counsel, and the only one presented by the bill of exceptions for decision, is whether a transfer for valuable consideration of shares in a Massachusetts manufacturing corporation, not recorded as required by the statute of Massachusetts of 1870, ch. 224, § 26, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer.

That statute provides that "shares may be transferred by the proprietor, by an instrument in writing under his hand, which shall be recorded by the clerk of the corporation in a book to be kept for that purpose;" and "the purchaser named

in such instrument so recorded shall, on producing the same to the treasurer, and delivering to him the former certificate, be entitled to a new certificate." These provisions were re-enacted in the Public Statutes of Massachusetts of 1882, ch. 106, § 30, and similar provisions had existed since 1809. Mass. Stats. 1808, ch. 65, § 4; 1829, ch. 53, § 4; Rev. Stats. 1836, ch. 38, § 12; Stat. 1846, ch. 45, § 1; Gen. Stats. 1860, ch. 60, § 13.

By a series of decisions of the Supreme Judicial Court of Massachusetts, on which the plaintiff in error relies, it has been held that these provisions, taken in connection with the contemporaneous statutes of that State, authorizing and facilitating the attachment of such shares by creditors of the owner, are not to be construed as intended merely for the convenience and benefit of the corporation, and the regulation of its relations to its stockholders; but are to be considered as in the nature of a registry act, regulating the transfer of the stock as to third persons, and therefore preventing an unrecorded transfer from taking effect against a creditor afterwards attaching the shares without notice of the transfer. *Fisher* v. *Essex Bank*, 5 Gray, 373; *Blanchard* v. *Dedham Gaslight Co.*, 12 Gray, 213; *Sibley* v. *Quinsigamond Bank*, 133 Mass. 515, 521; *Central National Bank* v. *Williston*, 138 Mass. 244.

But the learned counsel for the plaintiff in error fails to show that an unrecorded transfer of shares has ever been held invalid as against a subsequent attachment by a creditor who has notice or knowledge of the transfer. The language and the reasoning of the opinions in the very cases that he cites clearly imply the contrary. And under the early Massachusetts registry act of 1783, ch. 37, § 4, which provided that no unrecorded deed of lands should "be good and effectual in law to hold such lands against any other person or persons but the grantor or grantors and their heirs only," it was always held that, the intent of the statute being to give notice to subsequent purchasers and attaching creditors, a deed was valid, without record, against those who had notice or knowledge of it. *Farnsworth* v. *Childs*, 4 Mass. 637; *Priest* v. *Rice*, 1 Pick. 164.

Judgment affirmed.

MARVEL *v.* MERRITT, Collector.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued November 23, 1885.—Decided December 14, 1885.

Iron ore is subject to the duty of twenty per centum *ad valorem* imposed by Rev. Stat. § 2504 upon "Mineral and bituminous substances in a crude state not otherwise provided for."

The facts are stated in the opinion of the court.

Mr. B. F. Lee for plaintiff in error submitted on his brief.

Mr. Solicitor-General argued on behalf of defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error brought his action to recover duties paid by him and exacted, as he claims, in excess of those imposed by law, upon certain quantities of iron ore imported by him into the port of New York in 1879.

The single question involved in the suit arose under the Tariff Act of 1874, being Title XXXIII, Rev. Stat.

The plaintiff was assessed and compelled to pay a duty of 20 per centum *ad valorem* on his importations as coming within the provision in Schedule M, Sundries, Rev. Stat. § 2504, for "mineral and bituminous substances in a crude state not otherwise provided for." He claimed that iron ore was dutiable upon a proper classification as "an unmanufactured article not herein enumerated or provided for," and subject only to a duty of ten per cent. *ad valorem*, under the provisions of Rev. Stat. § 2516.

On the trial below, the plaintiff offered evidence to show that iron ore was known to the trade commercially only under that name, and that scientifically considered it was a metallic and not a mineral substance, but the offer was rejected by the court. It was proven that iron ore was not a bituminous substance.

The court instructed the jury, there being no disputed question of fact arising upon the evidence as admitted, to return a verdict for the defendant. Judgment was rendered thereon accordingly, to reverse which this writ of error has been brought.

The Tariff Act of 1874, Rev. Stat. Title XXXIII, under which this case arises, does not expressly enumerate iron ore as the subject of duty. It is not on the free list, and is to be found, if at all, classified under some general description. The language in Schedule M, Sundries, Rev. Stat. 2d Ed. 478, is: "Mineral and bituminous substances in a crude state, not otherwise provided for, twenty per centum *ad valorem*." This is to be taken distributively, so as to cover all substances within the description, whether mineral or bituminous, or both, and is not to be confined to those which combine both characters.

The words used are not technical, either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning. They are the words of common speech, and, as such, their interpretation is within the judicial knowledge, and, therefore, matter of law. Webster, in his Dictionary, defines the noun *mineral* as "any inorganic species having a definite chemical composition," and *ore* as "the compound of a metal and some other substance, as oxygen, sulphur, or arsenic, called its *mineralizer*, by which its properties are disguised or lost." The word *mineral* is evidently derived from *mine*, as being that which is usually obtained from a *mine*, and, accordingly, Webster defines the latter as "a pit or excavation in the earth from which metallic ores or *other mineral substances* are taken by digging, distinguished from the pits from which stones only are taken and which are called quarries."

The importations of iron ore in question, therefore, were properly subjected to a duty of twenty per centum *ad valorem*, as a mineral substance in its crude state not otherwise provided for.

The judgment of the Circuit Court is accordingly

Affirmed.

SAXONVILLE MILLS *v.* RUSSELL, Collector.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued December 4, 1885.—Decided December 14, 1885.

The proviso in § 7 of the act of March 3, 1865, 13 Stat. 491, 494, "That the duty shall not be assessed upon an amount less than the invoice or entered value," and the like proviso in § 9 of the act of July 28, 1866, 14 Stat. 328, 330, are applicable to the valuation of wools, for the purpose of determining the rate of duty chargeable upon them under the acts of March 2, 1867, 14 Stat. 559, and June 6, 1872, 17 Stat. 230.

In construing a tariff revenue system, consisting of numerous acts enacted at different times, each alteration is to be regarded in connection with the system, and existing legislative rules of general application are not to be disturbed beyond the clear intention of Congress.

This was an action brought by the plaintiff in error to recover duties on certain importations of wool, alleged to have been illegally assessed, in which judgment was rendered for the defendant. It was brought here for review by writ of error.

In the Circuit Court judgment was rendered upon an agreed statement of facts, set out in the record, as follows:

"The plaintiff, in August, 1873, imported into the port of Boston from Rosario, by the bark Velox, three hundred and twenty-four bales of unwashed Cordova wool and entered it in bond. It subsequently withdrew the same for consumption. The defendant, as collector of customs, assessed and exacted of the plaintiff a duty of six cents per pound less ten per centum on this wool upon the appraisement as hereinafter set forth. The plaintiff claimed that this wool was only legally liable to a duty of three cents per pound less ten per centum, and paid the extra three cents per pound under due protest, and seasonably appealed to the Secretary of the Treasury, who affirmed the decision and action of the defendant. In due time and in conformity to law plaintiff brought this action to recover the extra three cents per pound less ten per centum. The pleadings may

be referred to.* As it appears by the invoice, this wool was bought in Rosario on the 28th day of March, 1873, and was shipped at Rosario on board the Velox for Boston on the 5th day of June, 1873, and the invoice was sworn to before the acting United States consul on the 9th day of June, 1873. Rosario was the last port from whence it was exported to the United

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* *Note by the Reporter.*—The following extract from the record contains all the pleadings sent up from below, and referred to in the statement of facts made by the court :

THE SAXONVILLE MILLS, a corporation under the laws of the Commonwealth of Massachusetts, and having its principal place of business at Boston, in said Commonwealth, Plaintiff, *v.* THOMAS RUSSELL, late Collector of Customs for the Revenue District of Boston and Charlestown, Defendant.

In an action of contract.

1st count. And the plaintiff corporation says the defendant owes it seven thousand and seventy-six and $\frac{86}{100}$ dollars for money received by the defendant to the use of plaintiff corporation, according to the account hereto annexed.

ACCOUNT ANNEXED.

BOSTON, *April* 14, 1874.

Thos. Russell, ex-Collector, to Saxonville Mills, Dr.

(1.) Jan'y 22, '74.	To excess of duty paid on 100 bales of wool, entered per Velox, Aug. 23, 1873.....	$2,184 30
(2.) Feb. 6, '74.	To excess of duty paid on 100 bales of wool, entered per Velox, Aug. 23d, 1873.....	2,184 30
(3.) Feb'y 25, '74.	To excess of duty paid on 60 bales of wool, entered per Velox, Aug. 23, 1873.	1,319 50
(4.) Jan. 6, '74.	To excess of duty paid on 60 bales of wool, entered per Velox, Aug. 23, 1873.....	1,398 76
		$7,076 86

Second count. And also for that, on the day of the purchase of this writ, the defendant, being indebted to the plaintiff corporation in the sum of seven thousand seventy-six and $\frac{86}{100}$, dollars demanded, exacted, and received of the plaintiff corporation, by the defendant, then and now collector of the customs for the revenue district of Boston and Charlestown, under color of a law of the United States for the collection of duties on imports (and by the plaintiff corporation paid under protest), and before that time had and received, by the defendant, to the use of the plaintiff corporation, in consideration thereof, promised to pay the same when he should be thereto afterward requested ; yet the said defendant has not paid the same or any part thereof, though thereto often requested ; and the plaintiff corporation alleges that both

States, and it was invoiced there and entered at the custom house in Boston at the price paid for it in the currency and weight in which it was bought, which, upon being reduced to United States currency and weight, showed the cost to be above twelve cents per pound. Between the time of purchase and the time of shipment and exportation to the United States, the market value or wholesale price of this wool fell at Rosario, and at the time and place of shipment and exportation to the United States the market value or wholesale price was less than twelve cents per pound excluding charges in such port or place. The acting United States consul made under his official seal the following certificate upon the invoice, which is objected to by the defendant as incompetent and immaterial:

"'U. S. CONSULATE, ROSARIO, *June 10th*, 1873.

"'I, Thomas B. Wood, acting United States consul for Rosario, do hereby certify, after investigation, that the market value of unwashed Cordova wool at this place at the date of shipment of the annexed invoice was thirty-two to thirty-two and one-half Bolivian reals, equivalent to [from] $24\frac{38}{100}$ to $24\frac{76}{100}$ reals fuerta per arroba net weight.

"'Given under my hand and seal, this day.

"'(Signed) THOMAS B. WOOD,

"'*Acting U. S. Consul.*'

"Which being reduced to United States weight and currency, shows a value per pound less than twelve cents at Rosario. In conformity with law and Treasury regulations upon entry of

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the foregoing counts are for the same cause of action, to the damage of the said plaintiff, as it says, the sum of ten thousand dollars.

The writ in this cause is dated the fourteenth day of April, A.D. 1874, and was entered at the May term of this court, A.D. 1874, when and where the parties appeared by their respective attorneys. And on the eleventh day of September the following answer was filed, namely:

And now comes the said defendant, and for answer to the plaintiff's declaration and bill of particulars denies each and every allegation in each and every count thereof.

And the said defendant further says that he did not undertake or promise in manner and form, as the said plaintiffs have above complained. And of this he puts himself upon the country.

this merchandise by the plaintiff the proper number of designated packages thereof were sent to the public store, and this invoice was sent by the defendant as collector to the United States appraiser for his examination, appraisement, and report. The appraiser, after examination, made on the invoice the following report, and returned the same to the collector, as and for his appraisement, from which no appeal was claimed or taken to merchant appraiser: 'Wool, class 3, dutiable at invoice value six cents per pound, less ten per centum;' said report bearing date August 28, 1873, and upon this appraisement the collector assessed and exacted the duty as aforesaid. It is admitted and agreed, if it be material and competent, that the appraiser made the said report to the collector as and for his appraisement, believing that he had no legal right to appraise the wool at less than the invoice value, although in fact he believed the true market value of said wool at the last port or place whence exported to the United States, at the time of exportation, excluding charges thereat, was less than twelve cents per pound. The plaintiff contended that this was not a legal or sufficient appraisement. The defendant, as collector, exacted the duty of six cents per pound, less ten per centum, upon the ground that whatever the market value or wholesale price of this wool might have been in Rosario at the time of shipment and exportation, inasmuch as the invoice showed the value to be above twelve cents per pound, it was legally liable to the duty exacted. This wool was of the third class named in the first section of the act of March 2d, 1867, 14 Stat. 560, which provides 'that upon wools of the third class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound. Upon wools of the same class, the value whereof at the last port or place whence exported to the United States, including charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound.'

"If the court shall be of opinion upon the foregoing facts that said duty was illegally assessed and exacted of the plaintiff, then judgment shall be entered for the plaintiff for an amount

equal to one-half of the duties paid in gold, with interest, to be ascertained by an assessor to be appointed by the court, and costs. On the contrary, if the court shall be of opinion that the duty was properly assessed and exacted, judgment shall be entered for the defendant, with costs."

Mr. Charles Levi Woodbury for plaintiff in error.

Mr. Assistant Attorney-General Maury for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The duties chargeable upon the importations in question were levied and collected under § 1 of the act of March 2, 1867, "to provide increased revenue from imported wool and for other purposes." 14 Stat. 559. It provides that "from and after the passage of this act, in lieu of the duties now imposed by law on the articles mentioned and embraced in this section, there shall be levied, collected, and paid on all unmanufactured wool, hair of the alpaca, goat, and other like animals, imported from foreign countries, the duties hereinafter provided." For the purpose of fixing the duties to be charged thereon, the articles mentioned are divided into three classes, as follows: Class 1, clothing wool; class 2, combing wools; class 3, carpet wools and other similar wools, the last being "such as Donskoi, native South American, Cordova, Valparaiso, native Smyrna, and including all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Egypt, Syria, and elsewhere." The importations affected by this suit were of this class. It was further provided, that, "upon wools of the third class, the value whereof at the last port or place whence exported into the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound; upon wools of the same class, the value whereof at the last port or place whence exported to the United States,

excluding charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound."

By the act of June 6, 1872, 17 Stat. 230, § 2, the duties on wool, imposed by the act of 1867, among other things, were reduced ten per centum of such duties.

As the value of the wool in question, at the last port or place whence exported into the United States, excluding charges in such port at the time of shipment, was less than twelve cents per pound, under these provisions of the law, standing alone, it would be subject to a duty of but three cents per pound, and it is contended by the plaintiff in error that the case is governed exclusively by these sections. But as the wool was bought in Rosario, and was shipped from there to the United States, and was invoiced there and entered at the custom house in Boston at the price paid for it in the currency and weight in which it was bought, which, upon being reduced to United States currency and weight, showed the cost to be above twelve cents per pound, it is contended on the part of the collector, that it was properly chargeable according to that value, with the duty actually exacted of six cents per pound.

This conclusion is based upon a proviso, occurring in § 7 of the act of March 3, 1865, "amendatory of certain acts imposing duties upon foreign importations," 13 Stat. 491, 493, and repeated in § 9 of the act of July 28, 1866, "to protect the revenue, and for other purposes," 14 Stat. 328, 330. The first of these sections is as follows:

"SEC. 7. *And be it further enacted*, That in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares, or merchandise imported into the United States, and in all cases where the duty imposed by law shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such goods, wares, or merchandise, it shall be the duty of the collector within whose district the same shall be imported or entered to cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised,

and such appraised value shall be considered the value upon which duty shall be assessed. That it shall be lawful for the owner, consignee, or agent of any goods, wares, or merchandise which shall have been actually purchased, or procured otherwise than by purchase, at the time, and not afterwards, when he shall produce his original invoice, or invoices, to the collector, and make and verify his written entry of his goods, wares, or merchandise, as provided by section thirty-six of the act of March two, seventeen hundred and ninety-nine, entitled "An Act to regulate the collection of duties on imports and tonnage," to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such goods, wares, or merchandise, at the period of exportation to the United States, in the principal markets of the country from which the same shall have been imported; and it shall be the duty of the collector within whose district the same may be imported or entered to cause such actual market value or wholesale price to be appraised in accordance with the provisions of existing laws, and if such appraised value shall exceed by ten per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of twenty per centum *ad valorem* on such appraised value: Provided, That the duty shall not be assessed upon an amount less than the invoice or entered value, any act of Congress to the contrary notwithstanding."

The other section is as follows:

"SEC. 9. *And be it further enacted*, That in determining the dutiable value of merchandise hereafter imported, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same shall have been imported into the United States, the cost of transportation, shipment, and transshipment, with all the expenses included from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind in

which such goods are contained; commission at the usual rates, but in no case less than two and a half per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment. And all charges of a general character incurred in the purchase of a general invoice shall be distributed pro rata among all parts of such invoice, and every part thereof charged with duties based on value shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined: *Provided*, That all additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by ten per centum the value so declared in the entry, in addition to the duties imposed by law, there shall be levied, collected, and paid a duty of twenty per centum on such value: *Provided*, That a duty shall in no case be assessed upon an amount less than the invoice or entered value: *Provided further*, That nothing herein contained shall apply to long-combing or carpet wools costing twelve cents or less per pound, unless the charges so added shall carry the cost above twelve cents per pound, in which case one cent per pound duty shall be added."

In our opinion the rule declared in the provisos in both these sections, that the duty shall not be assessed upon an amount less than the invoice or entered value, is applicable to the valuation of wools, for the purpose of determining the rate of duty chargeable upon them under the acts of 1867 and 1872, and was therefore properly applied in the present case. It is quite true that the act of 1867 provides a different classification of wools, and imposes a specific and not an *ad valorem* duty; but, nevertheless, the duty varies according to the value per pound of the article, and a valuation is, therefore, as necessary to the ascertainment of the rate of duty, as if it were strictly an *ad valorem* duty, and there is nothing in the act of 1867 which, by express words or necessary implication, repeals the proviso in question, as found in the previous acts of 1865 and 1866.

Opinion of the Court.

In the act of 1865, the rule is declared to be of general application, not only "in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares, or merchandise imported into the United States," but also "in all cases where the duty imposed by law shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such goods, wares, or merchandise." There is no more inconsistency between this provision and the act of 1867, than if the proviso had been expressly added to the section of the latter act, which contains the substituted classification of wools for dutiable purposes, and fixes the varying rates of duty upon them. It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress. "In the interpretation of our system of revenue laws, which is very complicated," as was said in the case of *The United States* v. *Sixty-seven Packages of Dry Goods*, 17 How. 85, 93, "this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provision upon the same subject, and differing in some respect from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of Congress."

The judgment of the Circuit Court is

Affirmed.

MILLER & Others *v.* FOREE & Another.

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

Argued November 2, 1885.—Decided December 14, 1885.

The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.

Pennsylvania Railroad Co. v. *Locomotive Truck Co.*, 110 U. S. 490, affirmed.

The facts which make the case are stated in the opinion of the court.

Mr. Arthur Stem and *Mr. George Harding* for appellants. [*Mr. James A. Beattie* was also on appellants' brief.]

Mr. Benjamin F. Thurston for appellees.

Mr. Justice Bradley delivered the opinion of the court.

This is a suit brought by the appellants against the appellees, complaining of the infringement of a certain patent granted to Anton Miller and Christian Worley, two of the complainants, for an alleged improvement in finishing tobacco plugs and in marking the same. A patent was applied for September 23, 1876, and was granted on the 5th day of December, 1876. It was subsequently surrendered and reissued on the 29th of January, 1878. The improvement, as declared in the specification, consists in pressing in the side of the plug, during the process of manufacture, letters or marks, so as to be ineffaceable. The description contained in the re-issued patent, which does not differ materially from that contained in the original, after referring to the illustrative drawings, which are not necessary to the understanding of the invention, proceeds as follows:

"In carrying out our process, the plugs are packed with alternating plates in the finisher, so that they take their per-

manent set with the impression in them, whereby said impression is preserved ineffaceable.

"We have used the process of finishing tobacco as described in patent No. 181,512, issued to Worley and McCabe, on the application of Christian Worley, and dated August 22, 1876, but this system of marking may be used in conjunction with the ordinary finishing process by having the devices in relief, on pressure plates used in the last pressing.

"Our preferred manner of forming the letters on the plates A′ is by stamping them therein, and then making the letters solid by filling in the concave side of the letters with melted metal, such as solder, so that said letters will withstand the extreme pressure to which they are subjected in the finishing box.

"In constructing said compress plate, however, any projecting surfaces in relief, either formed upon the plate or loose from the same, would secure the same result and may be employed."

From this description it appears that the process consists simply in attaching or placing raised characters on the metallic plates which are interlaid between the layers of tobacco to give it a smooth surface in its final compression, which characters leave their imprint in the side of the plugs.

The claim of the original patent was for—

"The mode of simultaneously stamping and finishing tobacco, consisting of tightly compressing the plugs between plates having in relief letters in alternating series, substantially in the manner described."

The claim of the re-issued patent is for—

"1. The described process of marking plug tobacco, which consists in impressing letters or other marks directly into the side of the plug during the process of manufacture, and by the pressure employed in making the plug, substantially as described.

"2. A tobacco plug marked with an impression, substantially as described."

The second claim of the re-issue was afterwards abandoned and formally disclaimed in the Patent Office. The first claim is, in its terms, broader than the claim of the original patent.

It is a general claim for the described process of impressing letters or marks directly into the side of the plug during the process of manufacture. This embraces the application of the process at any stage of the manufacture, either in the moulding process or the finishing process. But if it should be confined by construction to the latter, as in the claim of the original patent, it would still apply to every kind of finishing process, whether separate from the moulding process or not.

The question, then, will be, whether this claimed invention was anticipated by prior invention or use in the art.

Impressions of letters, figures, and other marks have for a long period been made by compression upon plastic substances, such as cakes of soap and chocolate, bars of lead, balls of butter, sealing wax, the leather covers of books, &c. It was not strange, therefore, that the same process for producing a like result should have been applied to tobacco when moulded and compressed into solid plugs of definite form. An English patent was granted to Thomas and George Cope in April (specification filed October), 1868, for improvements in machinery for moulding, pressing, and stamping Cavendish and other tobacco into any desired form by suitable dies. These dies have any desired form and design, and, when filled with tobacco, a powerful pressure is applied by means of a metallic die-piece, which gives to the tobacco a durable form and solidity, with the impression of the shape and design of the dies. In describing the machine and its operation, the patentees say: "This machine is useful for various purposes in manufacturing tobacco; it can be advantageously employed in stamping or forming devices of various kinds on tobacco."

Another patent was granted to Gibson and others in April (specification filed October), 1874, for a mode of heating, pressing, and curing roll and coil tobacco, in the course of which the tobacco (in the case of coil) is alternated with metallic plates, between which and the coils are placed thin wooden discs of a size to match the plates, and between these and the coils of tobacco a thin metal plate, bearing the manufacturer's name, abode, trade-mark, &c. It is then heated, and afterwards submitted to great pressure. And the inventors add: "When the

tobacco has cooled down sufficiently it is removed, and the sheath-pipe being withdrawn by gentle pressure, the metallic discs, scaleboard discs, and name tablets are separated from the tobacco, and the tobacco is found to be impressed with the name or marks from the tablets, the rest of its surface having the impression of the wooden disc, smooth, or showing the grain of the timber. The tobacco, then thoroughly cured and pressed, is fit for sale."

Charles Siedler obtained a patent of the United States, dated January 12, 1875, re-issued October 24, 1876, on application filed April 26, 1875, for impressing into the body of the plugs of tobacco metallic labels with raised letters, &c., either covered or not covered by the outside wrapper, whereby he obtained distinct and durable impressions. He says: "Before giving the plug of tobacco its final pressure the metal B *b* [the label] is placed in proper position upon it by an attendant, and by subsequent powerful pressure the label is sunk into the body of the tobacco so that its face is about flush with the outer surface thereof, and its points *b* sink quite deeply into the most dense mass. It adheres firmly. . . . The plugs thus impressed with the hard labels, presenting the letters in relief, are then wrapped in a large leaf of properly dampened tobacco, A′, and again powerfully compressed. The label appears beneath the wrapper of the finished plug, and is not liable to be removed by any ordinary or extraordinary cause."

In 1867 or 1868 Fisher and Harris, of St. Louis, fitted into a mould for plug tobacco, a metallic plate, having on its face the word "Blackberry," in raised letters, in the form of types, which produced on the surface of the plug, as it was pressed in the mould, the word "Blackberry." Many plugs were made in this mould, and received the said impression, from the time of its construction until 1876, and were sold in the market. Boyce and Brothers bought out Fisher and Harris in 1869, and continued to use the same mould. It is true, that this mould was only one in a block or frame of fifteen moulds, and eleven other frames were used in connection with this frame, without any such types in them, in making up boxes of tobacco. But in view of the fact that the mould having the types continued to

be used for many years, and that the word "Blackberry" was invariably printed on the tobacco, the process, though somewhat imperfectly applied, cannot be regarded as an abandoned experiment. The impression being made in the mould whilst the tobacco was moist might not remain as clearly defined as if it were made in the finishing process (when a further finishing process was used); but it continued to appear quite distinctly and remained as a permanent mark on the tobacco, as is seen in the specimen which has been preserved, and made an exhibit in the cause.

There is also evidence in the case of a zinc plate with raised characters, forming the name of the maker, one "E. F. Smith," being used by him in the summer of 1875, both in the moulding and in the finishing process, for the purpose of imprinting the name upon plug tobacco which he was then manufacturing in a small way in Evening Shade, a village in Arkansas. The plate was used in substantially the same way as that described in the patent of the complainants; and if the evidence is to be believed, the fact of prior anticipation is clearly established. The circuit judge, who decided this case in the court below, after a careful examination of the testimony on the subject, came to the conclusion that it was to be believed, and based his decision principally upon it. We have come to the same conclusion. It is true that a vigorous effort was made to break down the testimony of the principal witnesses, Smith and his foreman, Lee; and it was pretty clearly shown that much could be affirmed derogatory to their general characters. But the complainants failed to show anything substantially affecting their characters for truth and veracity, or that they were not to be believed under oath. Besides, the manner in which their testimony was given, and in which they bore the test of a somewhat rigorous cross-examination, tends to give confidence in the truth of their statements. And they are not without a good deal of corroboration. One of the alleged identical plates was produced; and the jeweller who made it, being called as a witness, recognized it, and said that he thought he made two of them; and he corroborated the date; and testified that Smith showed him some tobacco which he

said had been marked with the plate, and which appeared to have been so marked. Metcalf, one of the complainants' witnesses, also states, on cross-examination, that he had seen one or two plugs with Smith's name impressed on it, which he (Smith) represented to be his work, and that this was in 1875 or 1876. Huddleston, the sheriff of the county, testified that he had purchased plug tobacco from Smith, about that time, with Smith's name impressed upon it. The fact that the process was not used to a great extent, and not brought into more public notice, is explained by the further facts that Smith's manufacture was not of large extent, and that his establishment was closed by the Internal Revenue officers in the spring of 1876, in consequence of sales charged to have been made by him without the proper stamp.

We think that the alleged process of Smith is substantiated by the evidence, and that the decision of the case might be rested on his anticipation of the complainants' invention.

But it is not necessary to rely on this branch of the case alone. Leaving the evidence in relation to Smith's process out of the case, the state of the art at the time of Miller and Worley's application for a patent, as already pointed out, was such as to leave no ground for its issue. What more did they do, at most, than to apply a process of stamping tobacco, which was already well known, to the same tobacco at a later stage in the process of manufacture? Did this entitle them to a patent? According to the ruling of this court in *Pennsylvania Railroad Co.* v. *Locomotive Truck Co.*, 110 U. S. 490, this question must be answered in the negative. That case is precisely in point. The contrivance for allowing the cars, in rounding a curve, to have a lateral motion so as to counteract the tendency to depart from the track, had been applied to passenger cars, but not to locomotives. Smith, the patentee in that case, obtained a patent for applying that same device to locomotives. We decided the patent to be void, and held, in general terms, that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of

result has not before been contemplated." We adhere to that ruling, and the principle involved in it is fatal to the patent now under consideration.

The decree of the Circuit Court is

Affirmed.

UTAH & NORTHERN RAILWAY *v.* FISHER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

Submitted October 21, 1885.—Decided December 14, 1885.

The Fort Hill Indian reservation in the County of Oneida, in the Territory of Idaho, is not excluded from the limits of the Territory by the act of March 3, 1863, creating it; and the treaty of July 3, 1868, with the eastern band of Shoshonees and the Bannack tribe does not necessarily except it from the jurisdiction of the Territory.

The lands and railroad of the Utah & Northern Railway Company situated within the limits of the Fort Hill Indian Reservation are subject to territorial taxation, which may be enforced within the exterior boundaries of the reservation by proper process.

The facts which make the case are stated in the opinion of the court.

Mr. John F. Dillon and *Mr. A. J. Poppleton* for plaintiff in error submitted on their brief.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The plaintiff became a corporation of Utah under an act of the Territory of February 12, 1869, for the incorporation of railroad companies; and by the act of Congress of June 20, 1878, it was made a railway corporation, not only of that Territory, but of Idaho and Montana also, with the same rights and privileges it had under its original articles of incorpora-

tion, with a proviso, however, that it should thereafter be subject to all laws and regulations in relation to railroads of the United States, or of any Territory or State through which it might pass. 20 Stat. ch. 242, § 2. It now owns and operates in Idaho a railroad, which, for the distance of sixty-nine miles and a fraction of a mile, passes through a tract of land in the county of Oneida, known as the Fort Hill Indian Reservation, which was, on the 30th of July, 1869, set apart by order of the President for the Bannack tribe of Indians, pursuant to the provisions of a treaty between the United States and the Eastern Band of Shoshonees and the Bannack tribe, concluded July 3, 1868. 15 Stat. 673.

In 1882 there was levied under the laws of the Territory upon the railroad, its depots, and other property within the reservation, for territorial and county purposes, a tax, amounting in the aggregate to $4478. The defendant is the assessor and tax collector of the county, and the tax having become delinquent, he was proceeding to enforce it by a sale of the property, when the plaintiff commenced this suit in the District Court of the county to restrain him, contending that the property, being within the boundaries of the Indian reservation, is withdrawn from the jurisdiction of the Territory. A preliminary injunction was granted, but at the hearing the court held that the property was subject to taxation, and that the tax was duly levied. The injunction was accordingly dissolved and judgment rendered for the defendant. On appeal to the Supreme Court of the Territory this judgment was affirmed.

The contention of the plaintiff is that the Indian reservation is excluded from the limits of Idaho by the act of March 3, 1863, creating the Territory, 12 Stat. 808; or, that it is necessarily excepted from the jurisdiction of the Territory by the treaty of July 3, 1868. Neither position can be sustained. The first section of that act embraces within the boundaries of the Territory the reservation; and the proviso upon which the plaintiff relies only declares that nothing shall be construed to impair the existing rights of the Indians in Idaho, so long as they shall remain unextinguished by treaty, or to include within its boundaries or jurisdiction any lands which, by treaty

with the Indian tribes, were not, without their consent, to be included within the limits or jurisdiction of any State or Territory; or to affect the authority of the government of the United States to make any regulations respecting the Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if the act had not passed. 12 Stat. 808. The proviso excludes from the limits and jurisdiction of Idaho only such lands as by treaty were not to be included without the consent of the Indians, and it recognizes the authority of the United States to make the same regulations respecting the lands, property, and other rights of the Indians, which it would have been competent to make before the passage of the act. There was at that time no treaty with the Indians that the lands, which might be reserved to them, should be thus excluded from the limits and jurisdiction of any State or Territory. The clause of the proviso on that head has therefore no application. *Harkness* v. *Hyde*, 98 U. S. 476, in which it was held that the jurisdiction of the Territory did not extend over the reservation, was decided upon the mistaken belief that such a treaty existed, and that to it the proviso referred. This error was corrected in *Langford* v. *Monteith*, 102 U. S. 145, 147. As no such treaty existed, the proviso did not exclude the reservation from the limits or the jurisdiction of the Territory.

By the treaty it was agreed that whenever the Bannacks desired a reservation to be set apart for their use, or the President deemed it advisable to put them upon a reservation, he should cause a suitable one to be selected in their country. It was under this agreement that the Fort Hill Reservation was subsequently established and the Bannacks placed upon it. The treaty provided a reservation for the Shoshonees, and declared that they should enjoy various rights and privileges, and that the Bannacks, when their reservation was made, should have the same rights and privileges therein. Among other things, it was stipulated that the reservations should be set apart for their absolute and undisturbed use and occupation, and for such other friendly tribes or individual Indians to whose admission from time to time they and the United States

might consent; and that no person should ever be permitted by the United States to pass through, settle upon, or reside on the reservation, except those designated in the treaty, and such officers, agents, and employees of the government as might be authorized to enter therein in the discharge of duties enjoined by law. The treaty also provided for the punishment, according to the laws of the United States, of any person among the Indians who should commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith; and that no treaty for the cession of any portion of the reservation held in common should be of any force or validity as against the Indians, unless executed and signed by a majority of the adult male Indians occupying or interested therein; and that no cession should be construed to deprive, without his consent, any member of the tribe of his right to land selected by him under the treaty.

It is contended by the plaintiff that these stipulations cannot be carried out, if the laws of the Territory are enforced on the reservation; and in support of the position special emphasis is placed upon the clause in regard to persons passing over, setling upon, or residing in the Territory, and the clause touching wrong-doers among the Indians. As these treaty provisions have the force and effect of a law, it is insisted that the reservation is excluded from the general jurisdiction of the Territory, as effectually as if the exclusion was made in specific terms.

To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not

perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by act of Congress of July 3, 1882. That agreement recites that the Utah and Northern Railway Company had applied for permission to construct a line of railway through the reservation, and that the Indians had agreed, for the consideration thereafter mentioned, to surrender to the United States their title to so much of the reservation as might be necessary for the legitimate and practical uses of the road. A strip of land and several parcels adjoining it, forming part of the reservation, were ceded to the United States for the consideration of $6000, to be used by the company and its successors or assigns as a right of way and road-bed, and for depots, stations, and other structures. By an act of Congress confirmatory of the agreement the same right of way was relinquished by the United States to the company for the construction of its road; and the use of the several parcels of land intended for depots, stations, and other structures was granted to the company and its successors or assigns, upon the payment to the United States of the $6000; and on the condition of paying any damages which the United States or Indians, individuals or in their tribal capacity, might sustain, by reason of the acts of the company, or its agents or employees, or on account of fires originating in the construction or operation of the road. By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed. The very terms on which the plaintiff became a corporation in the Territory rendered it subject to all such laws, and, of course, to those by which the tax in controversy was imposed.

The only answer of the plaintiff to this view is, that, by the

stipulation of the parties and the finding of the court thereon, it appears that the railway and property which are taxed, are situated within the boundaries of and *upon the reservation.* If this be so, it does not follow that the result would be changed. The moment that the road was lawfully constructed it came under the operation of the laws of the Territory. The stipulation and finding must, however, be read with reference to the legislation of Congress, and, therefore, as only establishing that the road and property are within the exterior boundaries of the reservation. They will not be so construed as to allow the company to escape taxation by the force of a stipulation as to an alleged fact which that legislation shows does not exist.

Judgment affirmed.

HOLGATE & Another *v.* EATON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Argued November 24, 25, 1885.—Decided December 14, 1885.

A married woman who, on being informed of a contract made by her husband for the sale of an equitable interest in real estate held by her in her own right, repudiates it, and who, for more than two years, refuses to perform it whenever thereto requested, during which time the property depreciates greatly in value, cannot, after the expiration of that time, enforce in equity the specific performance of the contract by the other party.

When the husband of a married woman obtains a decree of foreclosure of a mortgage held by him as her trustee, and at the sale purchases the property and takes a deed in his own name, she retains an equitable interest therein, as against a purchaser from the husband with actual notice.

A loaned B a sum of money on a conveyance of a tract of land, the equitable interest in which belonged, as A knew at the time, to B's wife. He further agreed with B to acquire an outstanding tax title of the property, and subsequently complied with that agreement. Simultaneously by a separate instrument, they agreed that A, on payment of a further sum, might, at his election, acquire the whole title of B and wife, to be conveyed by warranty deed executed by both ; or, if A so elected, B should repay the sum loaned and the amount paid for the tax-title, A holding the premises as

security until such payments, and then reconveying. B's wife, though often requested, refused to comply with the agreement. After the lapse of more than two years, the property meanwhile having greatly depreciated, B's wife, by next friend, filed a bill in equity against A to compel specific performance. A filed a cross-bill against B and wife in that suit to recover the sum loaned and the sum paid for the tax-title. The wife dying, the suit was revived and prosecuted by her administrator; and her heirs also joined as complainants. *Held*, (1) That the delay in commencing proceedings was inexcusable, especially as a material change took place meanwhile in the subject-matter of the contract. (2) That the estate of the wife was not charged with the payment of the debt. (3) That without further facts not before it this court could not say what effect the outstanding tax-title in the hands of A had upon the wife's estate. (4) That the title or interest of B in the land was charged with payment of the sum loaned and of the sum paid for the tax-title. (5) That the offers in the cross-bill entitled the heirs to conveyances of B's interest and of the tax-title on payment of both sums with interest, if they desired it. (6) That, they declining, A was entitled to a personal decree against B, and the cross-bill could be dismissed as to the heirs, without prejudice to A.

In equity. The facts which make the case are stated in the opinion of the court.

Mr. Henry Newbegin in person, and *Mr. William C. Holgate* in person, for appellants.

Mr. James H. Hoyt [*Mr. H. S. Sherman* was with him on the brief] for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court for the Northern District of Ohio.

The suit was originally brought by a bill in equity, in the name of Elizabeth R. Eaton, by her next friend, Rufus J. Eaton. During its progress Mrs. Eaton died, and her next friend was appointed administrator of her estate, and it was revived by him in that character. Afterwards her heirs were made plaintiffs also.

The case as it was presented to the Circuit Court for final decree, and as it comes before us, is to be gathered from the pleadings, documentary evidence, written correspondence, and depositions which are voluminous. We shall not recapitulate

the evidence, but state the material facts as we believe them to be established.

John B. Eaton, the husband of the complainant, who resided with her in Maine, and who claimed to be the owner in his own right of ninety-five acres of land near the town of Defiance, in the State of Ohio, lying between the Wabash and Erie Canal and the Pittsburgh and Fort Wayne Railroad, was in July, 1874, at Defiance trying to sell it. Being in pressing want of money, he made his note for $400, payable to the Defiance National Bank in ninety days, dated July 30, 1874, with Holgate and Newbegin, who are appellants here, as his sureties. This note they afterwards paid.

On the same day Eaton made a conveyance, absolute on its face, to Holgate of the land above mentioned, and, at the same time, he and Holgate executed the following agreement:

"DEFIANCE, OHIO, *July 30th*, 1874.

"This memorandum witnesseth, that John B. Eaton, of Fryeburg, Maine, has this day sold to Wm. C. Holgate, 'that part of the east half of section twenty-seven (27), T. 4 N., R. 4 E., lying between the Fort Wayne road and the W. & E. Canal, and containing 95 acres, more or less, excepting $12\frac{75}{100}$ acres now held by Michael Gorman, all more fully described and set forth in a deed this day executed by said John B. Eaton to said Holgate. It is understood said Holgate is to pay for said land the sum of six thousand dollars, and any valid tax claim Adam Wilhelm may hold on said premises, one thousand dollars of which is to be paid on or before October 1st next; two thousand dollars in six months thereafter; fifteen hundred dollars ($1500.00) in one year thereafter, and fifteen hundred dollars in two years thereafter, with interest from and after October first. It is further understood said Eaton is to execute another deed of warranty, his wife being joined with him as grantor in same, and to forward said deed on to H. Newbegin for said Holgate, which is to be substituted for the deed this day executed to said Holgate as aforesaid. And said Eaton agrees to send on to said Newbegin the mortgage and notes on which the judgment was taken by which his title was ac-

quired, in case he can find same, which are to be filed according to law. It is further understood and agreed that if, on or before said October first, from any cause, said Holgate shall prefer not to hold said premises on the terms herein set forth, said Eaton agrees to repurchase same of him, and to release any instalment that is unpaid of said Holgate, or portion of same, and the obligation to pay said Wilhelm's tax claims; also to refund with interest four hundred dollars ($400.00) this day advanced on said $1000.00 instalment to come due October first next, and for any advancements to said Eaton by said Holgate that is or may be made, said Holgate shall have a lien on said premises, and may hold the title for same as security till such advancements shall be adjusted. If, however, said Holgate shall be satisfied with said purchase on account of quality of land and all other particulars, he shall, at any time after sixty days, on demand of said Eaton, execute and deliver his notes for any unpaid part of said instalments, secured by mortgage on the premises. It being understood that any amount the railway companies may pay over for the portion of said premises between the two railways shall be credited on the said $6000.00 to be paid by said Holgate, or to go to said Eaton, less advancements aforesaid, if said Holgate shall prefer to release and reconvey his interest in the premises aforesaid. Given under our hands and seals the day and year above written.

J. B. Eaton. [seal.]
Wm. C. Holgate. [seal.]

"Attest: Henry Newbegin."

Holgate immediately assigned to Newbegin an undivided half interest in this contract, of which Eaton had due notice. He also, within the time limited, notified Eaton of his election to hold the property, and required him to furnish the deed in which Mrs. Eaton was to join, and the mortgage and notes on which the foreclosure proceeding was had, and on which Eaton's title depended.

This deed, however, was not tendered to appellants until December 7, 1876, though the notice and request for it was re-

ceived before October 1, 1874. As appellants rely upon this delay as a defence to the suit for the purchase-money, it is necessary to consider its importance in the contract and the excuses offered for the delay.

It appears sufficiently, we think, on the final hearing, that Mr. Eaton had no other interest in the land at the time he executed this agreement and made his deed to Holgate than that of trustee for his wife. "The mortgage and notes on which judgment was taken, by which his title was acquired," were never produced until the hearing before the master in 1882, and the effect of them as evidence is thus stated by the master:

"It appears that, by the will of William A. Allen, brother of Elizabeth R. Eaton, a share of his estate was given to her. Bartley Campbell, of Cincinnati, her agent, seems to have had possession of this share of the estate, being personal property, and used it as his own. In accounting for the same, he assigned a mortgage which he held on lands in Defiance to John B. Eaton, her husband, in trust for Mrs. Eaton and her children. This mortgage was foreclosed under proceedings at Defiance, in which John B. Eaton appeared to be the only party in interest, and at the sheriff's sale he became the purchaser, and the sheriff's deed was made to him, of about ninety-five acres of land in Defiance."

It should be added that the assignment of this mortgage expressed on its face that it was for the benefit of Mrs. Eaton.

It is said by the master that the deed from Mrs. Eaton required by the contract was unnecessary, because by the sale and purchase under the foreclosure proceedings Eaton had acquired title, and his deed to Holgate was sufficient to convey that title discharged of all equitable rights of Mrs. Eaton.

But we are of opinion that in this the master was in error.

It is quite clear to us that Holgate had full notice of Mrs. Eaton's interest in the land, for he seems to have been aware of the nature of the assignment by Campbell of the notes and mortgage to Eaton, and therefore required that they be delivered up to him, if they could be found, and they were found.

But, as a still further security against Mrs. Eaton's equitable

right or interest in the lands, he took from Eaton the covenant that if he elected to hold the land as a purchaser, Mrs. Eaton should join with him as grantor in another deed, with a warranty of title. It is idle to say that Holgate did not have a pretty clear idea of Mrs. Eaton's rights in the land, and intended to have full protection against them, and that this part of the covenant had reference to a right of dower. She was to join *as grantor* in the *warranty* of title.

That all the parties understood that Mrs. Eaton had the paramount interest and equitable title to the land is seen in the whole subsequent correspondence.

It is argued on the part of the appellants, on the other hand, that the deed of Eaton and the accompanying contract constituted a mortgage for the security of Holgate in regard to the $400 note which he agreed to pay, and for the sum he might have to advance to buy in the tax title of Wilhelm, with the option, on the part of Holgate, to convert it into a purchase before October 1, that is, within sixty days. We do not deem it important to decide whether we call the transaction a mortgage or a conditional purchase. The effect is the same either way, as, if the purchase was perfected, the $400 was to be part of the purchase-money. If it was not perfected, it, with the amount paid for the tax-title, was to be a lien on the land conveyed.

It seems that when Mrs. Eaton was informed of the transaction between her husband and Holgate she refused to abide by it, and would not make the deed which the contract called for.

In August, Holgate had informed Eaton of his election to hold the land, and in a letter of September 30 he requests him to forward the deed in which his wife was to join. It is quite apparent that Mrs. Eaton had got possession or control of the notes and mortgage, which Mr. Eaton was therefore unable to surrender, and he had to confess his inability to get Mrs. Eaton to join him in the deed. About this time the railroad company by judicial proceedings, condemned and appropriated thirteen acres of the land for their use, and the sum of $2600 awarded as damages was matter of contention between Mrs. Eaton and her husband.

Under these circumstances, Holgate and Newbegin entered into correspondence with Mrs. Eaton and her son, who acted for her in the matter. They both denied the binding force of the transaction with Mr. Eaton on Mrs. Eaton.

This correspondence ran through two years, in all of which Holgate and Newbegin urged her to fulfil the contract by making a conveyance of the land, and Mr. Eaton seems to have dropped out of the matter in utter helplessness. Holgate insisted that the price of the land condemned by the railroad company should be deducted from the price he had agreed to pay, and still pressed for his deed. Finally, in June, 1875, Holgate sent to Mrs. Eaton a mortgage executed by him and Newbegin on the land, less the thirteen acres taken by the railroad company, with two notes for $1500 each, payable directly to her, not negotiable, and requested her to send the deed of herself and Mr. Eaton for the land described in the mortgage, but she declined to do so, though she kept the notes and mortgage.

On the 7th December, 1876, she did, however, tender such a deed, which, Holgate and Newbegin refused to receive, and demanded payment of the $400 they had paid the bank on the note for Mr. Eaton and the sum they had paid Wilhelm for his tax-title, $424.00. Shortly after this the present suit was commenced.

We think that the correspondence shows that during all this time until a few months before Mrs. Eaton sent her conveyance, the appellants showed themselves ready, willing, and eager to perform the contract; that Mr. Eaton, with whom they had contracted, proved himself unable to perform his covenant to procure his wife's conveyance, and that she, when appealed to and offered the consideration which the contract provided for, repudiated the husband's action in the matter, and held the notes and mortgage of the appellants for eighteen months, refusing to make the deed, without which she had no right to hold them a day.

This deed was essential to the contract. Without it Holgate would get nothing for the money he had paid and the notes he had tendered. He had a right to prompt action on the part of

Mrs. Eaton if she intended to accept the contract. We are bound to hold that while she had a right to refuse to be bound by the contract, she could not play fast and loose with the other parties to suit her pleasure. When, a year and a half after the notes and mortgages were sent to her, she tendered her deed it was too late to bind the appellants without their consent.

An important consideration leading to the same conclusion is, that at the time the contract was made, and for a year or more after, the value of the property continued to increase, but, for reasons not necessary to discuss, it had decreased so largely that at the time she tendered her deed it was worth far less than when Holgate elected to keep the land as a purchaser and demanded of Eaton the joint deed of himself and Mrs. Eaton. It is reasonable to suppose that this depreciation in value entered into the motives which finally induced her change of mind in the matter. The injustice of permitting her to delay two years her consent under these circumstances is obvious.

The case before us is practically a bill by Mrs. Eaton for specific performance. At law she could sustain no action on the notes, and the circumstances under which she received and held them and the mortgage would be a perfect defence to a mere foreclosure of the mortgage. Her only ground of success in the present suit, therefore, is in the principles of equity jurisprudence in enforcing a specific performance of the agreement to buy the land and pay the purchase-money, and the allowance which a court of chancery sometimes makes for delay when time is not of the essence of the contract.

In the case of *Taylor* v. *Longworth*, 14 Pet. 172, 174, Mr. Justice Story uses language which has since become a legal maxim in this class of cases. "In the first place (he says), there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross

laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period been a material change of circumstances, affecting the rights, interests, or obligation of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust."

It is quite apparent, therefore, that, if Mrs. Eaton is seeking to enforce the contract made with her husband, she has been grossly negligent, until altered circumstances have lost her the right to do so; and, if she relies on a contract with herself, no such contract was ever completed.

Her bill, therefore, should have been dismissed.

Holgate and Newbegin, however, filed a cross-bill against Mr. and Mrs. Eaton asserting a right to recover the $400 paid for Eaton, and the $424 paid for the deed of Wilhelm for his tax-title, and, Mrs. Eaton having died while these suits were pending, her executor and her children were made parties in both bills. This cross-bill presents more difficulty to our minds than the main bill, for it seeks to subject the land to the payment of these sums, with interest. Undoubtedly, if Mrs. Eaton had accepted the contract made by her husband she would have been bound by this part of it as well as the other, and, failing to perform her part of it, these sums would become a lien on the land, according to the agreement. But she never became bound by that contract. As we have just said, no contract was ever made between her and Holgate. They never were bound to each other at any time. There was never a common consent of minds on the subject.

We have also expressed the opinion that Eaton's deed to Holgate did not convey her equitable interest, nor did his contract bind her in the agreement. It did not bind her to join him in a conveyance, and it did not bind her land as security for the money advanced to her husband. The same consideration applies to the purchase of the Wilhelm tax-title. We cannot see how the equitable estate of Mrs. Eaton in her lifetime, or of her heirs, now that she is dead, can be made liable for a contract to which she was no party and which she never sanctioned. But appellants have such title or interest in the land

as Mr. Eaton had, and which passed by his conveyance. This may be a life estate. It may be a right to hold as a lien for costs and expenses, or it may be the naked legal title. Whatever it is it passed to Holgate by the deed.

As regards the Wilhelm tax-title, it may be a perfect title, or it may be a lien for the taxes paid by the purchaser at the tax sale. Or it may be that Holgate, holding the legal title, as Eaton did, in trust, was bound to protect that title by the purchase from Wilhelm, and if so, it may be a lien on the land, though not a perfect title.

Of all this we are unadvised. But in the cross-bill Holgate and Newbegin tender a conveyance of both these rights upon payment of the two sums mentioned, with interest. If the heirs of Mrs. Eaton will pay these sums and accept the conveyance, they should be permitted to do so. If they decline, the plaintiffs in the cross-bill may be entitled to a decree against Mr. Eaton *in personam*, for he is a defendant to that bill, has appeared, but made no answer. As regards the cross-bill against the heirs of Mrs. Eaton, if they will not pay these sums, the appellants can dismiss their bill as to them without prejudice to the legal rights of Holgate and Newbegin under the deeds from Eaton and Wilhelm, or they can proceed in it according to the principles of equity.

The decree of the Circuit Court in the original bill is, therefore, reversed, and the decree in the cross-bill also. The case is remanded to the Circuit Court, with instruction to dismiss the original bill at the costs of the plaintiffs in that bill, and to take such further proceedings in the cross-bill as are not inconsistent with this opinion, and as may be appropriate to enforce the rights of plaintiffs therein.

UNITED STATES v. PRICE.

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

Submitted November 23, 1885.—Decided December 14, 1885.

When an act of Congress directs the Secretary of the Treasury to pay a specified sum to a person named, for a specific purpose, no discretion is vested in the Secretary, or in any court, to inquire whether the person named is entitled to receive that sum for that object. *United States* v. *Jordan*, 113 U. S. 418, affirmed.

The facts which make the case are stated in the opinion of the court.

Mr. Attorney-General for plaintiff in error.

Mr. J. Z. George for defendant in error.

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

This is a suit brought to recover back a sum of money collected by Bem Price from the United States on a claim "for property and supplies taken . . . for the use of the armies of the United States during the war of the rebellion," allowed by the Commissioners of Claims under the act of March 3, 1871, 16 Stat. 524, ch. 116, § 2, on the ground that "said sum of money was paid to defendant under act of Congress, approved March 3, 1875, as heir and legatee of his deceased father's estate, and in mistake that the said sum was due him as only heir and legatee of decedent, when in truth and in fact the property and supplies so taken . . . belonged jointly to defendant and his two brothers;" and "when in truth and in fact the defendant and his said brothers were disloyal to the government during the war of the rebellion, and not entitled under the law to recover said sum of money, or any part thereof." The act of March 3, 1875, 18 Stat. 637, 646, Private Laws, ch. 205, is as follows:

"*Be it enacted, &c.*, That the Secretary of the Treasury be,

and he is hereby, authorized and required to pay, out of any moneys in the Treasury not otherwise appropriated, to the several persons in this act named, the several sums mentioned therein, the same being in full for, and the receipt of the same to be taken and accepted in each case as a full and final discharge of, the several claims presented by such persons to the commissioners of claims under the act of March third, eighteen hundred and seventy-one, and reported to the House of Representatives under the said act, that is to say: . . . Bem Price, six thousand three hundred and six dollars . . ."

The District Court gave judgment for the defendant. To reverse that judgment this writ of error was brought.

We are unable to distinguish this case in principle from that of *United States* v. *Jordan*, 113 U. S. 418, in which it was held that, when an act of Congress directed the Secretary of the Treasury to pay to a certain person a specific sum of money, the amount of taxes assessed upon and collected from him contrary to the provisions of certain treasury regulations, "no discretion was vested in the Secretary, or in any court, to determine whether the sum specified was or was not the amount of tax assessed contrary to the provisions of such regulations," and that consequently the payment must be made, whether the amount stated by Congress was the true amount collected or not. The Court of Claims had held that the language of the act, "taken together, was too clear to admit of doubt that Congress undertook, as it had the right to do, to determine not only what particular citizens of Tennessee, by name, should have relief, but also the exact amount which should be paid to each of them." In this we fully concurred.

The act now under consideration "required" the Secretary of the Treasury to pay Price the money he got. It was when the payment was made, and is now, the law of the land that he was entitled to that sum from the United States on account of his claim. The Secretary of the Treasury could not refuse to pay it, and no authority has been given any one to sue to recover it back. It may be that Congress required the payment to be made under a mistake, or that the claim was not a just one, but until Congress abrogates the law or directs suit

to be brought to recover back the money, the conclusive presumption is, that there was no mistake, and that Price is under no obligation to pay back what he has received.

Judgment affirmed.

MACKALL *v.* RICHARDS & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 8, 1885.—Decided December 14, 1885.

An appeal will not be entertained by this court from a decree entered in a Circuit or other inferior court in exact accordance with the mandate of this court upon a previous appeal. *Stewart* v. *Salamon*, 97 U. S. 361, affirmed.

In an appeal from the execution of a mandate of this court the appellant cannot object to an order in the original decree which was not objected to on the former appeal.

A defence, growing out of matter which happens after a mandate is sent down, can only be availed of by an original proceeding appropriate to the relief sought.

This was a motion to dismiss an appeal from the execution of a mandate of this court, 112 U. S. 369, 377, "for the reason that the decree of the Supreme Court of the District of Columbia, from which said appeal was taken, was by that court entered in accordance with, and in execution of, the mandate of this court, issued on a previous appeal and directed to that court; or if the said appeal shall not be dismissed, that the said decree of the said Supreme Court of the District of Columbia be affirmed, on the ground that, although in the opinion of this court, the record may show that this court has jurisdiction, it is manifest that said appeal was taken for delay only, and that the said question on which the jurisdiction depends, is so frivolous as not to need further argument."

Mr. William B. Webb and *Mr. Enoch Totten* for the motion.

Mr. W. Willoughby opposing.

Opinion of the Court.

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

This is an appeal from a decree of the Supreme Court of the District of Columbia entered at general term upon a mandate from this court. In *Stewart* v. *Salamon*, 97 U. S. 361, this rule was promulgated: "An appeal will not be entertained by this court from a decree entered in a Circuit Court or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate dismiss the case with costs. If it does not, the case will be remanded, with appropriate directions for the correction of the error."

This suit was begun in the Supreme Court of the District of Columbia, May 2, 1871, to subject to the payment of certain judgments so much of lot 7, in square 223 of the city of Washington, as had not been conveyed by the marshal of the District of Columbia to Alfred Richards by deed bearing date October 7, 1870. A decree was entered in favor of the complainants, at special term, on the 23d of May, 1873. This decree was affirmed at general term, October 16, 1873, and by this court, March 19, 1877. Under the decree, a sale was made and reported to the court below, but upon the return Mackall filed exceptions because the property sold had not been sufficiently described. Upon hearing, these exceptions were sustained, and the sale set aside. The court then took steps to fix the boundaries of the property, and on the 11th of December, 1879, a decree was entered at special term directing that the sale be made according to a certain description. From this an appeal was taken to the general term, where the decree was affirmed, April 5, 1881, in all respects, except that one of the two trustees who had been appointed to make the sale was removed at his own request, and the other directed to proceed alone. An appeal was thereupon taken to this court, where the only error assigned was that the boundaries of the property had been erroneously fixed. At the last term this appeal was

heard and the cause remanded, with directions "to set aside the decree from which this appeal is prosecuted, and to order the sale in satisfaction of complainant's demands, and in such mode as may be consistent with the practice of the court and with law, of all of lot seven (7) outside of that on which the building known as Palace Market stands." *Mackall* v. *Richards*, 112 U. S. 369. On the production of this mandate, the court below entered a decree at general term in all material respects like that appealed from, except in the description of the property, which was made to conform exactly to the order of this court.

Upon examination, therefore, we are satisfied that the decree as entered is in accordance with the mandate. As no complaints were made on the second appeal about the terms of sale or the manner in which the sale was to be made, it was quite right in the court to follow the old decree in those particulars, which has been substantially done. As the appeal was taken for the sole purpose of correcting the description, it was proper to construe the mandate as in effect nothing more than an order for such a correction, leaving the remainder of the decree to stand.

The decree upon the mandate, although rendered at general term, was still the decree of the Supreme Court of the District, (*Richards* v. *Mackall*, 113 U. S. 540,) and the order on the trustee to report his sale to "this court" can work no injury. The order to take possession was part of the original decree, and as no objection was taken to it on the former appeals it ought not to be permitted now.

A motion was made by Mackall in the court below after the mandate was received for leave to file what was called a "supplemental bill," but which was in reality a supplemental answer to the original bill, setting up new defences growing out of matters occurring since the original decrees. This was properly denied. No discretion was left in that court to grant such a motion. The order of this court was in effect to enter the precise decree which has been made. If, since the original decree, the debts have been paid, or anything else has happened which makes it improper to carry the decree into execution,

resort must be had to some form of original proceeding appropriate to relief on that account. It cannot be done by way of defence before decree upon our mandate. The order of this court places the case where it would be if the original decree had been what it is now.

It follows that

The appeal must be dismissed under the rule, with costs; and it is so ordered.

LEE *v.* JOHNSON.

ERROR TO THE CIRCUIT COURT OF EMMET COUNTY, STATE OF MICHIGAN.

Argued December 4, 1885.—Decided December 21, 1885.

One seeking in equity to have the holder of a patent of public land declared a trustee for his benefit on the ground that the patent was improperly issued, must clearly establish that there was a mistake or fraud in the issue of the patent, which affected the decision of the Land Office, and but for which he would be entitled to the patent.

In the absence of fraud, the findings of the Secretary of the Interior are conclusive upon questions of fact as to land claims submitted to him for his decision.

When it clearly appears in a proceeding that a claim set up is against public policy, and that in no event could it be sustained, the tribunal should dismiss it, whether the allegations of the parties have or have not raised the question.

The facts which make the case are stated in the opinion of the court.

Mr. Henry E. Davis for plaintiff in error.

Mr. James Blair for defendant in error, submitted on his brief.

Mr. Justice Field delivered the opinion of the court.

This case comes from the Circuit Court of Emmet County, Michigan. It was originally commenced in that court, where

a decree was rendered dismissing the suit. On appeal to the Supreme Court of the State the decree was reversed, and the Circuit Court directed to enter a decree in favor of the plaintiff for the relief prayed in the bill of complaint. The Circuit Court having complied with the mandate of the Supreme Court by entering that decree, the defendant sued out the writ of error from this court to review it. The writ was directed to the judge of the Circuit Court because the final decree was entered and the record of the suit remained there. *Atherton* v. *Fowler*, 91 U. S. 143; *Gelston* v. *Hoyt*, 3 Wheat. 246.

The defendant in the court below, the plaintiff in error here, is the holder of a patent of the United States for a parcel of land in Michigan issued to him under the homestead laws, and the present suit was brought to charge him, as trustee of the property, and to compel a conveyance to the plaintiff. The patent having been issued by officers of the Land Department, to whose supervision and control are entrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting in its name and by its authority. If, however, those officers mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed.

The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the Department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into

the evidence. It is not enough, however, that fraud and imposition have been practised upon the Department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. *Bohall* v. *Dilla*, 114 U. S. 47; *Sparks* v. *Pierce*, 115 U. S. 408.

If now, we apply these doctrines, which have been settled by repeated decisions, the case before us will be readily disposed of. The plaintiff below, Enos Johnson, on the 17th of April, 1875, entered the land in controversy, situated in Emmet County, Michigan, under the homestead laws. Previously, and for many years, he had resided in Kent County, in that State, distant several miles from the land. After the entry he resided upon the land only occasionally, offering as an excuse that the health of his wife required him to remain at "their home in Kent County." At the outset he employed his son-in-law, Shaeffer, and family, to go upon the land and remain there in his employ until his wife's health should so improve as to admit of his leaving her or taking her with him in his personal settlement upon the land. It would seem that afterwards some attempts were ostensibly made toward such a personal settlement, but they were at long intervals apart and for comparatively short periods. During these attempts Shaeffer and his family remained on the land, cultivating and improving it. More than a year after his entry Johnson, while living at the old home, voted in Kent County. It appears, also, that in June, 1876, at one of the periods, as is alleged, during which Johnson resided with his wife on the land, Lee complained at the land office that Johnson had abandoned the land for more than six months prior to that date; that a contest was thereupon initiated between Johnson and Lee for the right to the

land; that the usual proceedings in such cases were had before the register, by whom testimony was taken and forwarded to the Commissioner of the General Land Office. The Commissioner decided in favor of Johnson, but, on appeal, the decision was reversed by the Secretary of the Interior, and the entry ordered to be cancelled. When the land was subject to a new entry, Lee entered it under the homestead laws, and subsequently availing himself of the privilege of commutation under the statute, paid the government price and obtained a patent, bearing date July 13, 1878.

Without going into any detail of the evidence presented to the Commissioner and the Secretary of the Interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever initiated any, and whether or not he had abandoned the land. The findings of the Secretary upon any of these matters must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the Department upon matters of fact cognizable by it, has been expressly affirmed. *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 535; *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640; *Steel* v. *Smelting Co.*, 106 U. S. 447, 450.

The Supreme Court of Michigan held the decision of the Secretary of the Interior inconclusive because it was not upon a point in issue between the contestants, stating that the question was that of abandonment, which only was inquired into by the register, or could be considered on appeal; that the jurisdiction of the Secretary, if he disposed of the case finally on other grounds, was not appellate but original, and that this had not been conferred; that the register on the hearing and the Commissioner on appeal had decided that the

plaintiff had not abandoned the land, and upon that ground there was no reversal of the decision. It, therefore, held that the plaintiff was entitled to the relief prayed.

While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding. An illustration of this rule is found in *Oscanyan* v. *Arms Co.*, 103 U. S. 261. There a large sum was claimed from the vendor of firearms as commissions on sales that, through the influence of the plaintiff, had been made to the Turkish government, of which he was then an officer. The defendant pleaded the general issue; and it was contended that the illegality of the contract could not be noticed, because not affirmatively pleaded. But the court held that, assuming the contract to be a corrupt one, forbidden by morality and public policy, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties; that it was one which the court itself was bound to raise in the interest of the due administration of justice. p. 268.

So, in the present case, the Secretary of the Interior came to the conclusion, from the evidence returned by the register, that Johnson must be considered not as a *bona fide* homestead claimant, acting in good faith, but as one seeking, by a seeming compliance with the forms of law, to obtain a tract of land for his son-in-law, who had previously exhausted his homestead privileges, observing that the element of good faith is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him

over all proceedings instituted to acquire portions of the public lands. Upon the testimony the question of abandonment could be of no consequence, as no just right in Johnson's favor had been initiated. Upon an application for a rehearing, the Secretary reiterated his judgment, stating that he was unable, upon the testimony of Johnson himself, to arrive at the conclusion that he had complied with the provisions of the homestead law to an extent to entitle him to its benefits.

In the bill of complaint it is alleged that in the testimony reported by the register there was an interpolation to the effect that the plaintiff testified that he had intended the land as a homestead for his son-in-law, and not as a personal home for himself, and that while in Kent County, in the spring of 1876, he had voted at an election. His allegation that he gave no such testimony is contradicted, the answer averring that the testimony as reported was read over to him before he signed it, and was reported as signed. And in his examination in this case he admits, whilst denying that he testified as stated before the register, that he voted in Kent County a year after he had made his entry; and his direct testimony that he intended the land for Shaeffer could not be more persuasive of the fact than his conduct subsequent to the entry. To allow the conclusions of the Secretary of the Interior on questions of fact to be subjected to review by the courts in cases of this kind would open the door to endless litigation.

We are of opinion, therefore, that the Supreme Court of Michigan erred in its decision. The decree of that court will accordingly be

Reversed, and the cause remanded to the Circuit Court, with directions to enter a decree in conformity with this opinion.

SIMMERMAN *v.* NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Submitted December 3, 1885.—Decided December 7, 1885.

This court is without jurisdiction over a case brought here on error from a State court, unless it appears in the record that the Federal question was raised in that court before the entry of a final judgment in the case.

This was a motion to dismiss the writ of error for want of jurisdiction.

Mr. William Leese, Attorney-General of Nebraska, and *Mr. Enoch Totten* for the motion.

The plaintiff in error in person opposing. *Mr. L. C. Burr* also filed a brief for same.

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

It nowhere appears from this record, either in the application for a change of venue, or in the objections to the admissiblity of evidence, to the charge of the court as given, or to the refusals to charge as requested, or in the motion for a new trial, the assignment of errors in the Supreme Court of the State, or the opinion filed in that court, that any Federal question was actually presented for consideration or in any way relied on before the final judgment from which the writ of error has been taken. Such being the case, we cannot take jurisdiction. *Detroit Railway Co.* v. *Guthard*, 114 U. S. 133; *Brown* v. *Colorado*, 106 U. S. 95. The fact that, after the final judgment, and in the petition for a writ of error to this court, which seems to have been treated also as a petition for rehearing, a Federal question was presented is not enough. It was so decided in *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57. As was said in that case: "We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for

the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests."

The motion to dismiss for want of jurisdiction is granted.

CANNON *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued November 20, 23, 1885.—Decided December 14, 1885.

The offence of cohabiting with more than one woman, created by § 3 of the act of Congress of March 22, 1882, ch. 47, 22 Stat. 31, in regard to polygamy in the Territory of Utah, is committed by a man who lives in the same house with two women, and eats at their respective tables one-third of his time, or thereabouts, and holds them out to the world, by his language or conduct, or both, as his wives, and it is not necessary to the commission of the offence that he and the two women, or either of them, should occupy the same bed or sleep in the same room, or that he should have sexual intercourse with either of them.

An indictment under that section charged a male person with having unlawfully cohabited with more than one woman, continuously, for a specified time, naming two women, but did not allege that he was a male person, nor that he cohabited with the women as wives, or as persons held out as wives. The statute provides that "if any male person . . . hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The defendant pleaded not guilty: *Held*,

1. Under the Criminal Procedure Act of Utah, of February, 22, 1878, Laws of 1878, p. 91, objections taken to the indictment after a jury was sworn, that it did not contain the allegations before mentioned, were properly overruled.
2. The word "cohabit," in the statute, means, "to live together as husband and wife," and its use in the indictment includes every element of the offence created, as above defined; and the allegation of cohabiting with the two women as wives, is not an extrinsic fact, but is covered by the allegation of cohabiting with them.
3. The case of *United States* v. *Carll*, 105 U. S. 611, distinguished.

This was a writ of error to bring up for review proceedings in the Supreme Court of the Territory of Utah, in the indict-

ment and conviction of the plaintiff in error for unlawfully cohabiting with more than one woman. The facts which make the case are stated in the opinion of the court.

Mr. Franklin S. Richards for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

Angus M. Cannon was indicted by a grand jury in the District Court of the Third Judicial District in and for the Territory of Utah, in February, 1885, for a violation of § 3 of the act of Congress, approved March 22d, 1882, ch. 47, entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy and for other purposes." 22 Stat. 31. Section 1 of the act amends section 5352 of the Revised Statutes, which was a re-enactment of § 1 of the act of July 1st, 1862, ch. 123, 12 Stat. 501; and, in order that the amendment may be understood, the original and new sections 5352 are here placed side by side, the parts in each which differ from the other being in italic:

Original.	*New.*
"Every person *having* a husband or wife living, who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of *bigamy*, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former mar-	"Every person *who has* a husband or wife living, who, *in a Territory or other place over which the United States have exclusive jurisdiction, hereafter* marries another, whether married or single, *and any man who hereafter simultaneously, or on the same day, marries more than one woman*, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of *polygamy*, and shall be pun-

riage whose husband or wife by such marriage *is* absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which *has* been dissolved by decree of a competent Court; nor to any person by reason of any former marriage which *has* been pronounced void by decree of a competent Court, on the ground of nullity of the marriage contract."

ished by a fine of not more than five hundred dollars, and by imprisonment for a term *of* not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage *shall have been* absent for five successive years, and is not known to such person to be living, *and is believed by such person to be dead*, nor to any person by reason of any former marriage which *shall have* been dissolved by *a valid* decree of a competent Court, nor to any person by reason of any former marriage which *shall have* been pronounced void by *a valid* decree of a competent Court, on the ground of nullity of the marriage contract."

Sections 2 to 8 inclusive of the act of 1882 are as follows:

"SEC. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offence already committed against the section amended by the first section of this Act.

"SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

"SEC. 4. That counts for any or all of the offences named in sections one and three of this Act may be joined in the same information or indictment.

"SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offence punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the Act of July first, eighteen hundred and sixty-two, entitled 'An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah;' or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the Court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this Act; but if he declines to answer on any ground, he shall be rejected as incompetent.

"SEC. 6. That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this Act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

"SEC. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such mar-

riages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, Anno Domini eighteen hundred and eighty-three, are hereby legitimated.

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in such Territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor, or emolument, in, under, or for any such Territory or place, or under the United States."

Section 9 of the act contains provisions declaring vacant registration and election offices, and enacting that persons shall be appointed to execute those offices, by a board of five persons, which is directed to canvass votes to be returned to it for members of the legislative assembly, with the proviso, "that said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy."

The indictment against Cannon was as follows: "The grand jury of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empanelled and sworn, on their oaths do find and present, that Angus M. Cannon, late of said district, in the Territory aforesaid, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days and continously between the said first day of June, A.D. 1882, and the first day of February, A.D. 1885, at the county of Salt Lake and territory of Utah, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United

States in such case made and provided, and against the peace and dignity of the same."

The defendant pleaded not guilty, and the case was tried in April, 1885, resulting in a verdict of guilty, and a judgment imposing a fine of $300, imprisonment in the penitentiary for six months, and further imprisonment till the payment of the fine.

After the jury was empanelled and sworn, and the prosecution had called a witness, the defendant objected to the giving of any evidence under the indictment, on the ground that the indictment was defective and did not charge any criminal offence, nor any offence under the statutes of the United States, nor the offence described in the statute, either in the statutory words or equivalent words, and, especially, did not show that the person charged was a male person, and was insufficient to warrant a verdict or support a judgment of conviction. The court overruled the objection, and the defendant excepted. The following proceedings then took place, as shown by the bill of exceptions:

Clara C. Cannon, a witness called for the prosecution, was sworn, when the defendant renewed the said objection to the indictment, with a like ruling by the court and a like exception. The witness testified as follows: "My full name is Clara C. Cannon. I know the defendant. I have been his wife. I was his wife. I was married to him about ten years ago, and have since lived at 246 First South Street, Salt Lake City. I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time, and in the same house during the past three years. I have one living child, which is a child of that marriage, born January 11, 1882. I have had two other children by that marriage, both born before the living one. In this house I occupy two rooms on the ground floor, a parlor and a dining-room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the

hall. I know Amanda Cannon. She has lived in the same house that I live in during the past three years. She has occupied, on the ground floor, two rooms on the west side of the hall, beside her kitchen, which is attached to the back of the main building, and is not the kitchen I use. I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the house ever since I went to live there. She has nine children, I think. During the past three years, I think, all her children have been living there at home, but not all the time. My little child lives with me in my part of the house—I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house. During the past three years, and prior to the month of February in this year, the defendant has been in the habit of taking his meals with me, in my part of the house, a portion of the time, about one-third of the time. There were stated intervals; he took his meals with me every third day—with me and my children. I have a son and daughter grown up, and two orphan children. He took his meals with me and the child of this marriage and the other children every third day. He took his meals with Amanda Cannon and her family one-third of the time. He took all three of his meals with me every third day, on week days, and on Sunday morning he had breakfast at my house—that is, he took his meals with me two days of each week, and also his breakfast Sunday morning, which made one-third of the time. On Sunday he took his dinner at Sarah's, and his supper at Amanda's. There are four rooms on the second floor of the house used as bed-rooms, and a hall, with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occupied the bed-room in the northeast corner, and Amanda has occupied the one in the southwest corner of the house. The defendant has occupied the bed-room in the southeast corner. The room occupied by me as a bedroom, and the one occupied by the defendant as a bed-room, are on the same side of the hall, and there is no intervening room. The house I speak of is in Salt Lake County, Utah Territory. Cross-examined: My oldest daughter is twenty-three years old,

and my son twenty. I have a little girl, Clara Hardy, twelve years old, and a little girl ten years old, who are orphans. Their mother was a niece of mine, and, when she died, she left them to me. These, with my little daughter Alice, three years old past, are the members of my family. My daughter Alice was three years old last January. The two orphan children have lived with me for the last five years. The two little girls and my oldest daughter and the youngest daughter have occupied my room with me. We have two beds, and have all slept in that room.

Q. State whether that state of things and that relation with your children and the orphans continued until February last?

Objected to by the prosecution on the ground that it is immaterial, irrelevant, and incompetent. The objection was argued, the prosecuting attorney announcing that the objection was on the relevancy, materiality, and competency of the evidence offered, and not on the ground it was not a proper subject of cross-examination or that the offer was out of order, but that any proof tending to show non-access was immaterial; and defendant's counsel admitted and stated to the court that the evidence was offered as tending to show, with other evidence to be given, non-access during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by testimony of the witness. The court sustained the objection, stating that the question presented by the objection had been deemed by both parties as being properly raised by the interrogatory objected to; and the defendant excepted.

Q. Was Amanda Cannon married to defendant prior to the time you was married to him?

Counsel for the prosecution objected to the question as irrelevant, incompetent, and immaterial. The court sustained the objection, and defendant excepted to the ruling. The following questions were severally propounded to the witness, counsel stating that the sole purpose for which the questions were asked was to establish sexual non-intercourse.

Q. Did you hear and know of the passage of the act of

Congress usually called the "Edmunds Act," about the time it was passed?

Q. What had been the habit of defendant prior to that time, as to his occupation of your room and bed, and the room and bed of Amanda Cannon?

Q. About the time of the passage of that law did he say anything to you and the other members of the family in respect to his intention to not violate that law, and what did he say?

Q. Did you assent to what he proposed?

Q. After that did any change occur in his habit as to occupying your room and bed, and what, if any, was the change?

Q. After March 22, 1882, has the defendant at any time occupied your room or bed, or has he had any sexual intercourse with you?

To each of these questions the prosecuting attorney objected, on the ground that the evidence sought was irrelevant, immaterial, and incompetent, and the objections were based solely on these grounds, and not to the form of the questions, or time or manner of offering the evidence. The court sustained each objection, and to the ruling on each the defendant excepted.

George M. Cannon, a witness sworn for the prosecution, testified: My father's name is Angus M. Cannon; he is the defendant here. My mother's name is Sarah M. Cannon. I have heard my father state he was married to Amanda Cannon.

Q. Have you heard your father state he was married to Sarah Cannon?

Defendant objected to the question on the ground it is immaterial; that Sarah Cannon is not named in the indictment, or any marriage with her charged.

The prosecuting attorney explained that he intended to show that Sarah and Amanda Cannon were married to defendant by the same ceremony, and that he offered the evidence to show whom he had the right to call as a witness.

The court overruled the objection and allowed the evidence for this purpose, and the defendant excepted to the ruling.

Witness. I have heard my father say he was married to my mother and Amanda Cannon at one and the same time.

Angus M. Cannon, Jr., sworn for the prosecution, testified:

My father's name is Angus M. Cannon and my mother's name is Amanda Cannon. I have lived during the last three years in the same house with my father and mother. My mother has nine children; eight of them are living at home and have during this period. I took my meals there and slept there on my mother's side of the house. Have taken my meals at the same table with the rest of the family. My father has taken his meals about one-third of the time at Clara's, one-third of the time at Sarah's, and one-third of the time with my mother. About every third day he takes his meals with my mother and her children. There are four sleeping apartments in the second story of the house; two on each side of the hall-way which goes north and south, and the rooms on each side open into the hall. During the period mentioned Clara C. Cannon has occupied the northeast bed-room, my father has occupied the southeast, and my mother the southwest bed-room. Cross-examined: Clara Cannon has occupied the northeast bed-room to my knowledge five or six years.

Q. Who occupied it with her?

Objected to as immaterial, etc. Objection sustained and defendant excepted.

My father has occupied the same house with Clara and Amanda Cannon. I have not been at home continuously for the past three or four years. I have been away probably between five and six months, and, with this exception, I have been there more than three years.

Q. Do you know where your father during that time passed his nights.

Objected to. Objection sustained, and defendant excepted to the ruling.

The prosecution here rested.

George M. Cannon recalled for further cross-examination: The substance of what my father said about his marriage to Sarah and Amanda Cannon was, that he married them at the same time. He said he married them prior to any act against polygamy, and when he considered it legal. He perhaps stated the year, but I don't at present recollect it. I am in my twenty-fourth year.

Clara C. Cannon recalled by the defendant and testified: I am a member of what is called the Church of Latter-day Saints, and I have been a member for twenty-four years. The defendant is also a member of that church. I don't know how long he has been a member, but it is ever since I first knew him. Mrs. Amanda Cannon is a member of the same church, and has been since I first knew her—that is, thirteen years.

Q. Was Mrs. Amanda Cannon married to the defendant prior to your marriage to him?

Objected to by counsel for prosecution as irrelevant and immaterial. Objection sustained, and defendant excepted to the ruling."

Defendant's counsel then made the following offer of proofs: "We offer to prove by this and other witnesses to be called, that Amanda Cannon was married to the defendant before the marriage with this witness; that, prior to the passage of the Edmunds law, he had alternately occupied the sleeping-room and bed of each; that each, with her family, occupied, and still occupies, separate apartments, including separate dining-rooms and kitchens; that, after the Edmunds law had passed both Houses of Congress, and before its approval by the President, the defendant announced to witness, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it should remain a law, and at the same time assigned his reasons for so doing, and thereafter, and during the times alleged in the indictment, he did not occupy the rooms or bed of, or have any sexual intercourse with, the witness, and to this extent, by mutual agreement, separated from the witness; that, during all the time mentioned in the indictment, the two families have taken their meals in their respective dining-rooms; that defendant has taken his meals with the witness and her family, in her dining-room, two or three days each week, has provided for the support of the witness and her family distinct from other family expenses, and allowed them to occupy separate apartments in the same house occupied by him and Amanda, and this is the extent of his relations with the witness; and, also, that the defendant was financially unable to provide a separate house for witness and her family;

also, that the witness and family and Amanda and her family are dependent on the defendant for their support. To this offer and each paragraph thereof the prosecution objected, and the objection was sustained by the court, and the defendant excepted to the ruling."

The foregoing was all the evidence given in the case. The court instructed the jury as follows: "The indictment in this case charges that the defendant, on the first day of June, in the year of our Lord 1882, and on divers other days, continuously, between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. [If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.] [It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed or slept in the same room; neither is it necessary that the evidence should show that, within the time mentioned, he had sexual intercourse with either of them.] I will state, the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence and of the facts, and if you find the defendant guilty you will say in your verdict, 'We, the jury, find the defendant guilty in manner and form as charged in the indictment;' and, if you find him not guilty, you will say, 'We, the jury, find the defendant not guilty.'" No further or other instructions were given to the jury.

The defendant excepted to the parts of the instructions which are enclosed in brackets. He also submitted the following prayers for instructions, each of which was separately refused, followed by a separate exception:

"1. The offence charged is that defined in the third section

of the act of Congress entitled 'An Act to amend section 5352 of the Revised Statutes in reference to bigamy, and for other purposes,' approved March 22d, 1882, commonly known as the 'Edmunds Act.'

"2. That section is applicable to Utah Territory, and provides that, if any male person here, since March 22d, 1882, has cohabited with more than one woman, he shall be deemed guilty of a misdemeanor.

"3. This section does not apply to male persons who have at successive periods cohabited with lawful wives, but only to contemporaneous cohabitation with two women.

"4. Cohabitation includes living together as members of one family, a consorting in social intercourse, and eating and lodging together. They need not occupy the same bed, but there must be an equivalent intimacy.

"5. The word 'cohabit,' in this section, is to be understood in a technical or restricted sense. It does not apply to all persons who live with each other under one roof as members of one family, but only to adults of different sexes who live together in the manner that husbands and wives do, including the intimacy of occupying continuously or for recurrent periods the same bed.

"6. (Requested if the last refused.) The word 'cohabit,' in this section, is to be understood in a technical or special sense. It does not apply to all persons of opposite sexes who live with each other under one roof as members of one family, but only to adults of different sexes living together in the manner that husbands and wives do. So understood, it must include a continuous or recurrent occupying of the same apartments, in the manner usual with persons of opposite sex who live in sexual intimacy.

"7. No case is within this section which does not include such association of a man with two women in their mode of living as to make it an example of immorality, by necessarily indicating an habitual intimacy with each of two or more women by mutual consent.

"8. The cohabitation which is made a misdemeanor by this section is an habitual residence or dwelling by a man with two or more women in intimate sexual relations.

"9. The ingredients of this offence are, first, that the person charged be a male person; second, that he has lived or dwelt with two women, either continuously at the same time or with each in alternate periods of time; third, that he has so lived with each of two or more women in such personal intimacy as to indicate that he has had sexual intercourse with them, respectively, at his and their pleasure.

"10. The Court will interpret this Edmunds Act by its terms, and in view of the actual situation in this Territory, of which the Court is judicially cognizant, and thus deduce that Congress intended to apply a corrective to polygamy and the anomalous status produced by its long practice.

"11. The act is intended to prevent any future polygamous marriages, and to prevent the continued cohabitation of persons who are already in polygamy. The section making cohabitation a misdemeanor has special or primary application to a cohabitation with a plurality of wives. This obvious intention indicates the ingredients of the criminal cohabitation; that it is a living together in the sexual intimacy usual between persons united in the marital relation, immoral in example for not having the sanction of lawful marriage, and pernicious in producing an illegitimate offspring.

"This Act legitimizes all children born prior to January 1, 1883; it authorizes amnesty to all offenders prior to its enactment, and thus it is shown that the Act was passed in view of the long existence of polygamy in this Territory, and the multitudes of children born therein; it is merciful to those who have broken the laws against polygamy, and humane and paternal to the children born in polygamy.

"13. This Act does not command polygamous fathers to abandon their children nor to break off all communication with their mothers. Such fathers are at liberty, and under the strongest moral obligation, to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident to the proper discharge of such duties. All his social familiarity with the mothers of such families, established prior to the passage of said Act, not shown to include all the particulars of cohabitation as the Court has defined it,

should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal.

"14. The existence at the time of the passage of the Edmunds Act of a polygamous relation between the defendant and the women mentioned in the indictment, though an illegal relation, is not, and cannot be, made by the statute evidence of any fact necessary to, or tending to, a conviction for violating the third section. Any enactment intended for such a purpose would be *ex post facto* and void.

"15. The law presumes innocence, and, therefore, that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so.

"16. No fact in the conduct of the defendant subsequent to the passage of the Edmunds Act can be made more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment, prior to the passage of that statute.

"17. The defendant is entitled to show his marital and parental status at the time of the passage of the Edmunds Act, to explain his subsequent conduct toward the women mentioned in the indictment, and to show an innocent and laudable motive therefor.

"18. For this purpose, he may show that he had families of children by said women respectively, at and prior to the passage of said Act; that such women and their children had been and were still dependent on him for their support; that he has continued since to support them; that he has visited them for that purpose, and as the father of said children; and that he has not had sexual intercourse with such women since the passage of said Act; and no inference of cohabitation can be drawn from the fact of such relations, from the fact of furnishing support for such mothers and children without living with them, nor from the fact of visiting them, taking meals with them, nor from his living in a separate suite of rooms in the same house, belonging to himself, as that occupied by them,

if they occupied separate apartments and habitually lived as a separate and distinct household; nor can such inference be drawn from all such facts. They do not, of themselves, constitute cohabitation.

"19. There is no evidence in this case tending to show that this defendant recognized Clara C. Cannon as his wife, or held her out to the world as such, since the passage of the Edmunds Bill, and within the dates named in the indictment, and without such proof the jury should acquit the defendant.

"20. If the jury find that the defendant has not held out to the world, and announced and recognized, as his wife, the Clara C. Cannon named in the indictment, since the passage of the Edmunds bill, and within the dates named in the indictment, then they should acquit the defendant.

"21. Sexual intercourse is a necessary element of the crime of cohabitation; and, if the jury find the defendant has not had sexual intercourse with both Clara C. and Amanda Cannon since the passage of the Edmunds bill, and within the dates named in the indictment, then they should acquit the defendant.

"22. In order to find the defendant guilty of the offence charged, it must appear that the defendant had gone through the forms of marriage with both of the women named in the indictment, Amanda and Clara C. Cannon; that, it not appearing in this case that he was ever married to Clara C. Cannon, the jury should acquit.

"23. If the jury find that there never was the form of marriage between Clara C. Cannon and the defendant, they should acquit.

"24. There can be no conviction under the indictment in this case, for the reason that there is no charge that the defendant was ever married to either Amanda or Clara C. Cannon, nor any charge that he held out either or both as his wives."

From the judgment the defendant appealed to the Supreme Court of the Territory, which affirmed it, and he has brought the case to this court by a writ of error.

The principal question argued at the bar was the proper

construction of § 3 of the act of 1882. That question depends on the meaning of the word "cohabit" in the section. The meaning contended for by the defendant is indicated by his offer to show by Clara C. Cannon non-access, and facts to rebut the presumption of sexual intercourse with her, and the actual absence of such intercourse; and by the requests for instructions to the jury, which are based on the view that the word "cohabit" necessarily includes the idea of having sexual intercourse. But we are of opinion that this is not the proper interpretation of the statute; and that the court properly charged the jury that the defendant was to be found guilty if he lived in the same house with the two women, and ate at their respective tables one-third of his time or thereabouts, and held them out to the world, by his language or conduct, or both, as his wives; and that it was not necessary it should be shown that he and the two women, or either of them, occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them.

This interpretation is deducible from the language of the statute throughout. It refers wholly to the relations between men and women founded on the existence of actual marriages, or on the holding out of their existence. Section 1 makes it an offence for a man or a woman, with a living wife or husband, to marry another, and calls such offence polygamy. Section 3 singles out the man, and makes it a misdemeanor for him to cohabit with more than one woman. Section 4 provides that counts for any or all of the offences named in §§ 1 and 3 may be joined in the same information or indictment. This certainly has no tendency to show that the cohabitation referred to is one outside of a marital relation, actual or ostensible. So, in § 5, bigamy, polygamy, and unlawful cohabitation are classed together, and it is provided, that, in any prosecution for any one of such offences, it shall be sufficient cause of challenge to a juror, that he has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or has been guilty of an offence punishable by the preceding sections, or that he believes it to be right for a man to have more than one living and undivorced wife at the same

time, or to live in the practice of cohabiting with more than one woman. It is the practice of unlawful cohabitation with more than one woman that is aimed at—a cohabitation classed with polygamy and having its outward semblance. It is not, on the one hand, meretricious unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the Territorial government. Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed; and without reference to what may occur in the privacy of those relations. Compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates. In like manner, bigamy, polygamy, and unlawful cohabitation are classed together in §§ 6 and 8 of the act. Section 6 authorizes the President to grant amnesty to persons guilty of bigamy, polygamy, or unlawful cohabitation before the passage of the act. Any unlawful cohabitation, under the laws of the United States, before that time, could only have been ostensibly marital cohabitation, for the only statute on the subject was § 5352 of the Revised Statutes, in regard to bigamy. Section 8 excludes from voting every polygamist, bigamist, or person cohabiting with more than one woman, and every woman cohabiting with any polygamist, bigamist, or person cohabiting with more than one woman. This section was considered by this court in *Murphy* v. *Ramsey*, 114 U. S. 15, where Mr. Justice Matthews, speaking for the court, in construing the words "bigamist" and "polygamist" in that section, says: "In our opinion, any man is a polygamist or bigamist, in the sense of this section of the act, who, having previously married one wife, still living, and having another at the time when he

presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although, from the date of the passage of the act of March 22, 1882, until the day he offers to register and to vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether, at the time he entered into such relation, it was a prohibited and punishable offence, or whether, by reason of lapse of time since its commission, a prosecution for it may not be barred, if he still maintains the relation, he is a bigamist or polygamist, because that is the status which the fixed habit and practice of his living has established. He has a plurality of wives, more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom with their children he maintains as a family, of which he is the head. And this status as to several wives may well continue to exist, as a practical relation, although for a period he may not in fact cohabit with more than one; for that is quite consistent with the constant recognition of the same relation to many, accompanied with a possible intention to renew cohabitation with one or more of the others when it may be convenient. It is not, therefore, because the person has committed the offence of bigamy or polygamy, at some previous time, in violation of some existing statute, and as an additional punishment for its commission, that he is disfranchised by the act of Congress of March 22, 1882; nor because he is guilty of the offence, as defined and punished by the terms of that act; but because, having at some time entered into a bigamous or polygamous relation, by a marriage with a second or third wife, while the first was living, he still maintains it, and has not dissolved it, although for the time being he restricts actual cohabitation to but one. He might in fact abstain from actual cohabitation with all, and be still as much as ever a bigamist or a polygamist. He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the forbidden status he has previously assumed. Cohabitation is but one of the many incidents to the marriage relation. It is

not essential to it. One man, where such a system has been tolerated and practised, may have several establishments, each of which may be the home of a separate family, none of which he himself may dwell in or even visit. The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the description of those who are bigamists or polygamists, those words in the statute would be superfluous and unnecessary. It follows, therefore, that any person having several wives is a bigamist or polygamist in the sense of the act of March 22, 1882, although since the date of its passage he may not have cohabited with more than one of them." p. 41. In the spirit of this interpretation, a man cohabits with more than one woman, in the sense of §§ 3, 5 and 8 of the act, when, holding out to the world two women as his wives, by his language or conduct, or both, he lives in the house with them, and eats at the table of each a portion of his time, although he may not occupy the same bed or sleep in the same room with either of them, or actually have sexual intercourse with either of them. He holds two women out to the world as his wives, by his conduct, when, being the recognized and reputed husband of each, so understood to be by the two wives, and by the son of one of them, and by the son of a third reputed wife, he maintains the two wives and the children of each, all in the same house with himself, and regularly eats at the table of each, and acts as the head of the two families.

This meaning of the phrase "cohabit with more than one woman," in the statute, is in consonance with a recognized definition of the word "cohabit." In Webster "cohabit" is defined thus: "1. To dwell with; to inhabit or reside in company, or in the same place or country. 2. To dwell or live together as husband and wife." In Worcester it is defined thus: "1. To dwell with another in the same place. 2. To live together as husband and wife." The word is never used in its first meaning, in a criminal statute; and its second meaning is that to which its use in this statute has relation. The context

in which it is found, and the manifest evils which gave rise to the special enactments in regard to "cohabitation," require that the word should have the meaning which we have assigned to it. Bigamy and polygamy might fail of proof, for want of direct evidence of any marriage, but cohabitation with more than one woman, in the sense proved in this case, was susceptible of the proof here given; and it was such offence as was here proved that section 3 of the act was intended to reach—the exhibition of all the indicia of a marriage, a household, and a family, twice repeated. However, in some divorce cases, and in reference to a question of the condonation of adultery, the word "cohabit" may have been used in the limited sense of sexual intercourse, or however its meaning may have been so limited by its context in other statutes, it has no such meaning in the statute before us.

These views of the proper construction of section 3 show that the evidence which the court rejected was properly excluded, and that there was no error in the instructions given to the jury, or in refusing to give those asked, aside from those which were proper to have been given, but were covered by the instructions given. Nor is the charge given open to the objection that the paragraphs in it which follow the first are not confined to the time laid in the indictment.

Objection is taken to the indictment because it does not allege that the defendant was a male person, § 3 making the offence it specifies punishable only when committed by a male person. By the Criminal Procedure Act of the Territory of Utah, passed February 22d, 1878, and which was in force from and after March 10, 1878, Laws of 1878, p. 91, it is provided as follows:

"Sec. 148. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Act.

"Sec. 149. The first pleading on the part of the people is the indictment.

"Sec. 150. The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

2. A clear and concise statement of the acts or omissions constituting the offence, with such particulars of the time, place, person, and property as will enable the defendant to understand distinctly the character of the offence complained of and answer the indictment. It must be substantially in the following form:

Territory of Utah.

In the ——— Judicial District Court. The People of the Territory of Utah against A. B.

A. B. is accused by the Grand Jury of this Court, by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the — day of ———, A. D. eighteen ———, at the county of ——— (here set forth the act or omission charged as an offence).

"Sec. 151. It must be direct and certain as it regards:

1. The party charged;

2. The offence charged;

3. The particular circumstances of the offence."

"Sec. 156. The words used in an indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning.

"Sec. 157. Words used in a statute to define a public offence need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

"Sec. 158. The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated:

2. That it was found by a grand jury of the district in which the court was held;

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown;

4. That the offence committed was within the jurisdiction of the court, and is triable therein;

5. That the offence was committed at some time prior to the time of finding the indictment;

6. That the act or omission charged as the offence is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended; and

To pronounce judgment upon a conviction, according to the right of the case."

"SEC. 190. The only pleading on the part of the defendant is either a demurrer or a plea."

Section 192 provides that the defendant may demur to the indictment when it appears upon the face thereof that it does not substantially conform to the requirements of § 150; or that the facts stated do not constitute a public offence.

Section 200 provides that when the objections mentioned in § 192 appear upon the face of the indictment, they can only be taken by demurrer, except that the objection that the facts stated do not constitute a public offence may be taken at the trial, under the plea of not guilty, or, after the trial, in arrest of judgment.

"SEC. 479. Neither a departure from the form or mode prescribed by this act in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

Certainly, under these provisions, the defendant, having pleaded to the indictment and not demurred, must be held to have understood distinctly that the charge was against a male person, as guilty of the offence complained of, the offence being one which only a male person could commit; and the omission from the indictment of the allegation that he was a male person could not have prejudiced him, or tended to his prejudice, in respect to a substantial right.

The same statutory provisions apply to the objection that the indictment contains merely a charge of unlawful cohabitation with more than one woman, and does not allege a cohabitation with the women as wives, or as persons held out as wives. The defendant, having pleaded and not demurred, it must be held, under § 150, that the statement of the acts constituting the

offence was such as to enable him to understand distinctly the character of the offence complained of, as that offence is now interpreted, and to answer the indictment. The objection now made cannot be regarded as an objection that the facts stated do not constitute a public offence, because the statement is in the words of the statute, and they, as is now held, have but one meaning; and there could not have been any prejudice to the defendant, or tendency to prejudice, in respect to a substantial right, in not alleging any more pointedly that he cohabited with the women as wives.

In connection with these statutory rules, § 3 of the act of Congress makes the offence a misdemeanor. In *United States* v. *Mills*, 7 Pet. 138, 142, it was said by this court: "The general rule is, that, in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. . . . But in all cases the offence must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." These principles were applied to a case of misdemeanor, in *United States* v. *Britton*, 107 U. S. 655, and an indictment was held sufficient because it embodied the language of the statute, and that language covered every element of the crime, and thus the offence created by the statute was set forth with sufficient certainty, so as to give the defendant clear notice of the charge he was called on to defend. That case was distinguished by the court from *United States* v. *Carll*, 105 U. S. 611, as this is distinguishable. In Carll's case, the statute made it an offence to pass a forged obligation of the United States with intent to defraud, and the punishment was a fine and imprisonment at hard labor. The question arose, on a motion in arrest of judgment, whether the indictment was sufficient, it setting forth the offence in the language of the statute, without further alleging that the defendant knew the instrument to be forged. This court held that the offence at which the statute was aimed was similar to the common-law offence of uttering a forged bill; that, therefore, knowledge that the instrument was forged was essential to make out the crime; and that the uttering, with intent to defraud, of an instrument in fact counterfeit,

but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. The omitted allegation in that case—a knowledge of the forgery—was a separate, extrinsic fact, not forming part of the intent to defraud, or of the uttering, or of the fact of forgery; and, in the absence of that allegation, it was held that no crime was charged. In other words, the case was of the class provided for under the Utah statute, where the facts stated do not constitute a public offence. This, as has been shown, is not that case. The word "cohabit" has, in the statute, a definite meaning, including every element of the offence created, as before defined. The allegation of cohabiting with the two women as wives is not an extrinsic fact, but is covered by the allegation of cohabiting with them.

A strong appeal was made, in argument, to this court, not to uphold the rulings of the trial court, because that would require a polygamous husband not only to cease living with his plural wives, but also to abandon the women themselves; and this court was asked to indicate what the conduct of the husband toward them must be in order to conform to the requirements of the law. It is sufficient to say, that, while what was done by the defendant in this case, after the passage of the act of Congress, was not lawful, no court can say, in advance, what particular state of things will be lawful, further than this, that he must not cohabit with more than one woman, in the sense of the word "cohabit," as hereinbefore defined. While Congress has legitimated the issue of polygamous marriages, born before January 1, 1883, and thus given to such issue claims upon their father which the law will recognize and enforce, it has made no enactment in respect to any right or status of a bigamous or polygamous wife. It leaves the conduct of the man toward her to be regulated by considerations which, outside of § 3, are not covered by the statute, and which must be dealt with judicially, when properly presented.

Judgment affirmed.

Miller, J., with whom concurred Mr. Justice Field.—I dissent from the judgment of the court in this case.

I think that the act of Congress, when prohibiting cohabitation with more than one woman, meant unlawful habitual sexual intercourse.

It is, in my opinion, a strained construction of a highly penal statute to hold that a man can be guilty, under that statute, without the accompaniment of actual sexual connection.

I know of no instance in which the word cohabitation has been used to describe a criminal offence where it did not imply sexual intercourse.

Mr. Justice Field concurs with me.

ROBERTS *v.* REILLY.

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

Argued November 20, 1885.—Decided December 14, 1885.

Appeals in cases of habeas corpus from the final decision of a District Court, or of a judge thereof, may, within the discretion of the court or judge, be sent to the appellate tribunal, at a term of the Circuit Court current at the time when the appeal is taken, under regulations adapted to secure justice.

An appeal from the final decision of a District Court or of a judge thereof in a habeas corpus case may be heard by the Circuit Justice at chambers, when it appears that the order therefor is made without objection, and for the convenience of parties, and that the parties appear and are heard and no objection is taken at the hearing, and that no hardship or injustice follows. An objection thereto under these circumstances is too late if taken for the first time in this court.

On the application of an alleged fugitive from justice (detained under authority of the executive of the State where he is found in order to be surrendered to the executive of the State in which the crime is alleged to have been committed), to be discharged on a writ of habeas corpus, it is a question of law, whether he is substantially charged with the commission of a crime against the laws of the latter State ; but the question whether he is a fugitive from justice is one of fact, the decision of which by the governor of the State in which he is found is sufficient to justify the removal—at least until overthrown by contrary proof.

The question whether a corporation is capable in law of ownership of property, the subject of a larceny charged, is not a question which can be raised in proceedings in habeas corpus for the discharge of an alleged fugitive from justice held for surrender to the executive of the State in which the crime is alleged to have been committed.

Statement of Facts.

If the governor of the State from which the delivery of a fugitive from justice is demanded does not require a certified copy of the law of the State against which the crime is charged to have been committed, the prisoner cannot take advantage of the omission in proceedings in habeas corpus for his discharge.

It is discretionary with the State upon which demand is made for surrender of a fugitive from justice to surrender him, even if the allegations charge acts done by him in the State surrendering, which amount to a crime by its laws.

A person who, having committed, within a State, an act which by its laws constitutes a crime, is, when sought for to be subjected to criminal process to answer therefor, found without that State and within the territory of another State or Territory, is a fugitive from justice within the meaning of that term as used in the Constitution of the United States.

The record in this case showed the following state of facts:

On April 30, 1885, the appellant Roberts presented his petition to the judge of the District Court for the Southern District of Georgia, and filed the same in the office of the clerk, alleging that he was illegally restrained of his liberty by the appellee, Reilly, who claimed to be acting as an agent of the State of New York, and as such to hold the petitioner, under color of the authority of the United States, by virtue of an arrest made in pursuance of an executive warrant issued by the governor of Georgia, on a requisition from the governor of New York, reciting that the petitioner had been indicted in the State of New York and was a fugitive from the justice of the latter State. He averred that the custody by which he was restrained of his liberty was illegal, for various reasons assigned, and prayed for the writ of *habeas corpus*. The writ was issued as prayed for, and duly served, and thereupon an amendment to the petition was filed, as follows:

"And now comes the said William S. Roberts, and, by leave of the court first had, amends said petition, and says that he is restrained of his liberty, in violation of a law of the United States, viz., the Act of February 12, 1793, section 5178 of the Revised Statutes of the United States, in this: that it appears from the record, now here to your honor shown, upon which the executive warrant under which he is now restrained issued, that the crime with which he is charged was committed in the State of Georgia; that the papers accompanying the demand

of the governor of New York are not authenticated, as required by that act; that it nowhere appears that the relator was personally within the limits of the State of New York at the time when said alleged crime is stated to have been committed; that it nowhere appears that any evidence was before the governor of New York, at the time he issued his demand, that relator was personally within the limits of New York State when the crime is alleged to have been committed."

The defendant Reilly, on May 2, 1885, filed his answer and return, under oath, to the writ of *habeas corpus*, which had been issued and served upon him, as follows:

"UNITED STATES OF AMERICA,

Southern District of Georgia, Eastern Division:

"Pursuant to a writ of *habeas corpus*, issued by the Hon. Emory Speer, judge of the District Court of the United States for the Southern District of Georgia, served upon me, I herewith produce the body of William S. Roberts, and return as the cause of his detention the executive warrant of the Governor of the State of Georgia under which he was delivered to me by authority issued to me by Hon. D. B. Hill, Governor of the State of New York, April 22, 1885, here to the court shown, copy of which is annexed, under which I still hold him, I having, as agent of the State of New York, received said Roberts from Wilberforce Daniel, sheriff of the county of Richmond, to be carried to the State of New York, there to be dealt with according to law; that a certified copy of the indictment found for grand larceny in the State of New York, with evidence of fleeing from justice after commission of the crime, were produced by respondent as received from the governor of New York and delivered to the governor of Georgia, and retained in his office at the time of the issuing of the executive warrant under which the said Roberts was placed in possession of the respondent by the sheriff of Richmond county.

"I further return that on April 26, 1885, after the delivery of the said Roberts to me by the sheriff of Richmond county, I was served with a writ of *habeas corpus* issued by the Hon.

Statement of Facts.

H. C. Roney, judge of the Superior Court of the Augusta circuit, of which circuit the county of Richmond is a part, and by his order required to produce the said Roberts before him April 27, 1885; that from that date until May 1, 1885, I held the said Roberts subject to the order of the said judge, who at said time remanded him into my custody, a certified copy of which proceedings, with the judgment thereon dismissing the writ and remanding him into my custody, is here to the court shown.

"Whereupon this respondent prays that the said writ may be dismissed at the costs of the relator."

On the hearing before the District Court, documents were put in evidence, and constituted a part of the record, as follows:

1. The authority given by the governor of New York to the respondent, as agent of the State, to take and receive the prisoner as a fugitive from justice and convey him to the State of New York to be dealt with according to law.

2. A copy of the requisition of the governor of New York upon the governor of Georgia, as follows:

"STATE OF NEW YORK, EXECUTIVE CHAMBER.

"David B. Hill, Governor of the State of New York, to his Excellency, the Governor of the State of Georgia:

"Whereas it appears by a copy of an indictment, which I certify to be authentic and duly authenticated, in accordance with the laws of this State, that William S. Roberts stands charged with the crime of grand larceny in the first degree, committed in the county of New York, in this State, and it has been represented to me that he has fled from justice of this State, and may have taken refuge in the State of Georgia; now, therefore, pursuant to the provisions of the Constitution and laws of the United States in such cases made and provided, I do hereby require that the said William S. Roberts be apprehended and delivered to Philip Reilly, who is authorized to receive and convey him to the State of New York, there to be dealt with according to law.

"In witness whereof I have hereunto signed my name and

affixed the privy seal of the State, at the city of Albany, this twenty-second day of April, in the year of our Lord, one thousand eight hundred and eighty-five.

[Seal of the State of New York.] DAVID B. HILL.

"By the Governor: WILLIAM G. RICE,
Private Secretary."

3. A copy of the application for this requisition made by the district attorney of the county of New York, accompanied and supported by affidavits of Wm. W. Thurston and others, giving in detail the circumstances of the alleged offence, and averring that the prisoner, and one Walton, charged with him, had fled from the justice of the State of New York and were to be found in Georgia.

4. A copy of the indictment, as follows:

"Court of General Sessions of the Peace of the City and County of New York.

The People of the State of New York
against
William S. Roberts and Edward H. Walton.

"The grand jury of the city and county of New York by this indictment accuse William S. Roberts and Edward H. Walton of the crime of grand larceny in the first degree, committed as follows: The said William S. Roberts and Edward H. Walton, each late of the first ward of the city of New York, in the county of New York aforesaid, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four, at the ward, city, and county aforesaid, with force and arms, ten written instruments and evidences of debt, to wit, the bonds and written obligations issued by the Georgetown and Lane's Railroad Company, a corporation duly existing under the laws of the State of South Carolina, and called 'first mortgage bonds,' in and by each of which the said railroad company acknowledged itself indebted to the bearer thereof in the sum of one thousand dollars, and which said sum the said railroad company thereby promised to pay on the first day of January, in the year of our Lord 1913, with interest,

the same bearing date on the first day of January, in the year of our Lord 1883, and being then and there each duly signed by the president and secretary of the said railroad company, and sealed with the seal thereof, and numbered nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen, respectively, and being then and there in full force and effect, and wholly unsatisfied, and of the value of one thousand dollars each, (a more particular description of which said bonds and written obligations is to the grand jury aforesaid unknown,) of the valuable things, evidences of debt, goods, chattels, and personal property of the Bethlehem Iron Company then and there being found, then and there feloniously did steal, take, and carry away against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

"RANDOLPH B. MARTINE,
District Attorney."

Indorsed on back of indictment:

"Filed 10 day of April, 1885. The People *vs.* William S. Roberts and Edward H. Walton. Grand larceny, 1st degree. Sections 528, 530, 540, Penal Code. Randolph B. Martine, District Attorney.

"A true bill.

"HENRY A. OAKLEY, *Foreman.*

"Witnesses: W. W. Thurston.
W. P. St. John."

The foregoing were certified by the secretary of the Executive Department of Georgia to constitute a true and complete transcript or copy of papers of [on] file in that office in the matter of the requisition for William S. Roberts by the governor of New York upon the governor of Georgia.

5. The executive warrant of the governor of Georgia, with the return of the execution thereof by the sheriff, as follows:

"State of Georgia, by Henry D. McDaniel, Governor of said State, to all the sheriffs and constables thereof, greeting:

"Whereas his excellency, David B. Hill, Governor of the

State of New York, and as the executive authority thereof, has demanded of me as the executive authority of this State, William S. Roberts, as a fugitive from justice from the State of New York, and has moreover produced a copy of indictment charging the said William S. Roberts with having committed in the said State of New York the crime of grand larceny in the first degree, which copy [of] indictment is duly certified as authentic by his excellency the governor of the State of New York, and has also appointed and commissioned Philip Reilly agent on the part of the State of New York to receive said fugitive from the civil authorities of this State, to the end that he may be carried to the State of New York, there to be dealt with according to law; and whereas it is suspected that the said fugitive from justice is now within the jurisdictional limits of this State:

"Now, in accordance with the provisions of an act of Congress, passed the twelfth day of February, seventeen hundred and ninety-three, respecting 'fugitives from justice,' and in order that the said William S. Roberts may be brought to trial for the offence for which he stands charged, you are hereby commanded to arrest and deliver him to the said Philip Reilly, agent as aforesaid, so that he may be carried to the State of New York, within whose jurisdiction said offence is alleged to have been committed; and I moreover charge and require all officers, both civil and military, in this State, to be vigilant in endeavoring to apprehend the said William S. Roberts, fugitive as aforesaid.

"Given under my hand and the seal of the Executive Department, at the capitol, in Atlanta, this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-five, and of American Independence the one hundred and ninth.

[SEAL.] HENRY D. MCDANIEL, *Governor.*

"By the Governor: HOWARD E. W. PALMER,
Secretary, Executive Department."

Sheriff's Return.

"GEORGIA, *Richmond County:*

"Executed the within warrant by arresting William S.

Roberts, and delivering him, pursuant to the mandate of the governor, to Philip Reilly, agent on the part of the State of New York, at one p. m., April 26th, 1885.

W. DANIEL, *Sheriff R. C. Ga.*"

6. A transcript of the record of certain proceedings in the Superior Court of Richmond County in *habeas corpus*, on a petition therefor presented by the said William S. Roberts on April 26, 1885, the return thereto of the said Philip Reilly, and the order of the court thereon, rendered May 1, 1885, remanding the petitioner to the custody of the said Reilly, under the executive warrant of the governor of Georgia, issued in pursuance of the requisition of the governor of New York, heretofore set out.

7. An affidavit of W. S. Roberts, setting forth the facts of the transaction imputed to him as a crime, and on which the indictment is based, and denying the truth of the charge. It also denied that he was in New York on the day laid in the indictment as the date of the offence, and denied that he was in that State after indictment found or that he fled therefrom. And in support of these averments an affidavit of E. H. Walton was also made and filed.

On May 4, 1885, the matter was heard by the judge of the District Court on these pleadings and proofs, when it was ordered and adjudged that the writ be disallowed, and that the petitioner be remanded to the custody of the respondent.

Thereupon, on May 5, 1885, the following order allowing an appeal was made and entered in the District Court:

"In the District Court of the United States for the Southern District of Georgia, Eastern Division.

"*In Re* Petition of WILLIAM S. ROBERTS.

"The judge of the District Court having rendered a final decision in said case dismissing said writ and remanding said petitioner, and said petitioner having prayed that an appeal be taken in his behalf to the next Circuit Court for said district, in which said cause may be heard in accordance with the statute in that behalf enacted, after argument had it is considered

and ordered that an appeal be, and the same is hereby, allowed upon the following terms and under the following regulations:

"That the said William S. Roberts be taken into the custody of the United States marshal for the said Southern District of Georgia, to be by him safely kept, and that the said William S. Roberts do execute and deliver a good and sufficient bond in the sum of ten thousand dollars, with security, to be approved by the judge of said District Court, which said bond, when approved, shall be filed with the clerk of said Circuit Court, and shall be conditioned as follows: That the said William S. Roberts do deliver himself up to the marshal of said southern district, and do appear before the Circuit Court whenever and wherever ordered by this court, or by the said Circuit Court, and do then and there abide by and perform the judgment of the Circuit Court in the premises.

"And that the said William S. Roberts do cause to be sent to the said appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings and documents and affidavits in said cause, immediately on execution of said bond. And that upon the execution and approval of said bond as aforesaid, and the tender of the same, the said William S. Roberts be discharged from the custody of said marshal and allowed to go free, subject to the terms of this order or the final decision of said appellate court.

"In open court, May 5th, 1885.

EMORY SPEER, *U. S. Judge.*"

On May 16, 1885, the relator, William S. Roberts, filed, in the clerk's office of the Circuit Court for the Eastern Division, Southern District of Georgia, at a stated term of said court, begun and holden in the city of Savannah, on the second Monday in April, 1885, a transcript of a record, on appeal from the District Court, of the foregoing proceedings and order, having previously given the bond on appeal required thereby.

Afterwards an order was made in the Circuit Court, the district judge presiding, directing the clerk to transmit a transcript of all the proceedings in the cause to the circuit justice, at Atlanta, Georgia, that the same might be heard before him on

May 18, or as soon thereafter as the same could be heard. Accordingly on May 19, the matter was heard before Mr. Justice Woods, at Atlanta, when and where the parties appeared, the petitioner and appellant by counsel, his personal presence being excused by reason of physical disability. The following order was thereupon made, and entered on the minutes of the Circuit Court:

"In the matter of appeal of Wm. S. Roberts from the decision of the District Judge of the United States for the Southern District of Georgia, Eastern Division, under petition for *habeas corpus* against Philip Reilly:

"This case came on to be heard before me pursuant to the order of the Circuit Court of the United States for the Southern District of Georgia, Eastern Division, dated May 15th, 1885, to which court an appeal was allowed May 5th, 1885, and which was perfected upon the execution of a bond approved by the district judge, and filed May 7th, 1885.

"After argument heard, it is ordered that the judgment of the district judge of May 4th, 1885, 'that the writ is disallowed, and the petition of the relator be dismissed, and that he be remanded to the custody of Philip Reilly,' be, and it is hereby, affirmed at the costs of the relator.

"It is further ordered that this order be entered on the minutes of the Circuit Court of the United States for the Southern District of Georgia, Eastern Division, and a certified copy transmitted to the district judge of the United States for the Southern District of Georgia, Eastern Division, for enforcement by him of his judgment of May 4th, 1885.

"It further appearing that sufficient cause was shown before me for the non-appearance of the relator, it is ordered that no liability rest upon the sureties upon the bond filed May 7th, 1885, for such non-appearance, but that said bond remain of full force until complied with by the delivery of the relator to the United States marshal to be turned over to said Philip Reilly, or such other duly constituted agent as may be appointed by the governor of New York to receive him.

"It is further ordered that the relator have leave to apply

to the district judge for stay of his order of May 4th, 1885, until physically able to be removed, and that for the cause shown in the affidavit of Henry F. Campbell of May 18th, 1885, submitted at the hearing, and now ordered to be filed, the delivery of the relator to Philip Reilly to be made by the marshal of Georgia, the obligee in the bond, be stayed until June 19th, 1885.

"May 19th, 1885. W. B. Woods,
Circuit Justice."

Thereupon the relator, Roberts, filed in the Circuit Court, on June 20, 1885, his petition, praying an appeal from this order and judgment to this court, which was allowed; and it was ordered "that the clerk of the United States Circuit Court for the Southern District of Georgia, Eastern Division, do send up to the October Term, 1885, of the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings in said cause. Further ordered, that the judgments heretofore had in the cause remanding said Roberts into the custody of said Reilly be, and the same are hereby, superseded until the final decision of the Supreme Court can be had in the case, and that the bail of said Roberts retain him in their custody and produce him to answer whatever decision the Supreme Court may render in the cause, or if his bail have surrendered him into the custody of the United States marshal, that said marshal hold him to be produced to answer said judgment, with liberty to said Roberts to give a new bond in the sum of $10,000, with surety, to be approved by the undersigned (the circuit justice), conditioned for his appearance to answer said judgment."

The appeal to this court having been perfected, the appellant filed the following assignment of errors:

"Afterwards, to wit, on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said William S. Roberts, by W. W. Montgomery, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record

aforesaid it appears that an order was passed referring said cause to Judge Woods, to be heard by him in vacation, said order having been passed at a term of said Circuit Court which was in session when the appeal from the district judge was allowed, whereas appellant insists that the appeal from the district judge was to the term of said Circuit Court next after the judgment of the district from which the appeal was taken. Appellant further insists that no hearing could be had in vacation unless the record shews on its face that such hearing was had by consent of parties. Appellant further insists that the judgment of his honor Judge Woods was error, because there was no evidence showing that the relator had ever been in New York since the alleged commission of the crime, or at the time of its commission, which was not fully rebutted; and again, because no copy of the laws of New York was submitted to the governor of Georgia shewing what constituted grand larceny under the laws of New York.

"And again, because no copy of the laws of New York was submitted to the governor of Georgia shewing that by such laws the indictment was sufficient, it manifestly appearing that said indictment did not charge any crime by the rules of the common law.

"And again, because the evidence submitted to the governor of Georgia shewed that, if any crime was committed, it was committed in Georgia, and not in New York.

"And again, because it nowhere appears that the affidavits accompanying the requisition of the governor of New York were sworn to before officers authorized to take them.

"And the said Roberts prays that the said several judgments herein complained of may be reversed, annulled, and altogether held for naught, and he be discharged from custody and restored to all rights which he has lost by reason of the said executive warrant of the governor of Georgia and the judgments complained of."

And afterwards, the counsel for the appellant filed additional assignments of error, as follows:

"That the Circuit Court erred in not discharging appellant, for the reason that the affidavits on which the requisition of

the governor of New York is found are not authenticated by him.

"And again, because the warrant of the governor of Georgia does not state upon what evidence it is issued, or that the governor was satisfied from the testimony that a case was made which required him to exercise the power of extradition conferred upon him by the United States Constitution and the Act of Congress.

"And again, because the affidavits on which the indictment and requisition mainly rest are taken before the leading counsel of the prosecution in the case, such counsel acting as a notary public.

"And again, because the facts show a crime under the laws of Georgia, which, even if they show a crime under the laws of New York also, take the case out of the operation of the extradition laws."

Mr. W. W. Montgomery for appellant.

Mr. Frank H. Miller and *Mr. Daniel Lord, Jr.*, for appellee.

Mr. Justice Matthews delivered the opinion of the court.

There is nothing in the Revised Statutes, § 763, providing an appeal in cases of *habeas corpus* to the Circuit Court from the final decision of the District Court, or the judge thereof, which requires it to be taken, as in ordinary cases at law or suits in equity or admiralty, to the next term of the Circuit Court thereafter to be held. On the contrary, the subject is regulated otherwise by § 765 Rev. Stat., which enacts, that "the appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the cause." This statutory pro-

vision evidently contemplates the summary character of proceedings under the writ of *habeas corpus* as not admitting, in favor of the liberty of the citizen, the delays usually and necessarily attending ordinary litigations between parties, and confers upon the judicial tribunal, or the judge hearing the application and making the order which is the subject of the appeal, discretion to send up the case to the appellate tribunal, under such regulations and orders as may seem best adapted to secure the speediest and most effective justice. This harmoniously adapts the practice in direct appeals in such cases, under these sections of the Revised Statutes, to that exercised independently of these provisions, by means of the original writ of *habeas corpus*, with the aid of a writ of *certiorari*, to bring up the record of the proceedings to be reviewed. This form of appellate jurisdiction was declared by this court in *Ex parte Yerger*, 8 Wall. 85, to exist independently of the provisions for a direct appeal, now incorporated into the sections of the Revised Statutes above referred to; and it was exercised without regard to the beginning and ending of the terms of the appellate court, and in a summary manner. The appeal in the present case, from the judgment of the District Court to the Circuit Court, was therefore not heard prematurely, although it was lodged and disposed of at a term of the latter court which was current at the time the appeal was taken.

In regard to the objection now taken that the hearing of the appeal was had before the Circuit Justice at Atlanta at chambers, and not at Savannah in open court, it is sufficient to say that the order to that effect was made without objection taken at the time, or afterwards, in the District or Circuit Court, or at the hearing before Justice Woods; that the appellant appeared at the time and place by counsel and was heard; that the arrangement was made for the convenience of the parties and to avoid delay; and that it does not seem to have involved any hardship or injustice to the party now complaining. The objection, if it could ever have been properly interposed and insisted on, cannot now be made for the first time. It comes too late.

The other assignments of errors relate to the merits, and require a consideration of the limits of the jurisdiction of judicial

tribunals in cases of the extradition of fugitives from justice under the clause of the Constitution by which it is regulated.

That constitutional provision declares that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Art. IV., sec. 2, clause 2. There is no express grant to Congress of legislative power to execute this provision, and it is not, in its nature, self executing; but a contemporary construction, contained in the act of 1793, 1 Stat. 302, ever since continued in force, and now embodied in §§ 5278 and 5279 of the Revised Statutes, has established the validity of its legislation on the subject. "This duty of providing by law," said Chief Justice Taney, delivering the opinion of the court in *Kentucky* v. *Denison*, 24 How. 66, 104, "the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for, if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the Governor of the State, where the fugitive was found, is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of Congress to authorize it."

It follows, however, that, whenever the executive of the State, upon whom such a demand has been made, by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice of another State, the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment. The jurisdiction of the courts of the States is not excluded in such cases, as was adjudged by this court in the case of *Robb* v. *Connolly*,

111 U. S. 624, for, although the party is restrained of his liberty under color of authority derived from the laws of the United States, he is not in the custody of, or under restraint by, an officer of the United States.

The act of Congress Rev. Stat. § 5278 makes it the duty of the executive authority of the State to which such person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made, before a magistrate of any State, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the State from whence the person so charged has fled.

It must appear, therefore, to the governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand.

The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof.

Ex parte Reggel, 114 U. S. 642. Further than that it is not necessary to go in the present case.

The objections taken in this proceeding to the sufficiency of the indictment, which were overruled both in the District and Circuit Courts, and which are still relied on here, are not well founded. The indictment itself is certified by the governor of New York to be authentic and to be duly authenticated, which is all that is required by the act of Congress. It charges a crime under and against the laws of that State. It is immaterial that it does not appear that a certified copy of such laws was furnished to the governor of Georgia. The statute does not require it, and the governor could have insisted, and it is to be presumed did insist, upon the production of whatever he deemed necessary or important properly to inform him on the subject. And the courts of the United States, to whose process the relator has appealed, take judicial notice of the laws of all the States.

The indictment in question sufficiently charges the substance of a crime against the laws of New York. The objection to it, that it does not appear that the Bethlehem Iron Company, averred to be the owner of the property the subject of the larceny charged, is a person capable in law of such ownership, is not matter of law arising upon the face of the indictment, but can arise only at the trial upon the evidence, if the question should then be made. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law, and is, therefore, traversable. The further objection, that the facts and circumstances, set out in the affidavits, as constituting the crime charged in the indictment, show that it is a crime in Georgia, and the possible subject of prosecution in that State under its laws, does not affect the question. These facts are, in brief, that the original taking of the bonds mentioned in the indictment is shown to have been in Georgia, whence they were brought into New York by the appellant, and there finally appropriated to his own use. If that be true, it is none the less true that the offence charged is also a crime in New York against its laws; and the State of Georgia may choose to waive the exercise of its jurisdiction

by surrendering the fugitive to answer to the laws of New York.

On the question of fact, whether the appellant was a fugitive from the justice of the State of New York, there was direct and positive proof before the governor of Georgia, forming part of the record in this proceeding. There is no other evidence in the record which contradicts it. The appellant in his affidavit does not deny that he was in the State of New York about the date of the day laid in the indictment when the offence is alleged to have been committed, and states, by way of inference only, that he was not in that State on that very day; and the fact that he has not been within the State since the finding of the indictment is irrelevant and immaterial. To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction and is found within the territory of another.

We find no error in the judgment of the Circuit Court, and the same is

Affirmed; and it is directed that the order and judgment of the District Court, remanding the appellant to the custody of the respondent as the agent of the State of New York, be executed.

Statement of Facts.

CALL *v.* PALMER.

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

Argued November 18, 1885.—Decided December 14, 1885.

When an agent, who is authorized by his principal to lend money for lawful interest, exacts for his own benefit more than the lawful rate, without authority from or knowledge of his principal, the loan is not thereby rendered usurious.

Where the promissor in a usurious contract makes it the consideration of a new contract with a third person, not a party to the original contract, or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious.

This was a suit in equity brought by Henry H. Palmer, the appellee, against Asa C. Call, the appellant, to foreclose a mortgage on the land of the latter given by him to secure his note for $11,000.

The record disclosed the following facts: Albert C. Burnham, residing in Illinois, was a partner in the firm of Burnham, Ormsby & Co., bankers, at Emmetsburg, Iowa. He had in his hands for investment $10,000 belonging to his relative, one Mrs. Davidson. Call applied in writing to Burnham, Ormsby & Co. for a loan of $10,000. Soon after the application was made Call met Burnham at Emmetsburg, Iowa, and they entered upon a treaty for the loan. Burnham thinking Call's proposition to be a favorable one, decided to accept it for Mrs. Davidson, and, after his return to Illinois, sent the money to Burnham, Ormsby & Co., at Emmetsburg, to be lent to Call on the terms proposed by him. Burnham, Ormsby & Co. took the note of Call dated in November, 1872, for $10,000, payable to A. C. Burnham, or order, on November 1, 1875, with ten per cent. interest, payable semi-annually, which Call secured by a mortgage on certain of his real estate in Iowa. Call received from Burnham, Ormsby & Co. $8000 for his note, they retaining $2000 as a compensation for their services in negotiating the loan. No part of this sum was paid to Mrs. Davidson—

she did not know that it had been deducted from the $10,000 lent by her to Call, and she never authorized Burnham or Burnham, Ormsby & Co. to lend her money at a greater rate of interest than ten per cent., or to retain any commission or bonus out of the sum lent. In short, she received no benefit from the usury and had no knowledge of it. A. C. Burnham held the note as the agent and trustee of Mrs. Davidson, but subject to her control. Afterwards the appellee, Palmer, who lived in New Jersey, bought of Burnham the $10,000 note of Call, with five coupon notes of $500 each, not then due, given by the latter for interest thereon. The notes were indorsed by Burnham to Palmer in September, 1873, and Palmer paid therefor in cash to Burnham for Mrs. Davidson the face of the principal note, $10,000, and the accrued interest. In this purchase Palmer acted for himself without the intervention of any agent whatever.

On November 13, 1875, the principal note being past due, Call, in order to raise money to pay it, applied in writing to Burnham, Ormsby & Co. to lend him $11,000 for five years. They, as agents of Palmer, agreed to loan Call the money. They took his note, dated November 1, 1875, for $11,000, payable to the order of Palmer, on November 1, 1880, with ten per cent. interest, payable semi-annually, secured by a mortgage executed by Call on his lands in Iowa.

The consideration for the note was as follows: Palmer delivered up to Call the $10,000 note, which he had purchased from Mrs. Davidson and released on the record the mortgage made to secure it, and he sent to Burnham, Ormsby & Co. $1000 in cash for Call. $500 of this $1000 was returned to Palmer through Burnham, Ormsby & Co., in payment of one of the coupon notes, for interest due on the Davidson note, and Call consented that Burnham, Ormsby & Co., who, through Ormsby, had procured for him the loan from Palmer, might retain the remaining $500 as a bonus for their services. Palmer had no notice or knowledge that Call had not received the full amount of the $10,000 for which he gave his note to Burnham for Mrs. Davidson until after the bringing of this suit, nor any notice or knowledge that the said $500 had been re-

tained by Burnham, Ormsby & Co. for their services in procuring the loan for $11,000, and did not in any manner authorize its retention by Burnham, Ormsby & Co.

Call set up the plea of usury to the suit brought by Palmer to foreclose his mortgage. The Circuit Court overruled the defence, and entered a decree against Call for the amount due on the note and for the foreclosure of the mortgage. The appeal of Call brings that decree under review.

PROPERTY OF THE UNITED STATES SENATE COMMITTEE COPY

Mr. Whiting S. Clark and *Mr. J. Harry Call* for appellant submitted on their brief.

Mr. M. F. Morris for appellee.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The contention of Call is that the note given to Burnham for Mrs. Davidson was infected with usury in her hands and in the hands of Palmer, her indorsee, and that the note given by Call to Palmer was also usurious, by reason of the retention by Burnham, Ormsby & Co. of the $500 as a bonus for effecting the loan for Call.

The note which is the basis of this suit was made in Iowa, and the contract must be governed by the laws of Iowa. *De Wolf* v. *Johnson*, 10 Wheat. 367; *Scudder* v. *Union National Bank*, 91 U. S. 406.

The Code of Iowa of 1873, title 14, ch. 2, sec. 2077, provides: "The rate of interest shall be six cents on the hundred by the year on . . . money due or to become due when there is a contract to pay interest and no rate is stipulated. In all the cases above contemplated parties may agree in writing for payment of interest, not exceeding ten cents on the hundred by the year."

"Sec. 2079. No person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum of value for the loan of money, or upon contract founded upon any bargain, sale, or loan of real or personal property, than is in this chapter prescribed.

"SEC. 2080. If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or property, the same shall work a forfeiture of ten cents on the hundred by the year upon the amount of such contract to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum, without either interest or costs. . . .

"SEC. 2081. Nothing in this chapter shall be so construed as to prevent the proper assignee in good faith and without notice of any usurious contract recovering against the usurer the full amount of the consideration paid by him for such contract less the amount of the principal money; but the same may be recovered of the usurer in the proper action before any court having competent jurisdiction."

We are of opinion that under these sections, as construed and administered by the Supreme Court of Iowa, the defence of usury was not maintained.

The $10,000 lent to Call by Burnham was the money of Mrs. Davidson, and the note taken therefor, though taken in the name of Burnham, was her note. Conceding that Burnham acted as her agent in making the loan, it does not follow that Mrs. Davidson is chargeable with making a usurious contract. It was said by this court in *Bank of the United States* v. *Waggener*, 14 Pet. 378, 399: "That in construing the usury laws the uniform construction in England has been (and it is equally applicable here), that, to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest. . . . When the contract on its face is for illegal interest only, then it must be proved that there was some corrupt agreement or device or shift to cover usury, and that it was in the full contemplation of the parties. . . . There must be an intent to take illegal interest." To the same effect are the cases of *Lloyd* v. *Scott*, 4 Pet. 205; *Condit* v. *Baldwin*, 21 N. Y. 219; and *Jones* v. *Berryhill*, 25 Iowa, 289.

It is clear, therefore, that Mrs. Davidson cannot be charged with taking or reserving usurious interest, unless she was bound

by the acts of her agent, Burnham. But she was not so bound. It is settled that, when an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious. *Dagnall* v. *Wigley*, 11 East, 43; *Solarte* v. *Melville*, 7 B. & C. 430; *Barretto* v. *Snowden*, 5 Wend. 181; *Condit* v. *Baldwin*, 21 N. Y. 219; *Bell* v. *Day*, 32 N. Y. 165; *Conover* v. *Van Mater*, 18 N. J. Eq. (3 C. E. Green), 481, 486; *Rogers* v. *Buckingham*, 33 Conn. 81; *Gokey* v. *Knapp*, 44 Iowa, 32; *Wyllis* v. *Ault*, 46 Iowa, 46; *Brigham* v. *Myers*, 51 Iowa, 397.

In *Gokey* v. *Knapp*, *ubi supra*, the Supreme Court of Iowa said: "Although Danforth may have been the agent of Knapp for the purpose of loaning the money, and may have contracted for more than ten per cent. interest, yet the loan was not necessarily usurious. An authority to loan money at a legal rate of interest does not include, by implication, the authority to loan it at an illegal rate. An authority to violate the law will never be presumed. When Danforth exacted, in addition to the ten per cent. interest which was embraced in the note, something for the benefit of himself, he went outside the legitimate purposes of his agency, and as Knapp did not authorize it expressly or by implication, he should not be affected thereby."

So in *Brigham* v. *Myers*, 51 Iowa, 397, it was held to be "well settled that when an agent for loaning money takes a bonus or commission to himself beyond the legal rate of interest, without the knowledge, authority, or consent of his principal, it does not affect with usury the loan of the principal."

These decisions seem to be founded on plain principles of justice and right. For when two persons, the agent and the borrower, conspire together and for their own purposes violate the law, how can punishment for their acts be justly imposed on the innocent third party, the lender?

The fact on which stress is laid by counsel for defendant, that Burnham, in his treaty with Call, did not disclose his agency, but professed to be acting for himself, appears to be an immaterial circumstance. The misrepresentation of Burnham did not injuriously affect any right of Call, unless it can

be said that he was entitled to know who the real lender was, so as to place himself in a position to plead usury against her. It can hardly be contended that the penalties imposed for a violation of the usury laws are intended as a reward to the borrower.

According to the principles of jurisprudence as generally administered, and especially as applied by the Supreme Court of Iowa under the statute law of that State, if suit had been brought by Mrs. Davidson herself to enforce the payment of the note given by Call to Burnham for her, the defence of usury would have failed. It cannot, therefore, hold as against Palmer.

But the defence of usury set up in this suit must fail for another reason. For it is settled that, where the promissor in a usurious contract makes it the consideration of a new contract with a third person not a party to the original contract, or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious. *Cuthbert* v. *Haley*, 8 T. R. 390; *Bearce* v. *Barstow*, 9 Mass. 43, 48; *Powell* v. *Waters*, 8 Cowen, 669; *Kent* v. *Walton*, 7 Wend. 256; *Houghton* v. *Payne*, 26 Conn. 396.

This rule is recognized by the Supreme Court of Iowa. Thus, in *Wendlebone* v. *Parks*, 18 Iowa, 546, it was held in substance that when the maker of a usurious note, which was secured by a deed of trust, borrowed money of a third party to pay the same, and instead of executing new securities for the money so borrowed, caused the note to be transferred by the payee to the lender as evidence and security for the new debt, the note was not tainted with usury in the hands of the second holder.

The authorities cited are conclusive against Call on both the grounds noticed. As the propositions upon which Palmer relies to defeat the plea of usury have both been sustained by the Supreme Court of Iowa while the present law against usury was in force, it is unnecessary to construe or discuss the statute. The result of the decisions of the Supreme Court of the State is, that there is nothing in the statutes of Iowa which upon the facts of this case, is a bar to the relief demanded by Palmer in his bill.

Decree affirmed.

UNITED STATES *v.* MOONEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued November 25, 1885.—Decided December 14, 1885.

The exclusive jurisdiction conferred upon District Courts of the United States, before the enactment of the Judiciary Act of March 3, 1875, over suits for the recovery of penalties and forfeitures under the customs laws of the United States, is not taken away by the first section of that act.

This was an action at law, brought in the Circuit Court to recover of the defendant $20,000, the value of certain merchandise imported by him, which it was alleged he had forfeited to the United States, because he had knowingly, and with intent to defraud the revenue, made an entry of the same by means of false and fraudulent invoices.

The defendant moved the court to dismiss the suit for want of jurisdiction to entertain it. The court sustained the motion, and the plaintiffs brought this writ of error.

Mr. Solicitor-General for plaintiff in error.

Mr. Charles Levi Woodbury for defendant in error.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The ninth section of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 76, provided as follows: "The District Courts shall have exclusive original cognizance" "of all suits for penalties and forfeitures incurred under the laws of the United States." Since the passage of that act several statutes have been enacted giving the Circuit Courts jurisdiction of suits for penalties and forfeitures, Rev. Stat. § 629, subdivisions 4, 5, 7, 15, but it is conceded by the counsel for the plaintiffs that the exclusive jurisdiction of all suits for penalties and forfeitures under the customs laws of the United States continued in

the District Courts until the passage of the act of March 3, 1875, entitled "An Act to determine the jurisdiction of the Circuit Courts of the United States," ch. 137, 18 Stat. 470, and still continues, unless the act mentioned gives concurrent jurisdiction of such suits to the Circuit Courts. The plaintiffs insist that such is the effect of the first section of the act of March 3, 1875. That section provides: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States," "or in which the United States are plaintiffs or petitioners," &c. The contention is that this section invests the Circuit Courts with jurisdiction, concurrent with the District Courts, of all suits for penalties and forfeitures under the customs laws of the United States. The argument to support the contention is that the section includes within its terms all suits to recover penalties and forfeitures, because such suits are of a civil nature at common law and the United States are plaintiffs; and when the amount in controversy is over $500 all the conditions necessary to give jurisdiction are fulfilled.

Admitting the plausibility of the argument, we are not able to adopt the conclusion to which it leads. For more than three-quarters of a century, under the ninth section of the act of 1789, the exclusive jurisdiction of the District Courts, in suits for penalties and forfeitures under the customs laws was unquestioned. In *The Cassius*, 2 Dall. 365, decided in 1796 by the United States Circuit Court for the District of Pennsylvania, and in *Evans* v. *Bollen*, 4 Dall. 342, decided by this court in 1800, it was held that under the Judiciary Act of 1789 the Circuit Courts had no jurisdiction of suits for penalties and forfeitures under the laws of the United States. These decisions have never been overruled, and the law has remained unchanged, except where jurisdiction of suits for penalties and forfeitures has been given to the Circuit Courts in special cases by statute. This construction of the ninth section of the act of 1789 prevailed, notwithstanding the provisions of section

eleven of that act, which were as follows: "The Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners." 1 Stat. 78. This is substantially the same, in respect of the question before us, as the first section of the act of 1875, which is relied on to take away the exclusive jurisdiction of the District Courts. But it was never supposed that under the act of 1789 the provisions of § 11 interfered with the exclusive jurisdiction conferred on the District Courts by § 9 of the same act. It was never held that the words "all suits of a civil nature, at common law or in equity," used in § 11, included suits for penalties and forfeitures of which the District Courts had been given exclusive jurisdiction by § 9. How, then, can the substantial re-enactment of § 11 by the act of March 3, 1875, with modifications immaterial, as far as the question in hand is concerned, have an effect which the original section did not? As said by the Circuit Court in its well-considered opinion in this case, 11 Fed. Rep. 476, "the restricted meaning attached for eighty-six years to the language of the eleventh section of the act of 1789 is presumed to attach to the same language in the act of 1875." It is not to be supposed that Congress, in using in the act of 1875 the same language, so far as the present question is concerned, as that employed in the act of 1789, intended to give it a meaning different from that put upon it by this court, and which had remained unchallenged for three-quarters of a century.

To sustain the contention of the plaintiffs, we must hold that the purpose of §1 of the act of March 3, 1875, was to repeal by implication and supersede all the laws conferring jurisdiction on the Circuit Courts, and of itself to cover and regulate the whole subject. But this construction would lead to consequences which it is clear Congress did not contemplate. All the laws in force December 1, 1873, prescribing the jurisdiction of the Circuit Courts were reproduced in Rev. Stat. § 629, and the jurisdiction was stated under twenty distinct heads, eighteen

of which had reference to the jurisdiction in civil cases. In sixteen of these eighteen heads the jurisdiction is conferred without reference to the amount in controversy. This is the case, among others, in all suits at common law where the United States are plaintiffs; in all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage in merchant vessels; in all suits by the assignee of any debenture for drawback duties against the person to whom such debenture was originally granted to recover the amount thereof; in all suits at common law or in equity arising under the patent or copyright laws of the United States; in all suits brought by any person to recover damages for an injury to his person or property, on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof; and in all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several States. The act of 1875 confers jurisdiction on the Circuit Courts only in cases where the matter in dispute exceeds $500. If that act is intended to supersede previous acts conferring jurisdiction on the Circuit Courts, then those courts are left without jurisdiction in any of the cases above specified where the amount in controversy does not exceed the sum of $500, and in several classes of cases, for instance, suits arising under the patent or copyright laws, neither the Circuit nor District Court of the United States would have jurisdiction when the amount in controversy is less than $500. But by Rev. Stat. § 711, par. 5, the jurisdiction of the State courts in cases arising under the patent and copyright laws is excluded. Therefore, when the matter in dispute in a case arising under these laws is less than $500, if we yield to the contention of plaintiffs, it would follow that no court whatever has jurisdiction. A construction which involves such results was clearly not contemplated by Congress.

The act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the Circuit or District Courts in special cases, and over particular subjects. *Third Nat. Bank of St. Louis* v. *Harrison*, 3 McCrary, 162.

Its purpose was to give to the Circuit Courts a jurisdiction

which the Federal courts did not then possess, by enlarging their jurisdiction in suits of a civil nature at common law or in equity, and not to take away from the Circuit or District Courts jurisdiction conferred by prior statutes, or to divide the jurisdiction which had for so long a time been vested exclusively in the District Courts. *Price* v. *Abbott*, 17 Fed. Rep. 506.

Thus construed, there is no conflict between § 1 of the act of March 3, 1875, and § 9 of the act of 1789, which conferred exclusive jurisdiction on the District Courts of suits for penalties and forfeitures incurred under the laws of the United States. The latter section, therefore, except as modified by statutes conferring jurisdiction upon the Circuit Courts in special cases, still remains in force, and the Circuit Court was right in dismissing the case for want of jurisdiction.

Judgment affirmed.

COYLE *v.* DAVIS & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 4, 1885.—Argued December 9, 1885.—Decided December 21, 1885.

The grantor in an absolute deed of an undivided interest in land, in fee-simple, sought, by a suit in equity, against the grantee, to have it declared a mortgage. There was no defeasance, either in the deed or in a collateral paper, and the parol evidence that there was a debt, and that the intention was to secure it by a mortgage, was not clear, unequivocal, and convincing, and it was held, that the presumption that the instrument was what it purported to be must prevail.

The weight of the testimony was, that the transaction was a sale, and that the property was sold for about its sale value, in view of the facts, that there was a poorly built and poorly arranged building on the premises, which was incapable of actual partition, and that the law did not permit a partition by a sale *in invitum*, and that the grantor's interest was a minority interest.

In equity. In the absence of plaintiff's counsel when this

case was called it was submitted by counsel for defendants. On motion, and for reasons shown the submission was set aside and argument ordered. The facts are stated in the opinion of the court.

Mr. Benjamin F. Butler and *Mr. O. D. Barrett* for appellant.

Mr. W. D. Davidge and *Mr. Henry E. Davis* for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the District of Columbia, made in general term, July 6, 1880, dismissing the bill of complaint, in a suit in equity brought by John F. Coyle against Henry S. Davis, William E. Spalding, and William W. Rapley. The bill was filed May 24, 1869, to redeem a parcel of land in the city of Washington alleged to be covered by a mortgage held by the defendant Davis. The substantial averments of the bill are, that Coyle, Spalding, and Rapley, in April, 1863, purchased the land, as tenants in common, and it was, by their mutual consent, deeded to Rapley; that Coyle's share was encumbered by a deed of trust executed as security for a loan made to Coyle by one Riggs; that, in order to pay Riggs, Coyle, in June, 1866, applied to Davis for a loan of $6000; that Davis had, for a long time, made many professions of warm friendship for Coyle, and of willingness and desire to serve him, and had acquired Coyle's full confidence, and, upon such application, offered to make to Coyle such a loan as would both pay Riggs and settle up all Coyle's accounts with Spalding and Rapley, in respect of the land, and, as security for the loan, asked a mortgage on Coyle's undivided one-third of the land, which would thus be free from all encumbrance and indebtedness, and suggested that a statement of Coyle's accounts with Spalding and Rapley be furnished to him, Davis; that, on or about June 12, 1866, Davis was furnished with a written instrument signed by Spalding and Rapley, fully setting forth Coyle's account in respect of the land; that, thereupon, Davis,

well knowing that one-third interest in the land was worth about $30,000, and would increase in value, urged Coyle to take a loan from him of about $17,000, in order to settle his account with Spalding and Rapley, as well as pay his debt to Riggs, and to give him, Davis, a mortgage on Coyle's interest, as security; that, as inducement to this course, Davis represented that the arrangement proposed by him would be freer from complication than any other, and would give him an independent security for the loan, and that his business, as well as his desire to serve Coyle, would afford him opportunity to effect, for the benefit of Coyle, a highly advantageous sale of said interest in the premises, from the proceeds of which he could retain the balance due on his loan, and pay over the residue to Coyle, and that this arrangement would tend to the benefit of both parties; that Coyle acceded to the proposition, and Davis loaned to Coyle $17,659.46, by advancing $6000 to pay the debt to Riggs, and assuming the payment, to be made as it should fall due, of the unpaid balance on Coyle's one-third interest, viz., $11,659.46; that, as security for the loan, Davis took a mortgage on Coyle's undivided one-third of the land, in the manner following, to wit: Rapley and Coyle, on or about July 6, 1866, conveyed to Davis Coyle's undivided one-third interest in the land, by a deed absolute in form, but the force and operation of which were defeated by the understanding, agreement, and contract between Coyle and Davis, that the deed was executed as security for the loan, and that between the parties the conveyance should have the operation, force, and effect of a mortgage, and none other, and that Davis should enter upon, and take possession of, the mortgaged property, as security for the loan, and subject to an account for its rents and profits, and whenever Coyle should offer to redeem the property an account should be had in respect of the rents and profits received by Davis, on the one hand, and of Coyle's debt, principal, and interest, on the other hand, and, on proffer of payment of the sum thus found due, if any, from Coyle to Davis, Davis, by conveyance of the property to Coyle, should surrender possession of it to Coyle, and while Davis should continue in possession as mortgagee, if he should have an oppor-

tunity to effect an advantageous sale of the property, he should do so for the benefit of Coyle, and should convey title to it and receive the purchase-money, and deduct the balance, if any, due on the loan, over and above the rents and profits meanwhile received by him, and pay over the residue to Coyle; and that Davis went into possession of the property and had received its rents and profits for three years, and had frequently admitted that the transactions between him and Coyle were as above set forth.

The answer of Davis alleges that Rapley, on taking a conveyance of the land, encumbered it, by a deed of trust, with a debt of $20,000, to secure unpaid purchase-money, which was not paid when the deed from Coyle to Davis was made; and that at that time there was a further encumbrance on Coyle's interest of $4100 as a debt to Riggs, secured by a deed of trust of that interest. It denies the allegations of the bill as to the application for a loan, or the offer of a loan, or the asking for a mortgage, or the suggesting or furnishing of a statement of account, and all the other allegations of the bill as to the making of a loan or of a mortgage, or of a deed as security for a loan or as a mortgage. It alleges the facts to be that, about six or eight weeks before the making of the deed to Davis, he was applied to by one Winder, acting as agent for Coyle, to make a loan to Coyle, to be secured by a deed in fee of Coyle's interest in the property, which application was rejected, and it was renewed in person by Coyle, with the same result; that when Coyle renewed it, he exhibited to Davis a paper purporting to show the cost of the property and the money value of the one-third interest of Coyle, after deducting the balance due by him on account of such interest, and $6666.66 as one-third of the unpaid purchase-money; that, afterwards, Coyle proposed to Davis to sell his interest to him for $20,000, but he rejected that proposition, and finally, in July, 1866, offered Coyle $18,000 in cash for such interest, which offer Coyle accepted; that Davis insisted that before the purchase-money should be paid the account of Coyle in respect of the property should be settled; that thereupon the indebtedness of Coyle to Spalding and Rapley in respect of the property was ascertained by a settlement

dated July 7, 1866, a copy of which is annexed to the answer, to be $6258.71; that Davis paid the $6258.71 to Spalding and Rapley, and paid to Riggs what was due to him, and paid the balance in cash to Coyle, less the $6666.66, which was reserved, with the approbation of Coyle, to pay his share of the unpaid purchase-money, and was afterwards paid by Davis; that, on July 7, 1866, Davis received from Coyle a deed executed by Coyle and Rapley and their wives, conveying to him in fee-simple the one-third interest of Coyle; that he took possession of it, and has received its rents and profits, as absolute owner, recognized as such by Coyle and his co-tenants; that Coyle's interest at the time Davis purchased it was not worth $30,000, and Coyle never asked from Davis more than $20,000 for it; and that Davis never admitted that he was mortgagee in possession in respect of Coyle's interest.

The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases, where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle being to him, his heirs and assigns, forever, with a covenant of warranty, and without a defeasance, either in the conveyance or in a collateral paper, the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well-settled rule of equity jurisprudence was applied by this court in *Howland* v. *Blake*, 79 U. S. 624, 626. The case stated in the bill herein is not supported by the weight of evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on inadequacy of consideration, where there is a considerable disproportion between the price paid and the real value of the property. *Russell* v. *Southard*, 12 How. 139, 148. There is testimony on both sides, on the question of disproportion, in this

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case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum;* and Coyle's interest was a minority interest. These considerations made it difficult of sale at all.

Decree affirmed.

LIVERPOOL & LONDON INSURANCE COMPANY *v.* GUNTHER.

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

Argued November 12, 1885.—Decided December 21, 1885.

A violation of any of the prohibitions in a policy of insurance against fire by a tenant, who occupies the insured premises with the permission of the assured, is a violation by the assured himself.

If a policy of insurance forbids the keeping of gasoline or benzine on the insured premises, but authorizes the use of gasoline gas there, the latter authority gives no warrant for keeping gasoline or benzine there for any purpose other than the manufacture of gas.

As the practice in New York allows a variance between proof and pleadings to be cured by amending the latter when the opposite party is not misled, if, in the trial of an action in that State on a policy of insurance, evidence is offered without objection, establishing or tending to establish a defence under the policy which has not been properly pleaded, and, on defendant's request for instructions, founded on that evidence, no objection is made that the defence was not within the issues, it is competent for the defendant to rely upon the defence after the opportunity for amending the pleadings has passed.

This was an action at law brought by Charles Godfrey Gunther, a citizen of New York, in the Supreme Court of that State, against the plaintiff in error, a corporation created by the laws of Great Britain, and consequently an alien, and by the latter removed into the Circuit Court of the United States

for the Eastern District of New York. There was a verdict and judgment for the plaintiff below; brought here for review by this writ of error.

The object of the action was to recover the amount claimed to be due on two policies of fire insurance, issued by the defendant below, in favor of the plaintiff, one for $20,000 on the two-story hotel frame building, with one-story frame kitchen and two-story frame pavilion building adjoining and communicating, situate in Gravesend Bay, of Bath, Kings County, Long Island, $1000 on the two-story frame stable occupied in part as a dwelling, and $200 on frame bathing-houses; and the other for $8500 on the contents of the buildings insured. The loss by fire was alleged to have occurred on August 15, 1879, while both policies were in force.

The execution of the policies and the fact of the destruction by fire of the insured premises were admitted by the answer, which, however, denied generally all the allegations of the complaint, not expressly admitted, or otherwise controverted in the answer, and, in addition, set out the following special defence:

"Tenth. For a separate and distinct defence to the causes of action alleged in the complaint, in addition to the matters and things hereinbefore set forth, the defendant avers that it was provided in and by the terms and conditions of said policies of insurance, among other things, as follows: 'If the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid, or chemical oils, without written permission in this policy, then and in every such case this policy shall be void;' and further, 'That petroleum, rock-earth, coal, kerosene, or carbon oils of any description whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other

carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void.'

"And the defendant avers that the said conditions of insurance were broken and violated on the part of the plaintiff, among other things, in that without written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept, and allowed on the insured premises mentioned and described in said policies, benzine or benzole, or other inflammable burning fluids or liquids, prohibited by said policies, and defendant avers that the fire mentioned and referred to in the complaint originated and was caused by such storing, using, keeping, and allowance of such prohibited articles on said insured premises, and defendant avers that it is advised and believes that, by reason of the premises, the said policies became and were null and void."

Each of the two policies, after the description of the premises insured, contained the following clause: "Privilege to use gasoline gas, gasometer, blower and generator being underground about 60 feet from main building, in vault; no heat employed in process."

Among the conditions in the body of the policies was also the following:

"Petroleum, rock-earth, coal, kerosene, or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight. Otherwise this policy shall be null and void."

To the first policy there was attached the following: "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only." And, also, the following: "Privileged to keep not exceeding five barrels of kerosene oil on said premises."

To the second policy the first only of the foregoing privileges was attached.

On the trial, the plaintiff, having produced the policies sued on, with the renewal receipts, showing that they were in force at the time of the loss, was called as a witness, and testified, among other things, as follows:

"I was the owner of the insured property at the time of the insurance, and have continued such until the present time. A fire occurred on the 15th of August, 1879, about dusk, by which the building and its contents were totally destroyed. I was seated on the piazza of the building proper in sight of the pavilion. I saw some parties with pails and a light. There were some children playing. Mr. Lanier Walker was playing with some boys around some small trees that I had planted in the lot, and my attention was attracted by hallooing, and I saw the men come out as though they were on fire. It did not occur to me then that there was any fire in the oil-room, although I saw it. I saw these men, and ran out and said, 'Roll in the grass.' One man struck for the water and the other one had the fire thrashed out by the crowd. In another instant I saw the oil-room burning. The wind was from the southwest, blowing very hard right over the kitchen. The pavilion immediately caught, and in one hour's time or less the building was level with the ground."

The proofs of loss were read in evidence and the amount of the loss proven. The plaintiff also testified that during the summer of 1879 he had a room at the hotel, where he staid on an average of four nights out of the week. The rest of the time he was in New York. Mrs. Fanny Walker kept the hotel as tenant, her husband, Mr. John Walker, being manager for her.

The plaintiff having rested his case, the defendant introduced evidence, not objected to, tending to prove the following facts:

A gas-making apparatus for the use of gasoline, including a gasometer, generator, and blower, about sixty feet from the house, and all under ground but the roof, had been in use for lighting the main building for about eleven years up to and including the summer of 1878, but its use was discontinued in

the fall of 1878, and it was not in use at all during the year 1879.

There was an oil-room in the basement of the hotel under the pavilion, about ten by twelve feet, with low ceiling. In this room the lighting material was kept.

The fire originated in the oil-room "about dusk, August 15, 1879." Three persons were in the room at the time—Jacob Constine, James Marrion, and one Schuchardt. The last named was in Walker's employ as night watchman, and had charge of the oil-room. The others were employed at premises about a mile distant from the Locust Grove Hotel, called the Bath Park Hotel, where gasoline was used for lighting the last-named hotel and an adjoining pavilion.

Constine and Marrion were sent by the book-keeper of the Bath Park House to the Locust Grove Hotel to borrow five gallons of gasoline, and each of them carried a wooden pail in which to fetch it. On reaching Locust Grove they saw Walker, who directed Schuchardt to give them the gasoline. Schuchardt took them into the oil-room. He carried a glass lantern with a wire frame around it—"a regular closed stable lamp with wire and then little holes on top." The lamp was lighted.

Schuchardt placed the lantern on the floor and drew fluid from a barrel which was raised on stanchions, a little above the floor. He drew from the end of the barrel, into which a piece of gas-pipe had been placed as a faucet. On pouring into the pails it was found that one of them leaked, and Schuchardt got a five-gallon can into which to pour the oil, and while filling the can there was "a sort of bluish flame and explosion, and the place was full of fire."

The fire spread with great rapidity. Schuchardt was burned to death. Constine was badly burned, and was laid up thirteen weeks. Marrion was burned a little, not much.

The hotel and all the buildings were destroyed by the fire. "In one hour's time or less the building was level with the ground."

There was no conflict of evidence as to the origin of the fire.

Walker purchased in New York and had shipped to the

hotel, on August 13, a barrel of kerosene, and a half barrel of benzine containing about 21 gallons, which were received and put into the oil-room under the pavilion on the morning of August 14, the day before the fire. There was evidence tending to show that gasoline, benzine, or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a pic-nic.

The plaintiff introduced evidence in rebuttal tending to prove that no gasoline or benzine had been brought to the premises or was kept there. The testimony having been closed on both sides, the defendant's counsel then requested the court to direct the jury to find a verdict for the defendant on the ground that it appeared from the undisputed evidence that there was a violation of the condition of the policy providing that in the use of refined kerosene oil the same must be drawn by daylight, the evidence being undisputed that three persons went into the oil-room with a lighted lamp, and that whatever was drawn there was drawn not by daylight, but by the use of a lighted lamp, the presence of which was the direct cause of the fire. The court refused so to direct the jury, to which refusal the defendant's counsel then and there excepted.

The defendant's counsel requested the court to instruct and charge the jury as matters of law, as follows:

1. That the several conditions contained in the policy respecting the keeping, using, or allowance on the insured premises of the products of petroleum, specified therein, were lawful provisions, and formed a part of the conditions of the insurance, which, if violated, rendered the policy void.

2. That if the jury believed from the evidence that gasoline, naphtha, or benzine were kept, used, or allowed on the insured premises at the time of the fire, whether permanently or temporarily, the plaintiff could not recover, and the defendant was entitled to a verdict.

3. That if the jury believed from the evidence that gasoline, naphtha, or benzine was used in the summer of 1879, previous to the fire, on the insured premises for lighting the pavilion by means of the torches described in the evidence, then the plain-

tiff could not recover, and the defendant was entitled to a verdict.

4. That if the jury believed from the evidence that any fluid product of petroleum used for lighting purposes was actually drawn, after sundown, in the oil-room by the light of a lamp, the flame of which ignited the fumes or vapors of such fluid and caused the fire, then there was a violation of the conditions of insurance, and the plaintiff could not recover, and the defendant was entitled to a verdict. Also, and as a part of the above request, that the permission indorsed on the policy to keep five barrels of kerosene oil did not vary or affect the conditions of the policy in drawing refined oil by daylight; and if the fire was caused by drawing refined kerosene oil after sundown, and in the presence of a lighted lamp, the plaintiff could not recover, and the defendant was entitled to a verdict.

5. That if the jury believed from the evidence that the risk of fire was increased by the actual presence on the insured premises of gasoline, naphtha, or benzine, then the plaintiff could not recover, and the defendant was entitled to a verdict.

6. That, irrespective of the questions raised by the preceding fourth and fifth requests, if the jury believed from the evidence that the fire was caused by the ignition of the fumes of gasoline, naphtha, or benzine in the oil-room, while such gasoline, naphtha, or benzine was being drawn from a barrel or keg, or poured from one vessel to another in the oil-room, then the plaintiff could not recover, and the defendant was entitled to a verdict.

7. That if any of the conditions of the policy were violated by the presence or use of gasoline, naphtha, or benzine on the insured premises, it was immaterial whether or not the plaintiff knew of such violation. If the fact of the violation was established, the defendant was entitled to a verdict.

8. That the permission in the policy to use gasoline gas, the generator, gasometer, and blower to be under ground 60 feet from the main building, no heat to be used in the process, did not authorize the plaintiff, or any one occupying the premises under him, to use gasoline, naphtha, or benzine for lighting the pavilion by the torches described by defendant's witnesses, or

to keep gasoline, naphtha, or benzine in the oil-room for use in such torches.

9. That in weighing the evidence the jury must determine on which side the preponderance of proof lay, and decide accordingly. That the testimony of the plaintiff in his own favor must be scrutinized in view of his interest as plaintiff, and that the evidence of witnesses not discredited or impeached, who swore positively to certain facts as within their own knowledge and actual observation, was not to be overcome by mere negative testimony of other witnesses that such facts were not observed by them at the same time and place.

At the conclusion of the charge, a juror asked the court whether the jury were to consider the matter of drawing oil in the daylight.

The court thereupon charged and instructed the jury that there was no question in the case in reference to the drawing of the oil by daylight, no such question having been made by the pleading; to which ruling and charge the defendant's counsel then and there excepted.

The defendant's counsel then excepted specifically to that part of the charge which instructed the jury that any question arose in the case under the permission in the policy to use gasoline gas.

The defendant's counsel then further excepted specifically to the refusal of the court to charge that if benzine was allowed on the premises at all the plaintiff could not recover, so far as the court did refuse.

The defendant's counsel then further excepted to that portion of the charge which confined the questions in the case to the three questions specified in the charge as being the sole questions which the jury were to consider.

The defendant's counsel then further excepted specifically to that portion of the charge which instructed the jury that if the benzine was brought to the insured premises by Walker for an outside purpose it did not vitiate the policy.

The defendant's counsel then further excepted specifically to that portion of the charge which instructed the jury that the only effect of the question whether torches were used was in

reference to the question of the half barrel of benzine being brought to the insured premises or not.

The defendant's counsel then further specifically excepted to the refusal of the court to charge the several propositions contained in the foregoing second, third, fourth, fifth, sixth, seventh, eighth, and ninth requests on the part of the defendant in the language as requested, and separately to each separate refusal to charge each separate request, so far as the court did so refuse.

In the charge to the jury the Circuit Court stated, in substance, that under the pleadings and upon the evidence there were but three questions for their consideration. The first was, whether in fact the half barrel of benzine testified to had been brought to the premises and stored in the oil-room; if not, the whole defence was taken away and the verdict must be for the plaintiff.

Second. If otherwise, had it been brought over and stored there by the authority of Walker in his management of the premises for his wife under her lease? If it had been brought and stored there by him for an outside purpose, referring to some testimony in reference to its intended use in lighting the pic-nic grounds, then the verdict should be for the plaintiff.

Third. This question was stated by the court, as follows:

"If it was brought there, and brought there by Walker in the course of his management, then would bringing that benzine there and putting it in the oil-room come within what would be expected when the company gave the assured the privilege of using the gasoline gas, the gasometer, generator, and blower to be under ground 60 feet from the main building? It would not come within that, unless you can say that by the common and ordinary mode of the use of such apparatus, as it would be understood by this contract to be used, it was proper to store somewhere else benzine or gasoline for use in the apparatus. If you can see that it would come within that, then that would be written permission to have so much stored there, although it was not to be used for that purpose. And if you find that the benzine was there, and then that Walker got it there, still, if you find that it came within that clause of the

policy, then you may return a verdict for the plaintiff; otherwise, you must return a verdict for the defendant.

"If the defendant has made out these three things, then you must return a verdict for the defendant, and you must find this upon the proof, and not upon any conjecture.

"And I feel bound to say to you that as to the use of a gasometer, generator, and blower, it is a matter with which perhaps you might not be familiar (I am not sufficiently so to know what the ordinary use would be). The only evidence directly is what one of these manufacturers and dealers in such things and familiar with them (I don't remember his name) said; he said the gasometer was used to store the gasoline or benzine, or whichever was used in it. That is all the direct evidence I call to mind on that subject. Still, I submit it to you to say, on the whole, what you think the fact is in this view."

Mr. William Allen Butler for plaintiff in error.

Mr. George H. Forster for defendant in error.—I. There was no error in the charge of the court on the point of the keeping, use, or allowance of benzine on the insured premises. The court said in effect that if it was brought and kept there by the procurement of Walker, acting under his wife's authority in managing the premises as they were to be managed under the arrangement made with Gunther for their use, then it was the act of Gunther; but if brought by a stranger, for a strange and outside purpose, not done in the course of Walker's management as his wife's manager, but for some purpose over which Gunther had no control, then it was not the act of Gunther. This is the law of New York. *Gates* v. *Madison Ins. Co.*, 5 N. Y. (1 Seld.) 469; see also *Stebbins* v. *Globe Ins. Co.*, 2 Hall, 632; *Stetson* v. *Massachusetts Mutual*, 4 Mass. 330; *Waters* v. *Merchants' Ins. Co.*, 11 Pet. 213; *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. 507; *Delano* v. *Bedford Ins. Co.*, 10 Mass. 347, 355; *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222; *Williams* v. *Suffolk Ins. Co.* 3 Sumner, 270, 276; *Copeland* v. *Marine Ins. Co.*, 2 Met. (Mass.) 432; *Shore* v. *Bentall*, 7 B. & C. 798, *n.* (b);

Busk v. *Royal Exchange Ins. Co.*, 2 B. & Ald. 73; *Shaw* v. *Robberds*, 6 Ad. & El. 75; *Insurance Co. of North America* v. *McDowell*, 50 Ill. 120; *Aurora Ins. Co.* v. *Eddey*, 55 Ill. 213; *Mickay* v. *Burlington Ins. Co.*, 35 Iowa, 174. *Sanford* v. *Mechanics' Mutual Ins. Co.*, 12 Cush. 541, was a case where a tenant, contrary to his lease not to make or suffer any alteration or make or suffer waste, erected furnaces for manufacturing purposes, increasing the risk without knowledge of the assured. It was held that the policy was not void, although it prohibited the insured from altering the building, or increasing the risk. See also *Hynds* v. *Trust Ins. Co.*, 11 N. Y. 554; *Steinbach* v. *Lafayette Ins. Co.*, 54 N. Y. 90; *Shipman* v. *Oswego Ins. Co.*, 79 N. Y. 627.

II. The court did not err in refusing defendants' request to direct a verdict for defendant, but properly refused so to direct the jury. No violation of the policy by the drawing of petroleum after daylight was pleaded in the answer. Defendant made no application to amend; and, as the defence was not pleaded nor made available by amendment, or a motion to amend, the question was not in the case, whether such a defence existed or not. *Hunt* v. *Hudson River Ins. Co.*, 2 Duer, 481; *Dimon* v. *Dunn*, 15 N. Y. 498; *Coda* v. *Rathbone*, 19 N. Y. 37; *Wright* v. *Delafield*, 25 N. Y. 266.

III. The court, having properly charged the jury, was not bound in addition to use the specific language which defendant's counsel had inserted in his requests. There is no valid exception in the case, because the court did not comply with such requests and follow their exact language in his instructions to the jury. The whole charge must be looked at to ascertain if there was any error. It is not just to the court or to the plaintiff to single out a statement from the charge and except to that. Looking at the whole charge the jury were correctly instructed, and there was nothing said to which they can properly except. *Franklin Fire Ins. Co.* v. *Vaughan*, 92 U. S. 516, 519, 520; *Beaver* v. *Taylor*, 93 U. S. 46. When instructions are asked in the aggregate, and there is anything exceptionable in either of them, the court may properly reject the whole. It is the settled law in this court that if the charge

given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to give further instruction. *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, and cases there cited. See also *Transportation Line* v. *Hope*, 95 U. S. 297, 301; and *Worthington* v. *Mason*, 101 U. S. 149.

IV. Defendant took a risk which involved the risk of the use of gasoline and of kerosene. The questions at issue were of fact, and were carefully tried before a jury. There was no error in the construction of the clauses in the policy by the court, as affected by the written language or permission. The importance and effect of such written words appear from the following cases: *Steinbach* v. *Lafayette Ins. Co.*, 54 N. Y. 90; *New York* v. *Hamilton Ins. Co.*, 10 Bosworth, 538; *Harper* v. *Albany Mutual Ins. Co.*, 17 N. Y. 194, 197; *New York* v. *Exchange Ins. Co.*, 9 Bosworth, 424. See also *Townsend* v. *Northwestern Ins. Co.*, 18 N. Y. 168; *Moore* v. *Protection Ins. Co.*, 29 Maine, 97; *O'Niel* v. *Buffalo Ins. Co.*, 3 Comst. 122. As to what is storage, see *New York Equitable* v. *Langdon*, 6 Wend. 623; *Vogel* v. *People's Mutual Ins. Co.*, 9 Gray, 23; *City Ins. Co.* v. *Corlies*, 21 Wend. 367; *Hall* v. *Ins. Co. of North America*, 58 N. Y. 292; *Buchanan* v. *Exchange Ins. Co.*, 61 N. Y. 26; *Cornish* v. *Farm Buildings Ins. Co.*, 74 N. Y. 295; *Franklin Ins. Co.* v. *Vaughan*, 92 U. S. 516; *National Bank* v. *Insurance Co.*, 95 U. S. 673; *Williams* v. *People's Ins. Co.*, 57 N. Y. 274. The written part of the policy shows that the company insured a frame hotel, with a privilege to use gasoline. There was no fraud or misrepresentation in obtaining this privilege. This permission involved the right to buy it and bring it there, and place it in a proper place for use. It was entirely proper for the court to charge the jury as it did, as to what weight they were to give to that clause, and what right there was given under that privilege as to the storage of gasoline. The policy is to be construed with reference to the privilege the defendant so gave in writing, and whatever that privilege gave, its exercise, or the exercise of any part of the privilege, would not be a violation of the printed condition of the policy. The court properly construed the

policy, and the written permission, under the authorities. And that construction is to be based on what the privilege authorized, and not on its exercise or non-exercise, to a greater or less extent, during part of the time after the policy was issued. *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 542; *Putnam* v. *Commonwealth Ins. Co.*, 18 Blatchford, 368. The most important question in the case relates to the proper construction of the defendant's policy of insurance. It is as true of policies of insurance as it is of other contracts, that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies. Lord Mansfield said long ago, that courts are always reluctant to go out of a policy for evidence respecting its meaning. *Lorraine* v. *Tomlinson*, Doug. 585. And so, Judge Strong says, are the authorities generally: citing *Astor* v. *Union Ins. Co.*, 7 Cow. 202; *Murray* v. *Hatch*, 6 Mass. 465; *Levy* v. *Merrill*, 4 Greenl. 180; *Baltimore Fire Ins. Co.* v. *Loney*, 20 Maryland, 20, 36.

V. There was no error as to the evidence received. The admission of even irrelevant evidence, which is not shown to have tended in the least to mislead the jury, is not an error. A verdict is not to be set aside because evidence was admitted at the trial which could have no bearing upon the verdict, unless it was misleading in its tendency. *Home Ins. Co.* v. *Baltimore Warehouse Co.*, cited above.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The first question to be examined is whether the Circuit Court erred in withdrawing from the jury the right to consider the facts proven as to the drawing of the oil in the oil-room after dark in the vicinity of a lighted lamp, which was the admitted cause of the fire, as constituting a defence to the action under the pleadings.

The tenth paragraph in the answer, setting up a separate and distinct defence, recited two conditions in the policy; the first, that the assured should not keep any burning fluid without written permission in the policy; the second, that kerosene,

carbon oils of any description, whether crude or refined, or any other inflammable liquid, "are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." It then alleged a breach of these conditions, in substance, as follows: that without the written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept, and allowed on the insured premises, benzine or benzole, or other inflammable burning fluids or liquids, prohibited by said policies, and that the fire referred to in the complaint originated therefrom and was caused thereby.

It is true that the answer does not specifically set out as part of the defence that kerosene was kept on the premises to be used for lights, but that, in breach of the condition which permitted such use, it was drawn after dark and with a lighted lamp near; but the right to keep it and use it in the manner specified in the condition is an exception from the general prohibition, which forbids the mere keeping of it without written permission; so that, strictly speaking, an averment that the article was kept and used on the premises, in violation of the condition, includes the use of it, otherwise than for lights, and the drawing of it otherwise than by daylight. Under the allegations of the answer, although not so definite and certain as might have been required, upon motion made in due time, it seems to us it was competent for the defendant to prove and rely upon any keeping and use of burning fluid prohibited by the conditions set out.

Whatever obscurity there was in pleading the defence, considered apart from the facts subsequently disclosed in evidence, nevertheless, all the testimony necessary to its establishment was offered and admitted without objection. It was offered and admitted as tending to prove that there had been a breach of the conditions of the policy; and the whole matter of the defence was covered by the testimony, on examination and

cross-examination of the witnesses, both on the part of the defendant in chief and on that of the plaintiff in rebuttal. On the conclusion of the testimony on both sides the matter now insisted on was specially called to the attention of the court by a request on the part of the defendant's counsel to direct a verdict for the defendant on that ground alone, when, if it was a matter of surprise to the opposite party, opportunity for meeting it might still have been given; or, if the pleadings were considered not to be sufficiently explicit, an amendment might have been required and made. The request was refused, and it does not appear from the record to have been on the ground that the defence was not within the issues; but the refusal was absolute and unqualified. We refer to it not for the purpose of intimating that the court was bound to grant the request, but because we think the matter ought to have then been either submitted to the jury or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence. By the course actually taken the defendant was deprived of the benefit of a defence, legitimately arising upon the evidence actually in the case, admitted without objection; and this, we think, was contrary to the practice established under the laws of New York, as appears from the cases cited of *N. Y. Cent. Ins. Co.* v. *Nat. Protection Ins. Co.*, 14 N. Y. 85; *Williams* v. *Mech. & Traders' Fire Ins. Co.*, 54 N. Y. 577; and *Williams* v. *People's Fire Ins. Co.*, 57 N. Y. 274.

The New York Code of Civil Procedure, which furnishes the rule of practice in such cases, is explicit on the point. In § 539 it is provided that "a variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. If a party insists that he has been misled, the fact and the particulars in which he has been misled must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended upon such terms as it deems just." And § 540 declares that, "when the variance is not material, as prescribed in the last section, the court may direct the fact to be found

according to the evidence, or may order an immediate amendment without costs."

There are other errors, however, in the charge to the jury, equally fatal to the judgment, which, as the case must be remanded for a new trial, it becomes important to point out.

The Circuit Court charged the jury, in substance, that it was not a breach of the conditions of the policy if they should find a half barrel of benzine was stored by direction of Walker in the oil-room, unless they should also find that he acted by the express or implied authority of the assured; that is, unless in doing so he was acting in the management of the property as the agent of his wife, and within the limits of the authority conferred upon him for the purpose of managing the property according to the terms and purposes of her tenancy; and accordingly the jury was told that if he had brought the prohibited article on the premises, not for the legitimate use of the hotel, but for an outside purpose, it constituted no defence. The outside purpose referred to was suggested by some testimony, that the benzine was brought for the purpose of being used in lighting an adjacent grove for a pic-nic. Whether this use was for the entertainment of the guests of the hotel, or to attract custom, does not appear from the evidence; but, in any view, we think the construction of the policy, on which the charge to the jury was based, was erroneous.

One of the conditions of the policy is, that if the assured shall keep or use any of the prohibited articles without written permission, it shall be void; another is, that the articles named "are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on the policy," &c.

A violation of these prohibitions by any one permitted by the assured to occupy the premises, is a violation by the assured himself. The company stipulates that it will not assume the risk arising from the presence of the articles prohibited, and if they are brought upon the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the company has refused to accept. In our opinion the defendant

in error was chargeable with the acts of Walker, if he brought upon the insured premises and stored in the oil-room any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a pic-nic. Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises, and, with the implied assent of the insured at least, was entrusted with the control and management of them. And under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequences of Walker's acts in doing that for which, if done, the company had stipulated that they would not be liable. The insured engaged that the prohibited thing should not be done, and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself.

This construction of such a condition is well supported by authority. *Kelly* v. *Worcester Mutual Fire Insurance Co.*, 97 Mass. 284, 287. In this case it was held that "a policy of insurance obtained upon a building by the owner, and containing a proviso that it shall be void if the buildings shall be occupied or used for unlawful purposes, is avoided by a tenant's use of the building for an unlawful purpose, even if without the owner's knowledge." In distinguishing the case from those cited by counsel adversely, the court said: "In some of the cases cited for the plaintiff the prohibited use was not so constant, or habitual, or of such a nature as to fall within the terms of the provision, and in the others the knowledge or assent of the assured was expressly required in order to avoid the policy."

In New York it has been the settled law since the case of *Duncan* v. *Sun Fire Insurance Co.*, 6 Wend. 488. In *Mead* v. *Northwestern Ins. Co.*, 7 N. Y. (3 Seld.), 530, 533, it was said, in such a case: "It is equally unimportant that the respondent was ignorant that such business was carried on. The question whether a warranty has been broken can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the fact constituting the breach." *Matson* v. *Farm Buildings Ins. Co.*, 73 N. Y. 310.

In *Fire Association* v. *Williamson*, 26 Penn. St. 196, 198, the Supreme Court of Pennsylvania said: "Neither it is material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without permission, and it was his business to see that his tenants did not violate the contract in this respect." *Diehl* v. *The Adams Co. Mutual Ins. Co.*, 58 Penn. St. 443; *Howell* v. *Baltimore Equitable Society*, 16 Maryland, 377.

The Circuit Court also erred in the charge to the jury, that, under the circumstances disclosed by the evidence, it was no breach of the conditions of the policy to have in the oil-room a quantity of gasoline, although not intended for use in the gas apparatus, the use of which had in fact been discontinued, if the oil-room was a place were such fluid might have been properly stored, when intended for use in the apparatus.

The only direct evidence in the case, as to the usual and suitable place for the keeping of gasoline when used in such an apparatus, was, that it should be deposited at once in the apparatus itself, one part of which is a generator where atmospheric air is carbonized by being forced through the gasoline. But waiving any question on that point, it is clear that the privilege indorsed on the policy, in the following terms: "To use gasoline gas, gasometer, blower, and generator being underground about sixty feet from main building in vault. No heat employed in process;" did not sanction the keeping, using or storing of gasoline, or its equivalent, burning fluid or oil, except for actual use in that gas apparatus. There is no express permission to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privilege granted.

But the evidence on the trial was uncontradicted, that, at the time of the fire and for nearly a year previously, the use of the gas apparatus had been discontinued. The plaintiff below him-

self testified that it was not used during the season of 1879, and that its use had been purposely discontinued. And the privilege indorsed on one of the policies "to use kerosene oil for lights, lamps to be filled and trimmed by daylight only," and "to keep not exceeding five barrels of kerosene oil on said premises," was dated September 17, 1878, at the time when, according to the testimony of the plaintiff, the use of the apparatus for lighting the premises by means of gas from gasoline ceased at the end of the season of 1878.

It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and, in doing so, would have been justified in obtaining, keeping, storing, and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. But if the privilege itself is not actually exercised, no such implication arises, and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to grant a new trial.

FISK *v.* JEFFERSON POLICE JURY.

LOUISIANA *ex rel.* FISK *v.* Same.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Submitted November 18, 1885.—Decided December 21, 1885.

Where a law attaches a fixed compensation to a public office during the whole term of service of a person legally filling the office and performing the duties thereof, a perfect implied obligation arises to pay for the services at the

fixed rate, to be enforced by the remedies which the laws then give; and a change in the State Constitution which takes away then existing powers of taxation so as to deprive the officer of the means of collecting his compensation is within the prohibitory clause in the Constitution forbidding the passage of State laws impairing the obligation of contracts.

The prohibition of the Constitution against State laws impairing the obligation of contracts applies to implied as well as to express contracts.

The facts which make the case are stated in the opinion of the court.

Mr. Charles Louque and *Mr. B. F. Jonas* for plaintiffs in error.

No appearance for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

These cases are brought before this court by writs of error to the Supreme Court of Louisiana.

As they involve precisely the same questions between the same parties they may be decided together.

Josiah Fisk, who was an attorney-at-law, brought three suits in the proper court of the Parish of Jefferson to recover for salary and fees due him from the parish as district attorney, and he obtained judgments in each case against the Police Jury, which is the governing body of the parish.

Being unable to obtain the payment of these judgments in any other mode, he first made application for a writ of mandamus to compel the assessment and collection of a tax for the payment of two of these judgments, and afterwards for another writ in regard to the third judgment; the two judgments being for his salary and fees under one appointment, and the other under a second appointment.

The inferior court granted the writ in one case and denied it in the other. But, on appeal to the Supreme Court of the State, the writs were denied in both cases.

The ground of the jurisdiction of this court to review these judgments is the assertion by plaintiff in error that they were founded on a law of the State which impaired the obligation of his contract, to wit, the contract on which he procured the judgments already mentioned.

Opinion of the Court.

The services for which the judgments were recovered were rendered in the years 1871, 1872, 1873, and 1874. During this period there was in force the act of the legislature of 1871, of which § 7 is as follows:

"That no city or other municipal corporation shall levy a tax for any purpose which shall exceed two per centum on the assessed cash value of all the property therein listed for taxation, nor shall the police jury of any parish levy a tax for any parish purposes during any year which shall exceed one hundred per centum of the State tax for that year, unless such excess shall be first sanctioned by a vote of the majority of the voters." Acts of 1871, p. 109.

But by the Constitution of the State of 1880 it was declared that no parish or municipal tax, for all purposes whatsoever, shall exceed ten mills on the dollar of valuation. The Police Jury showed that they had exhausted their power when the application for mandamus was made, by levying the full amount of taxes permissible under this constitutional provision, and the Supreme Court held they could not be compelled to levy more.

In answer to the argument that, as applied to plaintiff's case, the constitutional provision impaired the obligation of his contract, the Supreme Court decided that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary, or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.

It seems to us that the Supreme Court confounded two very different things in their discussion of this question.

We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made,

though this may include a part of the term of the office then unexpired. *Butler* v. *Pennsylvania*, 10 How. 402.

But, after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note.

The case of Fisk was of this character. His appointment as district attorney was lawful and was a request made to him by the proper authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract. The judgment in the court for the recovery of this compensation concluded all these questions. *Hall* v. *Wisconsin*, 103 U. S. 5, 10; *Newton* v. *Commissioners*, 100 U. S. 548, 559.

The provision of the Constitution restricting the limit of taxation, so far as it was in conflict with the act of 1871, and as applied to the contract of plaintiff, impaired its obligation by destroying the remedy *pro tanto*.

It is apparent that, if the officers whose duty it is to assess the taxes of this parish, were to perform that duty as it is governed by the law of 1871, the plaintiff would get his money. If not by a first year's levy, then by the next. But the constitu-

tional provision has repealed that law, and stands in the way of enforcing the obligation of plaintiff's contract as that obligation stood at the time the contract was made.

It is well settled that a provision in a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion, therefore, that, as it regards plaintiff's case, this restrictive provision of the Constitution of 1880 does impair the obligation of a contract. *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Nelson* v. *St. Martin's Parish*, 111 U. S. 716.

The judgments of the Supreme Court of Louisiana are reversed, and the cases are remanded to that court for further proceedings not inconsistent with this opinion.

STEWART *v.* JEFFERSON POLICE JURY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Submitted November 18, 1885.—Decided December 21, 1885.

The act of the legislature of Louisiana of 1872 prohibiting, with some exceptions, parish tax levies in excess of one hundred per centum of the State tax for the year was the measure of the taxing power of parishes in that State in 1874, 1875, and 1876.

The authority given by the act of the legislature of Louisiana of 1869 to a judge rendering a judgment against a parish to order a levy of taxes sufficient for its payment, was taken away by the act of 1872, limiting parochial taxation to one hundred per centum of the State tax for the year, for all amounts in excess of the limit fixed by the latter act.

The facts which make the case are stated in the opinion of the court.

Mr. Charles Louque and *Mr. B. F. Jonas* for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This, like the two cases just disposed of, is a writ of error to a judgment denying the plaintiff a writ of mandamus.

Opinion of the Court.

C. W. Besancon was employed as an attorney, by a resolution of the police jury, passed December 11, 1874, to defend in certain suits about roads in the parish; and for services in that behalf rendered during the years 1875 and 1876 he recovered against the police jury of the parish a judgment for $1138 on April 7, 1877.

This judgment he afterwards assigned to Stewart, who procured a writ of mandamus to compel the police jury to levy a tax to pay it. The case came by appeal into the Supreme Court of the State, which at first affirmed this judgment, but on a rehearing finally reversed the order of the inferior court, and denied the writ.

The opinion rendered on the first hearing was based upon the proposition that the limit of taxation of the parish for the years 1875 and 1876 was 14½ mills on the hundred dollars, and that the statute then required that when a court, in a case like this, rendered a judgment against the police jury, it should at the same time order the levy of a tax sufficient to pay it. And though no such order was made in plaintiff's case, the opinion held that the law in this respect became a part of the judgment, and the plaintiff was entitled to the writ to enforce the levy and collect the tax.

On the rehearing the court decided that this act of 1869, which had permitted a tax on the parish to the extent of 14½ mills, had been repealed by the act of 1872.

The first section of that act is as follows:

"SECTION 1. *Be it enacted, etc.*, That section seven of the act recited in the above-mentioned title and approved March 3d, 1871, be so amended and re-enacted as to read as follows: 'That no city or other municipal corporation shall levy a tax for any purpose which shall exceed two and three-quarters per centum on the assessed cash value of all the property therein listed for taxation, except the city of New Orleans, which may levy a tax of two and three-quarters per centum; nor shall the Police Jury of any parish levy a tax for any parish purposes, except to pay indebtedness incurred prior to the passage of this act, during any year, which shall exceed one hundred per centum of the State tax for that year, unless such excess,

whether levied by village, city, or parochial authorities, shall first be sustained by a vote of the majority of the said voters of said village, city, or parish, at an election held for that purpurpose. No per capita tax, except the poll-tax authorized by the Constitution, shall be assessed or collected in this State.'"

If this act was the measure of the taxing power of the parish in 1874, 1875, and 1876, when the contract with Besancon was made and the services rendered, then it is conceded that there is no right to a mandamus in this case.

The Supreme Court of Louisiana held this to be so, and we are not prepared to say they are wrong in a construction of their own statutes, both of which were in existence when the contract was made.

It is insisted, however, on the part of the plaintiff, that the law which required the court, when rendering a judgment against the parish, to order the levy of a tax sufficient to pay the judgment, was not repealed by this act of 1872, and was unaffected by it, and therefore he should now have, by writ of mandamus, what he ought to have had by the order of the court as part of his judgment. To this the court in its opinion replies, that, the act of 1872, being an absolute limit to the power of taxation by the parish authorities, any order of the court rendering the judgment should be in subordination to that limit and must have been governed by it. So that, though the power of a court to order a levy sufficient to pay its judgment, as a part of the judgment itself, may have remained, it could levy by that order no tax beyond the limit fixed by law at the time the contract was made, unless that limit had been enlarged, instead of diminished, by subsequent statutes.

In both these views of the case we concur. The judgment of the Supreme Court of Louisiana is

Affirmed.

SAN MATEO COUNTY *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Submitted December 17, 1885.—Decided December 21, 1885.

The court hears a motion by counsel for plaintiff in error, specially appointed for the purpose, to dismiss the writ of error, which motion is opposed by counsel of record for plaintiff in error. The court dismisses the writ on the ground that there is no longer an existing cause of action.

This was a motion to dismiss the writ of error in this case. The facts which make the case are stated in the opinion of the court.

Mr. John W. Ross for the motion.

Mr. A. L. Rhodes opposing.

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

This motion was made on the 18th of November last by Mr. John W. Ross, who had been specially appointed by the Board of Supervisors of the county as counsel for that purpose. Upon suggestion that counsel of record desired to oppose the motion, an order was made that notice be given them to appear and show cause against it if they desired to do so. This they have done, and it now appears that the suit was begun in a State court April 22, 1882. An answer was filed by the railroad company May 25, 1882. On the 30th of June the suit was removed to the Circuit Court of the United States. An amended answer was filed August 16, 1882, and on the same day a demurrer was filed to the answer. On the 6th of September the counsel for the county executed to the railroad company a receipt, of which the following is a copy:

"County of San Mateo, Plaintiff, *v.* Southern Pacific Railroad Company, Defendant.	In U. S. Circuit Court, Ninth Circuit. No. 2807.

"Received, San Francisco, September 6, 1882, of the Southern

Pacific Railroad Company, the sum of seven thousand two hundred and forty-seven $\frac{63}{100}$ dollars ($7247.63), and the sum of $724.76 dollars, attorneys' fees, all to be credited upon any judgment that may be obtained by the plaintiff in the above entitled action.

"In case judgment shall be rendered in said action in favor of said defendant, then said sum of money, less our fees agreed to be paid by said county, shall be paid into the treasury of the said county of San Mateo as a donation by said defendant in lieu of taxes for the fiscal year 1881–2, declared invalid. But in the event that a law shall be hereafter passed providing for a re-assessment of property in said complaint in said action in said county for said year, then said sum of money is to be treated as a part payment for taxes for said fiscal year.

(Signed) "RHODES & BARSTOW,
Attorneys for San Mateo Co. in said action."

On the 20th of September the following stipulation was filed in the cause:

"The County of San Mateo
v. } No. 2807.
The Southern Pacific Railroad Company.

"It is stipulated in the above-entitled actions that each of them be, and hereby is, submitted upon the plaintiff's demurrer to the first affirmative defence (second defence) in the defendant's answer. And it is further stipulated that judgment final in the action may be rendered upon the demurrer, it being agreed that for the purpose of this proceeding the other defences are withdrawn from the consideration of the court.

"RHODES & BARTSOW,
Att'ys for Plaintiff.
"L. D. MCKISICK,
Att'y for Defendant."

On the 25th of September a judgment was rendered upon the demurrer in favor of the defendant, and the suit dismissed. The next day a writ of error was brought to this court and docketed here October 13, 1882. The case was elaborately

argued before us December 19, 1882, but before a decision was reached a stipulation was entered into between the parties, as follows:

"In the Supreme Court of the United States.

"The County of San Mateo
v.
Southern Pacific Railroad Company. } No. 1063.

"Whereas certain actions brought by the People of the State of California, or by certain counties of said State, against said defendant, and other railroad companies operating railroads in said State, for the recovery of taxes assessed against said companies for State and county purposes, were, during the month of August last, tried before and submitted to the Circuit Court of the United States, Ninth Circuit, for the District of California, which actions have since been decided against the plaintiffs;

"And whereas the attorneys for the respective parties to said actions against whom judgments have been rendered intend to sue out a writ or writs of error in one or more of said actions, and to prosecute the same with as much diligence as possible, and to move the Supreme Court that the same be advanced on the calendar for argument:

"It is hereby stipulated by and between the parties to the first-mentioned action that the further consideration of the said action by the Supreme Court may be deferred until the argument of one or more of the last-mentioned cases.

"San Francisco, September 18, 1883.

(Signed) "A. L. RHODES.
Att'y for Pl'ff in Error.

(Signed) "S. W. SANDERSON,
Att'y for Defendant."

And thereupon the following order was made:

"The County of San Mateo, Plaintiff in Error,
v.
The Southern Pacific Railroad Company.

"The parties having stipulated that the further considera-

tion of this cause may be postponed until certain other cases are disposed of, this cause is restored to its original position on the docket, there to await the further action of the court."

It now appears that, according to the claim of the counsel of record, there is due on account of the taxes sued for, including penalty, attorneys' fees, and interest at the rate of two per cent. per month, from the time of delinquency until now, the sum of $14,399.07. It also appears that on the 11th of the present month the railroad company paid into the treasury of the county the sum of $7613.30. The county has also had the use of the $7247.63 paid on the 6th of September, 1882, from the time of such payment until now. The only condition attached to the payment made on the 11th of this month is that, if when the account is finally settled between the county and Rhodes & Barstow upon the basis of the assessment-roll, principal, interest, delinquency, and attorneys' fees, it shall appear that the payments, including that to Rhodes & Barstow, are more than the actual amount due, the excess shall be returned to the railroad company. The payments have been—

To Rhodes & Barstow, taxes.....	$7247 63
Attorneys' fees.....	724 76
To the county	7613 30
In all.....	$15,585 69

As this is more than the entire sum estimated by the counsel for the plaintiff to be due, it is clear that the debt for which the suit was brought has been unconditionally paid and satisfied.

As to the objection that this was by agreement of parties made a test case, and many others are depending on its adjudication, it is sufficient to say that both sides agree that the suit of the County Santa Clara against the same company presents all the questions that are in this case, and that the parties have stipulated that this need not be taken up for decision until that is heard. The interests of the State, therefore, will be as

well protected by the determination of that case as of this. For the reason that there is no longer an existing cause of action in favor of the county against the railroad company,

This writ of error is dismissed, each party to pay its own costs.

HEWITT *v.* FILBERT & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 7, 1885.—Decided December 21, 1885.

Except in cases of appeals allowed in open court during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error is necessary to perfect the jurisdiction of this court over the appeal or the writ, unless it sufficiently appears that citation has been waived.

This court has no jurisdiction to issue citation in an appeal docketed here after the term to which the appeal was returnable.

This was a motion to dismiss an appeal. The facts which make the case are stated in the opinion of the court.

Mr. C. C. Cole and *Mr. William F. Mattingly* for the motion.

Mr. S. S. Henkle opposing.

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

This is a motion to dismiss an appeal for want of a citation. The facts are these: A decree was entered by the Supreme Court of the District of Columbia on the 21st of November, 1882, dismissing the bill in a suit between Robert C. Hewitt, complainant, and Lewis S. Filbert and others, defendants. On the same day an appeal was allowed in open court, but that appeal was never docketed in this court by the appellant. It was, however, docketed by the appellee, and dismissed under Rule 9, on the 15th of October, 1883, but the mandate was not

sent down until March 25, 1885. In the meantime, on the 26th of June, 1884, Hewitt appeared in the Supreme Court of the District, at general term, and, on his *ex parte* application, an order was entered allowing him a second appeal upon his giving security in the sum of five hundred dollars. After the close of the term at which this order was made, and on the 18th of August, a bond was approved by one of the justices and filed in the office of the clerk of that court. The case was docketed in this court on the 20th of August, 1884, but no citation has ever been issued or served.

Except in cases of appeals allowed in open court during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error, is necessary to perfect our jurisdiction of the appeal or the writ, unless it has been in some proper form waived. *The San Pedro*, 2 Wheat. 132, 142; *Yeaton* v. *Lenox*, 7 Pet. 220; *Villabolos* v. *United States*, 6 How. 90; *United States* v. *Curry*, 6 How. 106, 111; *Castro* v. *United States*, 3 Wall. 46, 50; *Alviso* v. *United States*, 5 Wall. 824.

In *Dayton* v. *Lash*, 94 U. S. 112, it was held that, if a citation was actually issued but not served, before the first day of the term to which it was returnable, leave might be granted to make the service during that term. In this way the language of the court in *Villabolos* v. *United States*, and *United States* v. *Curry*, which seemed to require service as well as issue of the citation before the return day of the appeal or writ of error was to some extent qualified, but the authority of those cases as to the necessity of an actual issue of the citation and service before the end of the return term was in no way impaired. On the contrary, it was fully recognized. So in *Railroad Co.* v. *Blair*, 100 U. S. 661, where an appeal was allowed in open court at a term subsequent to that in which the decree appealed from was rendered, but when the solicitors of the appellee were present and had actual notice of what was done, leave was granted to issue a citation and have it served during the return term of the appeal.

Appeals allowed by the court in session, and acting judicially at the term when the decree was rendered, have always been

given a different effect from appeals allowed after the term or writs of error. Thus, in *Reily* v. *Lamar*, 2 Cranch, 344, 349, decided in 1805, only two years after the act allowing appeals in cases of equity and admiralty and maritime jurisdiction was passed, 2 Stat. 244, ch. 40, § 2, it was stated by Chief Justice Marshall "to be the opinion of the court that, the appeal having been prayed pending the court below, a citation was not necessary; and, therefore, the case was properly before the court" without a citation.

It has since been decided that if the appeal is allowed in open court at the term, but the appeal bond is not accepted until after the term, a citation will be necessary to bring in the parties. *Sage* v. *Railroad Co.*, 96 U. S. 712, 715. But if an appeal allowed in such a way is docketed in this court at the return term, our jurisdiction of the appeal becomes perfect, and what remains to be done to get in the parties is matter of procedure only, and not jurisdictional, so far as the bringing of the appeal is concerned. *Dodge* v. *Knowles*, 114 U. S. 430, 438. As was said in that case: "The judicial allowance of an appeal in open court, at the term in which the decree has been rendered, is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned, by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal, allowed in open court and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was made after the expiration of two years from the rendition of the decree, or before." The reason of this is, that the allowance by the court in session before the end of the term at which the decree was rendered, and when both parties are either actually or constructively present, is in the nature of an adjudication of appeal which, if docketed here in time, gives this court jurisdiction of the subject-matter of the appeal, with power to make all such orders, consistent with the practice of

courts of equity, as may be appropriate and necessary for the furtherance of justice. In legal effect, the judicial allowance of an appeal in this way transfers the cause to this court, if the appellant dockets the appeal here at the proper time. If not docketed, the appeal which has been allowed becomes inoperative for want of due prosecution. *Grisgby* v. *Purcell*, 99 U. S. 505, 506, and cases there cited.

But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the term to which it must be made returnable, the appeal becomes inoperative. The rule is thus stated in *Castro* v. *United States*, which was a case of an appeal taken after the term, and in which a citation was necessary: "The writ of error, or the allowance of appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the writ is sued out or the appeal allowed; otherwise the writ of error, or the appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ of error or a new appeal." There is nothing in any of the cases to the contrary of this. As, without a citation or its waiver, we cannot take jurisdiction of this appeal, and it is conceded that none has been issued or served, and there is no sufficient evidence of a waiver,

The motion to dismiss is granted.

McCLURE *v.* UNITED STATES.

ORIGINAL MOTION IN A CASE PENDING IN THIS COURT ON APPEAL FROM THE COURT OF CLAIMS.

Argued December 8, 1885.—Decided December 21, 1885.

An act of Congress specially referring to the Court of Claims a paymaster's claim for credits and differences in his accounts with the United States, and providing that the evidence of the claimant may be received, and that, if the court shall be satisfied that just and equitable grounds exist for cred-

its claimed by him, it shall make a decree setting forth the amount for which he shall receive credit, confers no equity jurisdiction upon that court, but only the ordinary jurisdiction of the subject as a court of law, subject to be proceeded with as in ordinary suits, and subject to the rules regulating appeals in ordinary judgments.

This court will not remand to the Court of Claims a case at law, with directions to return whether certain distinct propositions in requests for findings of fact, presented to that court at the trial of the case, are established and proved by the evidence, if it appears that the object of the request to have it so remanded is to ask this court to determine questions of fact on the evidence.

This was a motion to order up evidence from the Court of Claims, accompanied by an alternative motion to order that court to make specific findings of fact. The facts which make the case are stated in the opinion of the court.

Mr. Jeremiah M. Wilson for the motion.

Mr. Assistant Attorney-General Maury opposing.

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

This is a motion for an order on the Court of Claims "to transmit to this court all the evidence on which the cause was heard and determined" in that court, or, if such an order cannot be made, that the cause be remanded, "with directions to make return to this court, whether or not the evidence upon which said cause was heard and determined does, or does not, establish and prove the several separate and distinct propositions of fact contained in the requests for findings of fact presented . . . to the said court before the trial of said cause, and upon the motion for a new trial, or a rehearing of said cause, that the said court shall be directed to find specifically all the material facts involved in the case."

The suit was brought under the following act of Congress, passed February 24, 1874, entitled "An Act for the relief of Colonel Daniel McClure, Assistant Paymaster-General:"

"*Be it enacted, &c.*, That the claims of Daniel McClure, Assistant Paymaster-General, for credits on differences in his accounts as paymaster, under his official bond, dated March

second, eighteen hundred and fifty-nine, shall be, and are hereby, referred to the Court of Claims, with jurisdiction to hear and determine said claims. And if the said court shall be satisfied from the evidence that any of the moneys charged to him were not in fact received by him, or that other just and equitable grounds exist for credits claimed by him, it shall make a decree, setting forth the amount to which the said McClure shall be entitled to receive credit; upon which the proper accounting officers of the Treasury shall allow him the amount so decreed as a credit in the settlement of his accounts: *Provided*, That the testimony of said McClure shall be received in his own behalf by said court, and until the determination of said cause the final adjustment of his said accounts is suspended: *And provided further*, That an appeal shall be allowed to either party as in other cases." 18 Stat. 531.

In his petition filed in the cause, McClure made three claims for credit, to wit.: 1, for $1183.13, money on deposit to his official credit as paymaster with the Assistant Treasurer of the United States at New Orleans, which was seized by the insurgent forces of the Confederate States and appropriated to their own use without any fault on his part; 2, for $289.05 taken from his possession by a military force acting for and in behalf of the Confederate authorities; and 3, for $1000, an over addition made of pay-rolls by his clerk, which in no manner inured to his personal benefit. There were also three claims for differences between his accounts and those of the United States, being for moneys charged to him which as he alleged were not in fact received, to wit.: 1, $1432.48, said to have been transferred to him by J. L. Hewitt; 2, $25,000 by C. S. Stevenson; and 3, $4993 by V. C. Hanna.

The Court of Claims has found as facts, 1, that the sum of $289.05 was taken from McClure by an armed force in charge of one of the Commissioners of the State of Texas, while it was in his hands as government money; and 2, that the sum of $1183.13 was turned over by the Assistant Treasurer of the United States to the Confederate States while it was on deposit with him to the credit of McClure as paymaster. As to the sum of $1000, it is found that McClure stated an account show-

ing payments made to troops and accompanied the same with vouchers, one of which was overadded $1000, and he got credit at the time for the over addition as for money paid out. As to the several items of differences, it is found that the parties by whom the transfers were respectively supposed to be made had each obtained a receipt from McClure for the amount stated, and that they were allowed credit therefor in the settlement of their own accounts at the Treasury. As to the moneys taken by the Confederate authorities, the court was satisfied from the evidence that just and equitable grounds existed for their allowance as credits. As to the over addition, the court was not satisfied from the evidence that any just and equitable grounds existed for the credit thereof to McClure; and as to the several amounts specified in the receipts obtained by the different parties, the court was not satisfied from the evidence that the moneys charged to McClure by the United States were not in fact received by him, or that other just and equitable grounds existed for giving him credit for these amounts.

1. As to bringing up the evidence.

It is not pretended that this can be done unless the statute under which the suit is brought takes the case out of the operation of our rules regulating appeals from the Court of Claims. The original act which gave the right of appeal from the Court of Claims to this court was passed March 3, 1863, and provided that the appeals should be "under such regulations as the Supreme Court may direct." 12 Stat. 766, ch. 92, sec. 5. This provision is still found in § 708 of the Revised Statutes. At the December Term, 1865, this court adopted certain rules for the regulation of such appeals, and Rule 1 was as follows:

"Rule 1. In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

"2. A finding of the facts in the case by said Court of

Claims, and the conclusions of law on said facts on which the court founds its judgment or decree.

"The finding of the facts and the conclusions of law to be stated separately and certified to this court as part of the record.

"The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which those ultimate facts are founded. See *Burr* v. *Des Moines Co.*, 1 Wallace, 102."

This rule was amended in some particulars at the December Term, 1872, but not in a way to affect the present case. It has been in force substantially in its original form from the time of its adoption until now, and has always been strictly adhered to. Such being the case, when Congress passes a special statute allowing a suit to be brought in the Court of Claims, with a right of appeal to this court, the appeal will be governed by the rules applicable to cases arising under the general jurisdiction of the court, unless provision is made to the contrary.

In *Harvey* v. *United States*, 105 U. S. 671, the suit was brought under a statute passed April 14, 1876, 19 Stat. 490, ch. 279, which authorized the Court of Claims "to proceed in the adjustment of the accounts between said claimants and the United States as a court of equity jurisdiction; and may, if according to the principles of equity jurisprudence in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said Government may require." An appeal to this court was also given, and we held that, as the suit was to be in equity, the parties were entitled to an appeal in equity, which should bring up for review the facts as well as the law. But in *Tillson* v. *United States*, 100 U. S. 43, where the court was "authorized and directed to . . . ascertain, determine, and adjudge the amount equitably due said firm, if any, for such loss or damage," we decided that "the reference was made to the court, as a court, and not to the judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the

discretion of the judges. The same principles of jurisprudence, and the same statutory regulations as to practice, are to be applied here that would be if the case had come into the court under its general jurisdiction. It is to be ascertained and determined what, if anything, is due the claimants from the government, according to the rules of law applicable to the settlement in that court of controversies between the government and its citizens. . . . To our minds the word 'equitably,' as here used, means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants."

This suit clearly comes within the principle of *Tillson's Case.* It is in the nature of a defence to an action at law brought by the United States to recover the balance claimed to be due upon the account as stated at the treasury. The statute requires the court to hear and determine judicially, 1, whether the disputed sums charged to McClure were in fact received by him, and, 2, whether any other just or equitable grounds exist for the credits claimed by him. The statute under which the Court of Claims is organized would have been enough to give that court jurisdiction of the claims for credit on account of the moneys seized by the Confederate authorities. Rev. Stat. § 1059, clause 3, and § 1062. But under that statute McClure could not have given testimony in his own behalf. The special act relieves him from that disability and allows him to join his claims for other errors with his claims for losses by capture, &c., and thus have the whole matter determined in one suit; but, save as to his competency as a witness, and possibly an injunction to construe the rules of law liberally in his favor, the practice of the court under its general jurisdiction has not been altered.

Some stress was put in argument upon the use of the word "decree" in the statute, and it was insisted that, as this is a term technically applicable to proceedings in equity, a suit in equity must have been contemplated. To our minds this word has no special significance here. For it is provided in § 1062 of the Revised Statutes, that if, in a suit begun under clause 3 of § 1059 of the Revised Statutes, the court ascertains that the

loss sued for had been without fault or negligence on the part of the officer, "it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts;" and it is evident that the draughtsman of the present statute must have had the other before him when he was doing this part of his work, and followed it for the sake of uniformity. We have never known it to be contended that under the old law such a suit was to be looked upon as a suit in equity. It is clear, therefore, that this motion in its first alternative must be denied.

2. As to remanding the cause for further findings.

At the time of the promulgation of Rule 1, a copy of which has already been given, reference was made to the case of *Burr* v. *Des Moines Co.*, 1 Wall. 99, 102, as indicating what the finding of facts there provided for must contain. In that case, what was called "an agreed statement of facts" appeared in the record, and the question was as to whether it could be considered by this court. Upon this subject it was said: "The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences, or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fulness, and perspicuity of a special verdict. If it requires the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon."

In *United States* v. *Pugh*, 99 U. S. 265, the suit was brought under the abandoned and captured property act, and the main controversy was as to whether the proceeds of the sale of the property had actually been paid into the treasury. There was

no direct proof to this effect, and the court, instead of stating positively in its findings that such a payment had been made, set out all the circumstantial facts established by the evidence tending to show a payment, and gave judgment against the United States. When the case got here on appeal, it was claimed that the findings were not sufficient to support the judgment, because it did not appear affirmatively that the proceeds of the property had actually been paid into the treasury. But we held otherwise, because there was nothing left for us to determine but the necessary legal effect of the circumstantial facts found, and in doing so we said "that, when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on appeal to decide upon the weight of evidence. That is done in the court below when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that, the question is as to the effect of the fact; and when the evidence in a case has performed its part, and brought out all the facts that have been proved, these facts thus established are to be grouped and their legal effect as a whole determined." But in *The Francis Wright*, 105 U. S. 381, 387, where the question was as to the kind of facts the court could be required to put in its findings, we said it did not include "mere incidental facts which only amount to evidence bearing on the ultimate facts of the case." Questions depending on the weight of evidence must be conclusively settled below.

Applying these rules to the present case, we find that, as to the several disputed items of money charged against McClure, his only defence is that he never received them. If received, he is accountable. Upon the hearing, his receipt for each of the several sums was produced. The genuineness of his signature was not denied in any case, but he offered evidence tending to prove that he did not in fact get the money. Against this, other evidence was offered on the part of the government, and the question for determination below was whether the

testimony in his behalf was sufficient to overcome the receipts, and the evidence in corroboration of them. The finding was against him. What he wishes incorporated into the record now are, the incidental facts and circumstances testified to in his behalf which, when weighed as evidence, he thinks will overcome the showing against him. In other words, he wishes the record so made up that we can put on one side the receipts and the evidence in support of them, and on the other the evidence on which he relies, and determine which preponderates. Clearly there is nothing in Pugh's case which supports the right to any such findings. In that case there was no question of preponderance. There was no "balancing of testimony or weighing of evidence." The court was not required "to weigh conflicting testimony or balance admitted facts." All that had to be done was to declare the law on established facts all in harmony. Here, if the additional findings asked for are sent up, the question for us to determine will be, the comparative weight as evidence of the facts found on one side with those found on the other. In other words, whether the evidence offered on the part of McClure is sufficient to overcome the effect as evidence of his receipts, and the other testimony against him. The rule contemplates no such practice. All we can do is to declare the law upon facts which, so far as we are concerned, must be taken to be undisputed.

As to the proposed findings, with a view to ascertaining the existence of "just and equitable grounds for credits claimed," they are clearly immaterial for the purpose of a judicial determination of the rights of the parties. At most they would only show that McClure had been compelled to conduct his business under very unfavorable circumstances; that the amounts disbursed by him had been large; that much of his business had necessarily been done by his clerks, upon the accuracy of whose statements and calculations he was compelled in a great measure to rely; that with the exception of the present differences his accounts had always been found correct; that he had sometimes given receipts in advance of the time he had actually got the money, and by reason of the limited facilities for transacting business in his office it was possible for a receipt to be

got without the money being actually paid over; that there had been great delay in advising him of the errors in his accounts; and things of a like character. These are facts proper for the consideration of Congress on an application by McClure for legislative action in his favor, but, under the most liberal construction of the rules which govern courts of justice in determining the rights of parties, they fall far short of what is necessary for affording him judicial relief.

The motion is denied.

UNION PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

ORIGINAL MOTION IN A CASE PENDING IN THIS COURT ON APPEAL FROM THE COURT OF CLAIMS.

Argued December 7, 1885.—Decided December 21, 1885.

There is nothing in Rev. Stat. § 5261, authorizing certain railroad companies to bring suits against the United States in the Court of Claims to recover the price of freight or transportation, which takes those suits out of the operation of the general rules of this court regulating appeals from the Court of Claims, or which makes it proper for this court to require the Court of Claims to send up with its findings of facts the evidence in regard to them.

When the Court of Claims, on being requested by a party in a cause there pending to find specifically upon several facts which are only incidental facts and amount only to evidence touching the main facts in issue, and the court disregards the requests and finds the facts at issue generally, and judgment is entered, and the party whose request was denied appeals, this court will not remand the case to the Court of Claims, with directions to specifically pass upon each of said requests, or to make a finding of facts on the subject embraced in each of said requests.

This was a motion made in a case appealed from the Court of Claims, to require that court to send up the evidence, or to specifically find on certain requests for findings made by one of the parties, and not passed upon specifically and in detail by the court. The facts are stated in the opinion of the court.

Mr. John F. Dillon for the motion.

Mr. Solicitor-General opposing.

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

This suit was brought by the Union Pacific Railway Company against the United States under Rev. Stat. §§ 5260 and 5261, to recover among other things the price of the transportation of mails by the company in accordance with the requirements of its charter. These sections are as follows:

"Sec. 5260. The Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns on account of freights or transportation over their respective roads of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per centum of net earnings due and unapplied, as provided by law.

"Sec. 5261. Any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them; and either party to such suit may appeal to the Supreme Court; and both said courts shall give such cause or causes precedence of all other business."

One of the principal controversies in the case was as to what would be "fair and reasonable rates of compensation" for such transportation, "not to exceed the amount paid by private parties for the same kind of service." When the case was here on a former appeal, this court, adopting the ruling of the Court of Claims, said that it would be proper "to look over the entire field of service in determining what was a fair and reasonable charge for a kind which was similar to, but not identical with, any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars, and the costs and running expenses no

greater, we are inclined to think that that fact might be a proper element in the problem of estimating the amount of fair and reasonable rates of compensation." And we also said that, "upon a retrial, if the parties do not agree upon the amount or upon the rule of computation, the compensation, at fair and reasonable rates, must be determined upon a consideration of all facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service." *Union Pacific Railroad Co.* v. *United States*, 104 U. S. 662, 667. Accordingly, when the case went back, evidence was offered to show:

1. What the public paid for express service, and the similarity of this service in its nature and cost to the mail service;

2. The earnings per car of the cars employed in the passenger service;

3. What the company charged and the public paid per pound for carrying extra baggage;

4. What the company charged and the public paid for carrying first-class freight on passenger trains, and how much more it was worth to carry the same class of matter in passenger trains; and

5. That connecting roads allowed the company on through-business fifty per cent. more than they themselves received, and the reason for such allowance.

The motion papers also show that, before the first trial of the cause, a stipulation was entered into by the parties agreeing on the amount due the company for mail service, in case one or another of several proposed rules for estimating the price should be adopted by the court.

Before the trial began the court was requested to find specifically the facts as to the several kinds of service about which evidence had been furnished, and the nature, extent, and character of the mail service. The court did not comply with this request, but found generally that "the amounts allowed and retained by the Treasury Department for transportation of mails . . . are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service," and gave judgment ac-

cordingly. The case is now here on appeal by both parties, and the railroad company has moved that the Court of Claims be directed "to send up to this court the entire record in said case, including the interlocutory rulings, and all the evidence on which the case was heard," or, if that cannot be done, that the case be remanded with instructions to "specifically pass upon, affirmatively or negatively, each of said requests, or make a finding of facts on the subject embraced in each of said requests," and that the court be directed to incorporate in the record the stipulation already referred to, and a certain letter mentioned and set out in the motion papers.

So far as the first branch of the motion is concerned, it must be denied on the authority of *McClure* v. *United States*, just decided, *ante*, 145. There is nothing in the statute under which this suit was brought to show an intention by Congress to allow any other appeal to this court than such an one as is given by the statute conferring general jurisdiction on the Court of Claims. The suit is to be at law and not in equity. The recovery is to be "upon the law and the facts of the case," but that is no more than is required in every suit at law or in equity. Under our rule the facts are to be settled by the Court of Claims, and an appeal brings up for review only the decisions of that court upon questions of law arising in the course of the trial or in the application of the law to the facts as finally found. There is nothing unusual in this. In an ordinary suit at law the facts are settled in the trial court, and only questions of law are carried to the appellate court for review. Upon writs of error we hear the case only on findings of fact or exceptions to rulings of the court in the progress of the trial. Generally, in suits at law there is but one trial upon questions of fact.

The second branch of the motion is also covered by the decision in *McClure's* case. The special findings which were requested and refused related to mere incidental facts which amounted only to evidence, and were therefore inadmissible as part of the record to be sent here. *The Francis Wright*, 105 U. S. 381. They were in reality nothing more than requests for a finding of what the evidence was. The parties seem to have followed the suggestion on the former appeal, and, after

looking over the entire field of service, they brought in everything which, in their opinion, could be of use to the court in determining what would be a reasonable compensation for the service rendered, subject to the requirement of the statute that it should not be more than was paid to private parties for the same kind of service. The question to be determined was one of fact, as much so as the amount of recovery in any action *quantum meruit*. A conclusion could only be reached by considering all the testimony, weighing the facts, and estimating their comparative value as evidence. This presented in no just sense a question of law. Every fact that was proven according to the motion was simply evidence, and as evidence had performed its entire office when the facts were found. It has no place in the record which is to come here for review.

The motion is denied.

BURNETT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted November 23, 1885.—Decided December 21, 1885.

The pension which widows are entitled to receive under the provision of Rev. Stat. § 4702, is the pension for total disability which is granted to those entitled to receive it by Rev. Stat. § 4695.

This was an appeal from the Court of Claims. The facts are stated in the opinion of the court.

Mr. A. L. Merriam for appellant.

Mr. Solicitor-General and *Mr. John S. Blair* for appellee.

Mr. Justice Harlan delivered the opinion of the court.

By an act of Congress of March 3, 1879, 20 Stat. 665, ch. 290, the Secretary of the Interior was directed to place on the pension-roll the name of Ward B. Burnett, and pay him a pension of $50 per month in lieu of the pension then received by

him. The subsequent act of June 16, 1880, 21 Stat. 281, ch. 236, provides that all soldiers then receiving a pension of $50 per month, under the provisions of the act of June 18, 1874, entitled "An Act to increase the pension of soldiers and sailors who have been totally disabled," 18 Stat. 78, ch. 298, shall receive, in lieu of all pensions then paid to them by the United States, the sum of $72 per month; those whose pensions were thus increased from $50 to $72 per month, to receive the difference between those sums monthly, from June 17, 1878, to the date when that act took effect.

On the 17th of July, 1882, Gen. Burnett received from the Department of the Interior a certificate showing that he was entitled to a pension "for gun-shot wounds of left leg and rheumatism" at the rate of $30 per month, to commence on the 1st of August, 1848, and $31.25 per month from June 4, 1872, and $50 per month from June 4, 1874, and $72 per month from June 17, 1878.

By an act approved July 25, 1882, 22 Stat. 174, 176, ch. 349, it is provided that no person then receiving, or who should thereafter receive, a pension under a special act, shall receive, in addition thereto, a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which such person is entitled to receive under the general law.

Gen. Burnett died on June 24, 1884, from the effect of wounds received in the war with Mexico. The appellant, his widow, claims the same pension—$72 per month—that her husband was receiving at his death. The Interior Department granted her a certificate for a pension at the rate of only $30 per month, to continue from June 24, 1884, during her widowhood. Her claim for a larger pension having been denied, the matter was referred by the Department to the Court of Claims. The claimant, in her petition in that court, asked for judgment against the United States for $210, that being the difference between $30 per month and $72 per month from the date of her husband's death to the commencement of this action. A demurrer by the government to the petition having been sustained, the case has been brought to this court.

The only question presented by the parties for our consideration is whether, under existing statutes, the widow of Gen. Burnett is entitled to the same pension that he was receiving at his death.

Section 4692 of the Revised Statutes provides that "every person specified in the several classes enumerated in 'section 4693,' who has been, since the fourth day of March, eighteen hundred and sixty-one, or who is hereafter disabled, under the conditions therein stated, shall . . . be placed on the list of invalid pensioners of the United States, and be entitled to receive for a total disability, or a permanent specific disability, such pension as is hereafter provided in such cases, and for an inferior disability, except in cases of permanent specific disability, for which the rate of pension is expressly provided, an amount proportionate to that provided for total disability, and such pension shall commence as hereinafter provided and continue during the existence of the disability."

Section 4693 specifies who shall be beneficiaries under the preceding section, among whom is "any officer of the army, including regulars, volunteers, or militia, . . . disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty."

Section 4695 provides that "the pension for total disability shall be . . . for lieutenant-colonels and all officers of higher rank in the military service . . . thirty dollars per month." Other sections fix the amount of pensions in cases of disabilities known as permanent specific disability and inferior disability.

It is then provided, by section 4702, that "if any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies by reason of any wound, injury, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension had he been disabled, his widow . . . shall be entitled to receive the same pension as the husband or father would have been entitled to

had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood," &c.

It would seem to be too clear for discussion that the construction which the court placed upon these statutory provisions is correct. It is not to be doubted that the words "total disability" in the pension laws has a technical signification which cannot be disregarded. And when the statute fixes $30 per month as the pension, in case of total disability, of an officer of the rank of General Burnett, and declares that his widow shall receive the same pension as her husband would have received had he been "totally disabled," there is no room left for a construction that would give her a pension in excess of that amount. If it is supposed that the law operates unjustly against the officers and soldiers who became "totally disabled" in the service, or that an unreasonable distinction is made between different kinds of disability, the remedy is with another department of the government. The courts must give effect to the intention of Congress as manifested by the statute. They cannot make, but can only declare the law.

The judgment is *Affirmed.*

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY *v.* CREARY & Others.

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

Argued November 17, 18, 1885.—Decided December 21, 1885.

In an action by the vendee of personal property against an officer attaching it as property of the vendor, declarations of the vendor to a third party, made after delivery of the property, are inadmissible to show fraud or conspiracy to defraud in the sale, unless the alleged collusion is established by independent evidence, and the declarations fairly form part of the *res gestæ*.

A person whom a purchaser of personal property from a debtor in failing circumstances puts into possession of the property after the sale as his agent to manage it, cannot afterwards make declarations respecting the character

of the sale, which can be received in evidence against the vendor in proceedings in which the sale is questioned as made in bad faith, or with intent on the part of the vendor and vendee to hinder and delay the vendor's creditors.

This suit was brought by plaintiff in error as plaintiff below against an officer who had seized, on a writ of attachment against Webb & Co., property sold and delivered by them to plaintiff. The facts which make the case are stated in the opinion of the court. Judgment below for defendant. Plaintiff sued out this writ of error to review it.

Mr. M. F. Morris for plaintiff in error.

Mr. B. D. Lee and *Mr. Jeff Chandler* for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

The Winchester and Partridge Manufacturing Company, a Wisconsin corporation, brought this action to recover damages for the seizure and sale under an attachment sued out, on the 30th day of March, 1882, by J. E. Hayner & Co., against the property of John A. Webb & Co., of certain goods, wares, and merchandise, constituting a stock in trade; of which property the plaintiff claims to have been, at the time the attachment was issued and levied, the owner by purchase from the defendants in the attachment suit. The seizure and sale were made by direction of Hayner & Co., who, prior to the levy, executed to the defendant Creary, the officer who received the attachment, an indemnifying bond with sureties. Before the levy the officer was informed by plaintiff's agent, and also by John A. Webb, that the property belonged to plaintiff.

The defence proceeds upon the ground that the alleged sale was fraudulent and void as against the defendants, Hayner & Co., and other creditors of the vendors.

The evidence, so far as competent, tended to establish the following facts: On and prior to the 13th of March, 1882, John A. Webb and Joseph W. Webb were engaged at Austin, Texas, under the firm name of John A. Webb & Co., in selling wagons, agricultural implements, machinery, &c. In the

course of business they became largely indebted to various persons, firms, and corporations with whom they had dealt; among others, to the plaintiff in the sum of $19,000, and to the defendants, Hayner & Co. in the sum of $16,262. On the day last named they sold, after inventory, and by bill of sale, their entire stock in trade, and a large amount of unsettled accounts, to the plaintiff for the sum of $43,000, which was at that time the fair value of the property. Of the purchase price, $19,000 was paid by the cancellation of plaintiff's claim against the vendors, and the balance was paid by its promissory notes, of different amounts, and payable at different times. These notes were used by Webb & Co. in payment of their debts, no part of them being withheld from creditors. At the time of the sale the vendors were insolvent. That fact was recognized by them, and was known as well to plaintiff as to Hayner & Co., and to other creditors. By the sale of March 13, 1882, the vendee, intended to obtain and the vendors intended to give to it, a preference over all other creditors. Before the sale the plaintiff requested Webb & Co. to transfer to it only so much of their property as was necessary to discharge its claim. This was refused by Webb & Co., who, in view of the character of their stock, insisted upon selling nothing less than the whole of it, together with their unsettled accounts. Plaintiff would not have purchased at all if Webb & Co. had been able to secure them in any way. It made the purchase because there was no other mode of saving its claim. Immediately upon the sale being effected, Webb & Co. surrendered, and the plaintiff, by its agent Spaulding, took possession of the articles sold, and through him, thereafter and until the before-mentioned attachment was levied, conducted the business, exercising absolute control over the property. Within a day or two after taking possession the plaintiff caused such an alteration in the sign of the establishment as showed that the business was being conducted by it as the successor of John A. Webb & Co. After the sale the members of that firm remained in the employment of plaintiff, as clerks or salesmen, at a fixed monthly compensation. This was in pursuance of an understanding with the plaintiff at the time of the sale—their knowledge of the busi-

ness and their acquaintance with customers being regarded by it as important in the disposition of the property. Plaintiff also retained in its employment others who had been clerks for Webb & Co. While the latter thought they had been unduly pressed by Hayner & Co., and for that reason did not, at the time of the sale, feel as kindly toward them as toward other creditors, and intended by the sale to give a preference to other creditors over Hayner & Co.—of which fact plaintiff was informed at the time of its purchase—they had no purpose to hinder and delay Hayner & Co. in the collection of their debts, except as that result was involved in their giving preference to the plaintiff; nor had plaintiff any purpose, in the whole transaction, except, by means of the purchase, to secure its own debt. The evidence discloses a race of diligence between creditors, who knew the failing condition of their common debtors, and knew that the latter had the right to make a preference among them.

The defendants, in their answer, charge that the alleged purchase by plaintiff was pursuant to a combination and conspiracy between it and the firm of John A. Webb & Co., whereby a pretended sale was to be made with a secret reservation of an interest in the vendors beyond what was necessary to discharge plaintiff's claim against them; in other words, that there was a purpose and design on the part of the vendors and vendee, to put the property of the debtors in such condition that plaintiff would be secured while Webb & Co. held at bay other creditors, whom they did not intend to prefer, particularly Hayner & Co., and thus hinder and delay them in the collection of their demands.

It is contended that the charge of combination and conspiracy was established by various declarations and statements of John A. Webb, and of Spaulding, the plaintiff's agent, made after the sale of the 13th of March, 1882. To the admission of these declarations and statements as evidence the plaintiff objected. Its objection was overruled, and exception was taken in proper form to the action of the court. The competency of that evidence is the principal question to be determined.

We are of opinion that the court below erred in allowing the

defendants to introduce proof of these declarations and statements made after the sale. The instruction to the jury upon this point was in these words: "That it is true, as contended by the plaintiff, that if the sale, when made, was not vitiated because of fraud, and the sale was one that passed the title to the plaintiff as against the creditors of Webb & Co., then no act or declaration of the Webbs, or that of Spaulding, afterwards made, could affect plaintiff's right to have and hold the property. Evidence of what was said and done afterwards by the person in possession and in charge of the goods has been admitted with a view to ascertain the true character of the sale when made, and can only be considered with reference thereto." The jury must have understood, from this language, that they were at liberty in ascertaining "the true character of the sale when made," to find that plaintiff participated in the fraud charged, if the statements of John A. Webb and of Spaulding after the sale justified that conclusion. But such is not the law.

Webb & Co. were not in possession, within the meaning of the rule, announced in some cases, that permits, in favor of creditors, proof of the declarations of a vendor of personal property, who is allowed, after sale, to control, manage, and dispose of it just as he had before done. They were not, in any legal sense, in possession after March 13, 1882. The plaintiff was itself in actual possession, exercising by its agent full control. The vendors, it is true, entered plaintiff's service as soon as the sale was made and possession was surrendered, but only as clerks or salesmen, with no authority except such as employees of that character ordinarily exercise. What they might say, not under oath, to others, after possession was surrendered, as to the real nature of the sale, was wholly irrelevant. They were competent to testify under oath, and subject to cross-examination, as to any facts immediately connected with the sale, of which they had knowledge; but their statements out of court, they not being parties to the issues to be tried, were mere hearsay. After the sale, their interest in the property was gone. Having become strangers to the title, their admissions are no more binding on the vendee than the admissions of others. It is against all principle that their declarations, made after they

had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee.

It is, however, insisted that Webb's declarations after the sale were admissible in support of the charge of combination or conspiracy to defraud the defendants, Hayner & Co., and other creditors. Without extending this opinion by a review of the adjudged cases in which there was proof of concert or collusion between vendor and vendee to defraud creditors, and in which subsequent declarations of the vendor were offered in evidence against the vendee to prove the true character of the sale, it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestæ*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and vendee to hinder creditors, outside of certain statements which Webb is alleged to have made after his firm had parted with the title and surrendered possession.

It is argued that these subsequent declarations of Webb were competent for the purpose of contradicting him as a witness in behalf of the plaintiff, by showing that he had made statements out of court different from those made as a witness in behalf of the plaintiff. No foundation was laid for any such use of those declarations. Besides, if any such foundation had existed, the court should have instructed the jury, that, in determining, between the parties to the record, the true character of the sale, the subsequent declarations of Webb were competent only as impeaching his credibility as a witness.

It is also contended that the declarations and admissions of Spaulding, the plaintiff's agent, in controlling and disposing of the property, were evidence against the plaintiff. But this position cannot be sustained. What Spaulding and the Webbs did, in and about the management of the property after the sale, could be proven if it served to explain the nature and extent of plaintiff's possession. It was for the jury to say whether there was a real change of possession and control. But noth-

ing that Spaulding said, after the sale, to others, was competent upon the issue as to the character of the sale; that is, whether it was made in good faith, or with the intent on the part of Webb & Co. and the plaintiff to hinder and delay creditors. Spaulding was plaintiff's agent to control and manage the property. It was not within the scope of his agency to make admissions or declarations as to the circumstances under which, and the purpose for which, the plaintiff bought the property. Such admissions or declarations are only recitals of the details or circumstances of a past occurrence, and are not proof of the existence of the occurrence. They constitute, in their essence, hearsay evidence.

We are of opinion, upon the whole case, that the jury were misdirected as to the law of the case, by those portions of the charge which allowed them to consider as evidence the subsequent declarations or admissions of Webb and Spaulding, in respect to the true character or nature of the sale to plaintiff.

The judgment is reversed, with directions to set aside the verdict and award a new trial.

Reversed.

SMITH *v.* WHITNEY & Others.

APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Argued December 11, 1885.—Decided January 4, 1886.

This court has appellate jurisdiction, under the act of March 3, 1885, ch. 355, of a judgment of the Supreme Court for the District of Columbia, dismissing a petition for a writ of prohibition to a court martial convened to try an officer for an offence punishable by dismissal from the service, and consequent deprivation of a salary which during the term of his office would exceed the sum of $5000.

Where an inferior court has clearly no jurisdiction of a suit, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled as matter of right to a writ of prohibition from a court having authority to grant it; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error.

Statement of Facts.

It seems, that a writ of prohibition should issue from the law side of a court having both common law and equity powers.

Whether the Supreme Court of the District of Columbia has power to issue a writ of prohibition to a court martial--*quære*.

A writ of prohibition does not lie to the Secretary of the Navy convening a naval court martial.

A writ of prohibition does not lie to a court martial to correct mistakes in the decision of questions of law or fact within its jurisdiction.

A writ of prohibition will not be issued to prohibit a naval court martial from trying a naval officer, being paymaster general and chief of a bureau in the Department of the Navy, upon a charge of "scandalous conduct tending to the destruction of good morals," with specifications alleging that as such chief of bureau he made contracts and payments in disregard of the interests of the government, and to promote the interests of contractors, in violation of law, and to the great scandal and disgrace of the service, and injury of the United States; and upon an additional charge of "culpable inefficiency in the performance of duty," with specifications setting forth acts similar to those specified under the first charge.

A naval court martial, which has returned its proceedings to the Secretary of the Navy, and been adjourned by him until further order, may be reconvened by him to reconsider those proceedings.

This was a petition, filed September 21, 1885, praying the Supreme Court of the District of Columbia to issue a writ of prohibition to the Secretary of the Navy, and to a general court martial of naval officers convened by his order of June 25, 1885, to try the petitioner, a pay inspector in the navy, and, by appointment of the President, confirmed by the Senate, of the date of June 27, 1882, "Chief of the Bureau of Provisions and Clothing and Paymaster General in the Department of the Navy, with the relative rank of Commodore," upon certain charges and specifications, a copy of which was made part of the petition.

The first of those charges was "Scandalous conduct tending to the destruction of good morals," under which were fourteen specifications, alleging that "the said Joseph A. Smith, then being a pay inspector in the United States navy, and having been theretofore, as such officer of the navy, duly appointed Chief of the Bureau of Provisions and Clothing, with the title of Paymaster General, in the Department of the Navy," and being responsible for the proper and reputable administration thereof, and it being his duty to protect the interests of the

government in the making of contracts for supplies for the navy, did various acts, which were set forth in different forms and with much detail, but the substance of which was that he enlarged existing contracts, so as to include at the contract price additional supplies not required by the necessities of the service, without consulting the Secretary of the Navy or the sureties on the contractor's bond, or giving any opportunity for competition, and when the market was falling; extended the time of delivery of supplies contracted for, thereby necessitating the acceptance of supplies of an inferior quality; falsified a copy of a contract, and thereby enabled the contractor to obtain payment at a place other than that required by the contract; and by directions and instructions to pay-officers caused to be paid claims which had been refused by other pay-officers, and which, as he knew, had been declared illegal by the accounting officials of the Treasury; and by so causing pay-officers to pay these claims, and to pay them out of appropriations for years other than those in which the contracts were made, greatly embarrassed those officers in the performance of their duties; and thereby wilfully and knowingly, in disregard of his duties and responsibilities as chief of bureau, subordinated the interests of the government to those of the contractors, in violation of law, and "to the great scandal and disgrace of the service, and the injury of the United States."

The second charge was "Culpable inefficiency in the performance of duty," under which were four specifications, alleging that he failed in his duty in not obliging contractors to comply with the terms of their contracts, and in allowing deliveries to be made after the time for delivery had expired; and also in purchasing more supplies than the current needs of the navy required, and in purchasing unfit supplies, and in not affording due opportunity for competition.

In the application for a writ of prohibition, the petitioner alleged that, immediately upon the organization of the court martial, he objected that it had no jurisdiction of him, or of the charges and specifications against him, or of the subject-matter contained in them, or any part thereof; but the court martial overruled all his objections to its jurisdiction, and proceeded to

hear evidence on the charges, and to try him thereon. He further alleged that none of the charges or specifications in any degree arose out of or were involved in any case arising in the land or naval forces of the United States, or in the militia, but all, as appeared on their face, pertained exclusively to duties required of and performed by him in the exercise of a purely civil office, and under a civil commission; that none of the specifications charged him with the violation of any law of the United States, or of any rule of procedure in the Navy Department, or of any order of the Secretary of the Navy; that each of the acts complained of had been approved by the late Secretary of the Navy in the lawful exercise of his discretionary power over the subject, and that the exercise of his discretion could not be reviewed by his successor, or by a court martial; that throughout the trial the petitioner insisted on his objections to the jurisdiction; that after the conclusion of the testimony and arguments the court martial went into secret session, and excluded him and his counsel from its presence, and, as he was informed and believed, rendered some judgment adverse to him, and submitted it to the Secretary of the Navy for his approval, but it had not been approved; that all the proceedings at the trial, with the finding and judgment of the court, were made up and signed by the judge advocate, and returned to the exclusive custody of the Secretary of the Navy, and the court discontinued its sessions, and adjourned without day; that afterwards the Secretary of the Navy made an order, the terms of which were unknown to the petitioner, directing the court martial to reconvene on September 25, 1885, and to take additional action in the matter of the charges and specifications and evidence submitted to it as aforesaid; that it was about to reconvene accordingly, and, without permitting the presence of the petitioner or his counsel, to reconsider the evidence and the principles of law involved in his trial, and to reëxamine and readjudge his case; that the proceedings about to be taken by the court martial were not only unauthorized for want of jurisdiction, but would deprive him of the right of trial by jury, and put him twice in jeopardy for the same offence, in violation of the Constitution of the United States;

and that he was without remedy, except by the writ of prohibition.

On September 23, the petitioner moved for an order upon the defendants to show cause why a writ of prohibition should not issue as prayed for; and it was ordered that the petition be entertained and certified for hearing in the first instance to the court in general term.

On September 24, the Secretary of the Navy filed a plea, averring that the court ought not to hear or take further cognizance of the petition and proceedings, because their object and purpose were "to prohibit and restrain him from the exercise of powers and duties appertaining to his said office of Secretary of the Department of the Navy, whereas it is beyond the jurisdiction of this court and the judicial power of the United States to restrain or otherwise intermeddle with the exercise of the said powers and duties, which belong to and form a part of the political powers and duties of the government of the United States."

On the same day, the members of the court martial filed a plea and answer, in which they "say that they are advised that this court has no jurisdiction to arrest by writ of prohibition any proceeding they may take in the court martial referred to in the said petition;" and "not waiving in any wise, but insisting on their jurisdictional exception or plea, answering" admitted that the petitioner pleaded to the jurisdiction of the court martial, and that his plea was overruled; but alleged that he was subject to its jurisdiction, and that there was nothing in the legislation of Congress, creating the office of paymaster-general of the navy, manifesting an intention to withdraw the incumbent of that position from amenability to a court martial for offences committed while exercising the same; that the first charge and the specifications pursuant thereto were founded on the twenty-second of the Articles for the Government of the Navy, contained in § 1624 of the Revised Statutes, and on § 127 of the Orders, Regulations and Instructions for the Administration of Law and Justice in the United States Navy, which prescribes that "when the offence is a disorder or neglect not specially provided for, it should be

charged as scandalous conduct tending to the destruction of good morals;" and the second charge and the specifications pursuant thereto were founded on the ninth paragraph of the eighth Article for the Government of the Navy; that the question whether the acts and omissions charged against the petitioner were offences was a matter for the exclusive decision of the court martial; and that the court martial did not and could not adjourn itself without day, but, as appeared by orders, copies of which were produced, was by order of the Secretary of the Navy of August 11 "adjourned until further orders," and by his order of September 16 directed to reassemble on September 25; and concluded by praying to be dismissed with costs.

On September 25 the petitioner filed a replication, in which he "joins issue with the defendants upon the return and answer filed to the petition for the writ of prohibition;" and upon a hearing in general term the court entered the following judgment: "The court being of opinion that it has not jurisdiction of the matter complained of, it is therefore considered that the petition be and it is hereby dismissed, with costs, to be taxed by the clerk."

The petitioner in open court prayed and was allowed an appeal from that judgment, and also sued out a writ of error to reverse it.

Mr. Jeff Chandler for appellant and plaintiff in error. *Mr. Eppa Hunton* was with him on the brief.

Mr. Assistant Attorney-General Maury for appellees and defendants in error.

Mr. Justice Gray delivered the opinion of the court. After stating the facts as above reported, he continued:

The final judgment or decree of the Supreme Court of the District of Columbia in any case in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, may be reviewed and reversed or affirmed in this court upon writ of error, if the judgment is at law, or upon appeal,

if the decree is in equity. Rev. Stat. §§ 691, 692, 705; Rev. Stat. D. C. §§ 846, 847; Act of March 3, 1885, ch. 366, 23 Stat. 443.

The objection, founded on *Kurtz* v. *Moffitt*, 115 U. S. 487, and cases there cited, that this court has no appellate jurisdiction of the present case, because there is nothing in dispute the value of which can be estimated in money, cannot be sustained. The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars. Rev. Stat. §§ 1556, 1565, 1624, arts. 8, 22, 48, 53. The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction. *Columbian Ins. Co.* v. *Wheelwright*, 7 Wheat. 534; *United States* v. *Addison*, 22 How. 174.

It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities. *In*

re Forster, 4 B. & S. 187, 199; *Mayor &c. of London* v. *Cox*, L. R. 2 H. L. 239, 280; *Worthington* v. *Jeffries*, L. R. 10 C. P. 379, 380; *Chambers* v. *Green*, L. R. 20 Eq. 552, 555. See also *Weston* v. *City Council of Charleston*, 2 Pet. 449, reversing on error *S. C.*, Harper, 340.

The petitioner in the present case objected, at the very beginning of the proceedings before the court martial, that it had no jurisdiction to try him on the charges laid before it; and the facts upon which his objection to its jurisdiction are based, as well as the final judgment dismissing his petition for a writ of prohibition, appear of record. The case is therefore within the appellate jurisdiction of this court.

The Supreme Court of the District of Columbia having both common law and equity powers, it would seem that the proceedings in this case must be considered as on the common law side of that court, and that the proper mode of invoking the appellate jurisdiction of this court is by writ of error. In England, from long before the Declaration of Independence, writs of prohibition have usually issued from the courts of common law, and do not appear to have issued from a court of chancery in any case in which a court of law might issue them, except during vacation, when the courts of common law were not open. 2 Hale P. C. 147; Lord Holt, in *Blackborough* v. *Davis*, 1 P. Wms. 41, 43; *Anon.*, 1 P. Wms. 476; *Montgomery* v. *Blair*, 2 Sch. & Lef. 136; *In re Foster*, 24 Beavan, 428; *In re Bateman*, L. R. 9 Eq. 660. And in this country, so far as we are informed, these writs have never been issued but by a court of common law jurisdiction. But as the petitioner has both taken an appeal and sued out a writ of error, it is immaterial which is the proper form of bringing up the case.

The hearing below was upon a rule to show cause why a writ of prohibition should not issue as prayed for. The question at that hearing was the general question whether the court should issue a writ of prohibition. That question could not, at that stage of the case, be narrowed or divided by the pleadings filed by the defendants. The judgment, as recorded, although it contains a statement of the court's "opinion that it has no

jurisdiction of the matter complained of," is a general judgment dismissing the petition, with costs, which could not have been awarded upon a judgment of dismissal for want of jurisdiction. *Mayor* v. *Cooper*, 6 Wall. 247; *Elk* v. *Wilkins*, 112 U. S. 94, 98. The writ of error brings in question the judgment, not the opinion, of the court below. If the petition was rightly dismissed for any reason, whether because that court had no jurisdiction to issue a writ of prohibition to a court martial, or because the court martial had jurisdiction of the charges against the petitioner, the judgment must be affirmed.

It is argued in behalf of the petitioner that the Supreme Court of the District of Columbia is authorized to issue writs of prohibition, on the same grounds on which it was held, in *United States* v. *Schurz*, 102 U. S. 378, to be authorized to issue writs of mandamus, namely, because by the act of February 27, 1877, ch. 69, § 2, 19 Stat. 253, that court has cognizance of "all cases in law and equity between parties, both or either of which shall be resident or be found within said District;" as well as because it has all the powers formerly exercised by the courts of Maryland, which, as declared by the Court of Appeals of that State in *Price* v. *State*, 8 Gill, 295, 310, included "all the powers exercised in England by the Court of King's Bench, so far as these powers are derived from rules and principles of the common law, and so far as the same are suited to the change in our political institutions, and are not modified by our constitutional or statutory enactments." On the other side, it is contended that neither the Supreme Court of the District of Columbia, nor any other court of the United States, is empowered to issue writs of prohibition to a court martial.

Whether the Supreme Court of the District of Columbia has power in any case to issue a writ of prohibition to a court martial is a question of great importance, not heretofore adjudged by this court; and we are not inclined, in the present case, either to assert or to deny the existence of the power, because upon settled principles, assuming the power to exist, no case is shown for the exercise of it. In deciding the case upon the facts before us, and expressing no opinion upon the broader question, because the determination of the case does not require

it, we take the same course that has been followed by eminent English judges in disposing of applications for writs of prohibition under similar circumstances. *Ex parte Smyth*, Tyrwh. & Gr. 222, 225; *S. C.*, 2 Cr., M. & R. 748, 753; 1 Gale, 274, 277; *In re Forster*, 4 B. & S. 187, 198.

The object of a writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance. It can only be issued to restrain the exercise of judicial functions. When the suit complained of is brought by a private person, he may be joined as a defendant. But when it is a suit or prosecution on behalf of the government, the writ of prohibition can go to the court only. 3 Bl. Com. 112; *Ex parte Braudlacht*, 2 Hill (N. Y.) 367; *Thomson* v. *Tracy*, 60 N. Y. 31; *Connecticut River Railroad* v. *Franklin County Commissioners*, 127 Mass. 50, 59, 60.

The Secretary of the Navy being an executive officer, and not a member of the court martial sought to be prohibited, it is quite clear that his acts concerning the petitioner cannot be the subject of a writ of prohibition. The reasons against issuing a writ of prohibition to the court martial require fuller statement.

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or *certiorari*, to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. These rules have been always adhered to by this court, in the exercise of the power expressly conferred upon it by Congress to issue writs of prohibition to the District Courts sitting as courts of admiralty; *United States* v. *Peters*, 3 Dall. 121; *Ex parte Easton*, 95 U. S. 68; *Ex parte Gordon*, 104 U. S. 515; *Ex parte Ferry Co.*, 104 U. S. 519; *Ex parte Pennsylvania*, 109 U. S. 174; as well as by the courts of England and of the several States, in the exercise of their inherent jurisdiction to issue writs of prohibition to courts martial. *Grant* v. *Gould*, 2 H. Bl. 69; *State* v. *Wakely*, 2 Nott & McCord, 410; *State* v. *Stevens*, 2 McCord, 32; *Washburn* v. *Phillips*, 2 Met. 296.

And this court, although the question of issuing a writ of prohibition to a court martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise. *Dynes* v. *Hoover*, 20 How. 65, 82, 83; *Ex parte Reed*, 100 U. S. 13; *Ex parte Mason*, 105 U. S. 696; *Keyes* v. *United States*, 109 U. S. 336; *Wales* v. *Whitney*, 114 U. S. 564, 570; *Kurtz* v. *Moffit*, 115 U. S. 487, 500. See also *Wise* v. *Withers*, 3 Cranch, 331; *Meade* v. *Deputy Marshal of Virginia*, 1 Brock. 324; *In re Bogart*, 2 Sawyer, 396; *In re White*, 9 Sawyer, 49; *Barrett* v. *Hopkins*, 2 McCrary, 129.

In the leading case of *Grant* v. *Gould*, 2 H. Bl. 69, under an article of war subjecting to punishment at the discretion of a court martial any officer or soldier convicted of "having advised or persuaded any other officer or soldier to desert his Majesty's service," the petitioner for a writ of prohibition had been charged with "having advised and persuaded" two soldiers in the Coldstream Regiment of foot guards "to desert his Majesty's service, and to enlist into the service of the East India Company, knowing them at the same time to belong to the said regiment of foot guards." The sentence did not in terms find him guilty of having advised or persuaded them to desert the King's service; but merely stated that the court martial was of opinion that he was "guilty of having promoted and having been instrumental towards the enlisting of" the two soldiers "into the service of the East India Company, knowing them at the said time to belong to the said regiment of foot guards; and deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this, that it is rather inferior, but in a very slight degree, in point of aggravation," adjudged him to be punished. It was argued for the petitioner that he had not been found guilty of advising or persuading to desert, which was the substance of the offence charged, but, at the utmost, of promoting and aiding in the enlistment into the service of the East India Company, which of itself was no offence under the Articles of War or the Mutiny Act.

But Lord Loughborough, delivering the judgment of the Court of Common Pleas, discharging the rule for a writ of prohibition, said: "Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if, by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it is an error in the proceedings; but we cannot prohibit upon that account. The sentence in the case of an unfortunate admiral* was certainly an inaccurate one. The question there was whether the court had not mistaken the law, yet a prohibition was not thought of. But it is unnecessary to discuss the sentence further; it would be extremely absurd to comment upon it as if it was a conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed." 2 H. Bl. 107.

Of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. This is nowhere better stated than by Mr. Justice Perry in the Supreme Court of Bombay, saying: "And the principle of the non-interference of the courts of law with the procedure of courts martial is clear and obvious. The groundwork of the jurisdiction, and the extent of the powers of courts martial, are to be found in the Mutiny Act and the Articles of War, and upon all questions arising upon these her Majesty's judges are competent to decide; but the Mutiny Act and Articles of War do not alone constitute the military code, for they are, for the most part, silent upon all that relates to the procedure of the military tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points common law judges have no opportunity, either from their law books or from the course of their ex-

* See Admiral Byng's Trial (official ed. fol. London, 1757) 3, 4, 125–130; 1 McArthur on Courts Martial (4th ed.) 103, 328; 2 Id. 274, 387–398.

perience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of courts martial those rules which are applicable to another and different course of practice." *Porret's Case*, Perry's Oriental Cases, 414, 419. So in *Martin* v. *Mott*, 12 Wheat. 19, 35, Mr. Justice Story, delivering the opinion of this court, said that the law by which courts martial were bound to execute their duties and to regulate their mode of proceeding, in the absence of positive enactments, was "the general usage of the military service, or what may not unfitly be called the customary military law." The same view, as regarding naval courts martial, was asserted and acted on by this court in *Dynes* v. *Hoover*, 20 How. 65, 82.

The material provisions of the Revised Statutes, and of the Navy Regulations, affecting the nature of the office and duties of the petitioner, and the jurisdiction of the court martial over him, are as follows:

By § 415 of the Revised Statutes, "there shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof." By § 419, "the business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following bureaus," one of which is "Seventh. A Bureau of Provisions and Clothing." And by § 420, "all of the duties of the bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have force and effect as such."

By § 421, "the chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years." By § 425, "the Chief of the Bureau of Provisions and Clothing shall be appointed from the list of paymasters of the Navy, of not less then ten years standing."

By §§ 1471, 1472, he "shall have the relative rank of commodore while holding said position," and the title of Paymaster General; and by § 1473, upon being retired from that position by reason of age or length of service, he shall have the relative rank of commodore.

By § 178, in case of the death, resignation, absence or sickness of the chief of any bureau, his duties are to be performed by his deputy, or if there be none, by the chief clerk of such bureau, unless the President shall direct them to be performed by some other officer in either department.

Chapter 10 of Title 15 of the Revised Statutes, entitled "Articles for the Government of the Navy," contains the following:

"SEC. 1624. The Navy of the United States shall be governed by the following articles:"

"ART. 8. Such punishment as a court martial may adjudge may be inflicted on any person in the Navy—

"First. Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals;"

"Ninth. Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty."

"ART. 22. All offences committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished as a court martial may direct.

"ART. 23. All offences committed by persons belonging to the Navy while on shore shall be punished in the same manner as if they had been committed at sea."

The Orders, Regulations and Instructions for the Administration of Law and Justice in the United States Navy, issued by the Secretary of the Navy under authority of the President in 1870, provide, in § 126, that when a charge "comes directly under any enactment, it should be set forth in the terms used therein;" and in § 127, that "when the offence is a disorder or neglect not specially provided for, it should be charged as 'scandalous conduct tending to the destruction of good morals.'"

By § 1547 of the Revised Statutes, passed since the adoption

of the Navy Regulations of 1870, "the orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner." This legislative recognition of the Navy Regulations of 1870 "must," as was said by Chief Justice Marshall of a similar recognition of the Army Regulations in the act of April 24, 1816, ch. 69, § 9, 3 Stat. 298, "be understood as giving to these regulations the sanction of the law." *United States* v. *Maurice*, 2 Brock. 96, 105; *Ex parte Reed*, 100 U. S. 13.

It is argued for the petitioner that his office of Paymaster General and Chief of a Bureau in the Department of the Navy, under a distinct appointment by the President and confirmation by the Senate, is a separate office of a purely civil character; that the duties of that office are not military, but civil only, relating to the business of the Navy Department, performed under the authority of the Secretary of the Navy, who is exclusively a civil officer, and, in case of a vacancy in the office of chief of bureau, or of his absence, to be performed by a deputy or chief clerk, who is also exclusively a civil officer; and therefore that a violation of those duties can be prosecuted in the civil courts only, and not by court martial.

On the other hand, it is argued that the petitioner is an officer of the navy; that no one but an officer of the navy of a certain rank can be appointed to the office of chief of bureau and paymaster general; that the petitioner's appointment to that office gives him the relative rank of commodore in the navy; that the duties of paymaster general are naval duties performed by a naval officer; and therefore that any violation of those duties is triable and punishable by naval court martial.

The charges on which the court martial was ordered to try the petitioner are drawn up in two aspects. The leading charge is for "scandalous conduct tending to the destruction of good morals," and various acts done by the petitioner as paymaster general are set forth in fourteen specifications under that charge. The other charge is for "culpable inefficiency in the performance of duty," with four specifications, some of which,

at least, allege, though in different forms, acts set forth in the specifications under the first charge.

If the court martial has jurisdiction of the principal charge and of some or all of the specifications under it, the addition of the second charge with its specifications affords no ground for issuing a writ of prohibition. The evidence taken before the court martial is not produced or relied on by the petitioner. The question presented by the record before us is whether the court martial should be prohibited from trying him on the charges and specifications laid before it; and the case comes within the rule stated by Chief Justice Shaw in *Washburn* v. *Phillips*, already cited, "Unless it appears upon the face of the proceedings that the court has no jurisdiction of any part of the subject matter of these charges, it is not a case for a prohibition." 2 Met. 299. There may indeed be cases in which two matters before the inferior court are so distinct, that a writ of prohibition may go as to the one and not as to the other. But when the leading charge is within its jurisdiction, and the other charge, though varying in form, is for the same or similar acts, like a second count in an indictment, and the same sentence may be awarded on the first charge as upon both, a writ of prohibition should not issue. *Enraght* v. *Penzance*, 7 App. Cas. 240.

The essential point to be determined, therefore, is whether the court martial has jurisdiction of the first charge; and whether it would have jurisdiction of the second, if that were the only one, is immaterial.

In *Dynes* v. *Hoover*, above cited, this court held that the jurisdiction of courts martial, under the articles for the government of the navy established by Congress, was not limited to the crimes defined or specified in those articles, but extended to any offence which, by a fair deduction from the definition, Congress meant to subject to punishment, being "one of a minor degree, of kindred character, which has already been recognized to be such by the practice of courts martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial;" or which, though

not included, in terms or by construction, within the definition, came within "a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea." 20 How. 82.

The 32d of the Articles for the Government of the Navy, established by the act of April 23, 1800, ch. 33, 2 Stat. 49, in force at the time of that decision, has been retained in the existing Article 22, before cited, substituting only, at the beginning, the word "offences" for "crimes" and, in describing the mode of punishment, the words "as a court martial may direct," instead of "according to the laws and customs in such cases at sea." As the article in its new form still applies only to offences "not specified in the foregoing articles," the alteration was evidently intended to change only the rule of punishment, leaving within the jurisdiction of courts martial cases not so specified, but recognized as military offences by the usages of the naval service.

It does not, therefore, appear to us important to inquire whether, by the rules that govern military courts, the first charge should be considered as made under the concluding words of the first clause of Article 8, punishing "profane swearing, falsehood, drunkenness, gambling, theft, or any other scandalous conduct tending to the destruction of good morals;" or under Article 22, punishing "all offences committed by persons belonging to the navy, which are not specified in the foregoing articles;" for in either view, as we have already seen, it should, under the Regulations of 1870, recognized and sanctioned by Congress, be charged as "scandalous conduct tending to the destruction of good morals."

Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done

in the performance of military duties, or in a civil position, or in a social relation, or in private business.

Two cases, often cited in books on military law, show that acts having no relation to the public service, military or civil, except so far as they tend to bring disgrace and reproach upon the former—such as making an unfounded claim for the price of a horse, or attempting to seduce a brother officer's wife during his illness—may properly be prosecuted before a court martial under an article of war punishing "scandalous and infamous conduct unbecoming an officer and a gentleman;" for the sole ground on which the sentence was disapproved by the King in the one case, and by the Governor General of India in the other, was that the court martial, while finding the facts proved, expressly negatived scandalous and infamous conduct, and thereby in effect acquitted the defendant of the charge. 2 McArthur on Courts Martial (4th ed.) 298; Hough's Precedents in Military Law, 238; Samuel on Military Law, 650–652; Simmons on Courts Martial (4th ed.) 418–420; De Hart on Courts Martial, 375–377.

In a third case, a lieutenant in the army was tried in England by a general court martial for conduct on board ship while coming home from India as a private passenger on leave of absence from his regiment for two years. The charge was that, being a passenger on board the ship Cæsar on her voyage from Calcutta to England, he was accused of stealing property of one Ross, his servant; and that the officers and passengers of the ship, after inquiring into the accusation, expelled him from their table and society during the rest of the voyage; yet that he, "under circumstances so degrading and disgraceful to him, neither then, nor at any time afterwards, took any measures as became an officer and a gentleman to vindicate his honor and reputation; all such conduct as aforesaid being to the prejudice of good order and military discipline." Before and at the trial, he objected that the charge against him did not, expressly or constructively, impute any military offence, or infraction of any of the Articles of War, or any positive act of misconduct or neglect, to the prejudice of good order and military discipline; or state any fact which, if true, subjected him

to be arraigned and tried as a military officer. But the court martial proceeded with the trial, found him "guilty of the whole of the charge produced against him, in breach of the Articles of War," and sentenced him to be dismissed the service, and added, "that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the army; and that it does not mean by its sentence to offer any opinion as to the original charge of theft, of which the prisoner was accused by the man Ross." The sentence was approved by the King, and carried into execution, and for that reason the Court of King's Bench denied a writ of prohibition. Lord Denman, in delivering judgment, said that the court did not think it necessary to consider whether the charge was so framed as to bring the party within the Articles of War; but that it agreed with Lord Loughborough's remark in *Grant* v. *Gould*, above cited, that it would be extremely absurd to expect the same precision in a charge brought before a court martial as was required to support a conviction by a justice of the peace. *In re Poe*, 5 B. & Ad. 681, 688; *S. C.*, 2 Nev. & Man. 636, 644.

Under the 61st of the Articles of War for the Government of the Army of the United States, which, omitting the words "scandalous or infamous," provides that "any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," it is observed in the most recent treatise on military law, and supported by copious references to precedents, "While the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history. It may equally well have originated in some private transaction of the party, (as a member of civil society, or as a man of business,) which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority, as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service." 1 Winthrop on Military Law, 1023

& *seq.* See also 6 Opinions of Attorneys General, 413, 417; *Runkle* v. *United States*, 19 C. Cl. 396, 414.

This being the first case of an application to a court of the United States for a writ of prohibition to a court martial, we have cited the authorities bearing upon the subject more fully than might have been thought fit under other circumstances.

It is hardly necessary to add that by the Navy Regulations of 1870, §§ 260–265, the court martial could only be dissolved by the Secretary of the Navy, and might, at any time before he had dissolved it, be lawfully reconvened by him to reconsider its proceedings. *Ex parte Reed*, 100 U. S. 13.

To order a writ of prohibition to issue in the present case would be to declare that an officer of the navy, who, while serving by appointment of the President as chief of a bureau in the Navy Department, makes contracts or payments, in violation of law, in disregard of the interests of the government, and to promote the interests of contractors, cannot lawfully be tried by a court martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals, and to the dishonor of the naval service.

This we are not prepared to do, being clearly of opinion that such conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court martial under the articles and regulations made or approved by Congress in the exercise of the powers conferred upon it by the Constitution, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury.

Judgment affirmed.

FIELD *v.* DE COMEAU & Another.

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

Submitted December 7, 1885.—Decided January 4, 1886.

The patent issued to appellant, September 15, 1874, for an improved fastening in gloves is not infringed by the appellees' mode of using springs for the same purpose.

This was a bill in equity brought by appellant as complainant below to restrain appellees from an alleged infringement of a patent for an improved glove fastening. The facts are stated in the opinion of the court.

Mr. Eugene N. Elliot for appellant.

No appearance for appellees.

Mr. Justice Matthews delivered the opinion of the court.

The appellant, who was complainant below, filed his bill in equity to restrain an alleged infringement by the appellees of letters patent No. 155,077, for an improvement in glove fastenings issued to him September 15, 1874.

The bill was dismissed at the hearing on the ground that the defendants had not infringed.

The material part of the specification forming part of the letters patent is as follows:

"The object of my invention is to cause a glove to fit closely to the hand and wrist of the wearer without the use of buttons or other fastenings; and I attain this object by extending a spring *A*, entirely around the split portion *B* of the glove, in the manner plainly shown in Figure 1 of the accompanying drawing, so that when released the ends *a a* of the said spring shall overlap, as shown in Fig. 2, and thus close the glove upon the wrist.

"The spring is entirely concealed within the material of the

glove, and may be secured to the latter in any suitable manner; but I prefer to simply stitch it in place, as indicated by the dotted lines *x* in Fig. 1.

"The spring may also be variously shaped; but I prefer to construct it of a single piece of wire, bent to the form shown, as I have ascertained, by experiment, that a spring of this form is most suitable for the purpose, while it possesses the further advantage of presenting no sharp or abrupt ends, which would be apt to force their way through the material of the glove.

"The edge view, Fig. 3, shows the method of bending the spring to conform to the shape of the hand of the wearer of the glove.

"I am aware that springs have been combined with the wristlets of gloves; but they have always extended entirely around the latter, thus rendering it impossible to fold the glove, which was consequently clumsy and inconvenient to carry in the pocket. This objection it will be evident is entirely overcome by my invention.

"I claim—

"The combination, substantially as described, of a spring, *A*, with the split portion *B* of a glove, for the purpose specified."

The drawings referred to are annexed. [See page 189.]

Judge Wheeler holding the Circuit Court, in deciding the case, stated the grounds of his action in dismissing the bill, in an opinion contained in the transcript, as follows:

"The orator has a patent, No. 155,077 dated September 15, 1874, for an improvement in glove fastenings, consisting of the combination of a spring inserted in the material of the glove, and extending around the edges of the slit, which permits drawing the wrist of the glove over the hand, and adjusted so as to spring open by the insertion of the hand and to close automatically and overlap itself, and cause the edges of the slit to overlap each other when the glove is on. The defendants deny infringement. They make and sell for use springs for gloves to be inserted into the material, and with arms extending along each edge of the slit, jointed at the apex, working together like the blade and handle of a jack-knife. The

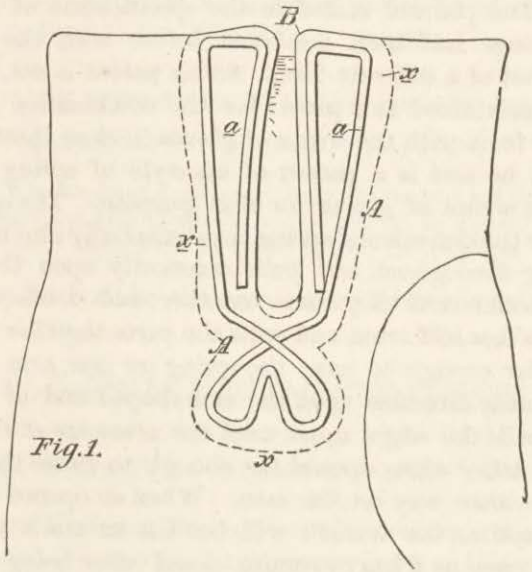


Fig. 1.

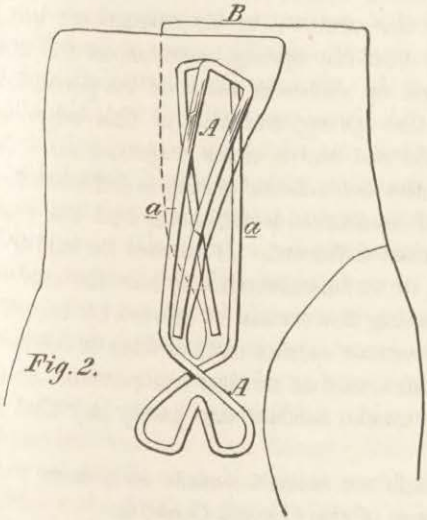


Fig. 2.



Fig. 3.

only question is, whether the use of such springs is an infringement. The plaintiff stated in the specification of his patent that springs had been combined before with the wrists of gloves, but of a different form. So his patent is not, and could not be maintained as a patent for the combination of springs in every form with the wrists of gloves to close them. It proposes to be and is a patent of his style of spring combined with the wrists of gloves for that purpose. The question is, whether the defendants' spring is substantially like his. His is a spring throughout, and pulls constantly upon the parts of the material until they come together and overlap. The defendants' has stiff arms, and pulls the parts together only when closed far enough to have the spring on one arm operate in the opposite direction upon the cam-shaped end of the other, and it pulls the edges apart until the arms are at right angles to each other when opened far enough to cause the spring to act the other way on the cam. When so opened it will not close itself as the orator's will, but has as much tendency to remain open as it has to remain closed after being closed. It is said by an expert called by the orator that if the edge of the cam, which throws the arms apart, was removed, the spring would become more like the orator's in its operation; but he probably failed to notice that the spring operates on the same edge of the cam, although on different sides of its pivot, both in opening and closing the spring, and that if this edge was removed the spring would not move arms together or either way at all. The form of the defendants' spring is different from the orator's; its mode of operation is different, and the result of its operation is somewhat different. It cannot be said to be the same as the orator's, or to be substantially like the orator's. Each got the idea of closing the wrists of gloves by means of springs from others; the orator carries out the idea in his mode and the defendants in theirs, and as neither has control of anything but the particular mode, neither can justly say that the other uses his mode."

For these reasons which we cannot restate in a more satisfactory manner, the decree of the Circuit Court is

Affirmed.

HEALY & Another *v.* JOLIET & CHICAGO RAILROAD COMPANY & Another.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Argued December 16, 17, 1885.—Decided January 4, 1886

The bridge built by the Joliet and Chicago Railroad Company and maintained by the Chicago and Alton Railroad Company over Healy Slough, does not cross it at a point where it is a navigable highway for the public.

The facts which make the case are stated in the opinion of the court.

Mr. Samuel F. Rice for plaintiffs in error submitted on his brief.

Mr. George W. Smith for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Illinois.

The plaintiffs in error, who were plaintiffs below, brought suit in the Circuit Court of Cook County of that State, praying for an abatement, or other appropriate relief, against a railroad bridge across Healy Slough, built by the Joliet and Chicago Railroad Company in 1856, and now kept up and maintained by the Chicago and Alton Railroad Company. This bridge is alleged to be an obstruction to the navigation of the slough, and therefore a nuisance, in regard to which plaintiffs suffer special damage, as owners of certain real estate situated above the bridge, which obstructs the access of vessels coming from Lake Michigan or from the Chicago River through that river and through the slough to plaintiffs' lots.

It is alleged that this slough, at the point where the bridge was built, was a navigable water of the United States, in the navigation of which plaintiffs had especial interest, and that it was navigable from the Chicago River up to and beyond the lots of plaintiffs, and that this navigability was seriously impaired by the bridge of defendants.

The answer denied that the slough was a navigable stream,

and asserted authority under the charter of the Joliet and Chicago Railroad Company to build the bridge as had been done. Much testimony was taken as to the nature and character of the slough in reference to its navigability, and, on hearing, the Circuit Court of Cook County dismissed the bill. An appeal was taken to the appellate court of the First Judicial District of the State, which reversed the judgment of the Circuit Court and granted relief against the bridge as a nuisance.

On further appeal to the Supreme Court of the State, the judgment of the appellate court was reversed, and the order of the Circuit Court dismissing the bill was affirmed.

It appears from the opinions delivered in the appellate court and in the Supreme Court, both of which are found in the record, that there was no difference between them on any question of law, but that they differed on the question whether the slough was in fact a public navigable water at the time the bridge was built over it. The Court of Appeals says: "Whether the Healy Slough is navigable in such sense as to constitute it a common highway must depend upon its capabilities, in its natural state and ordinary volume of water, of being utilized for purposes of commerce or transportation. This presents a mere question of fact to be determined by the evidence in the record." On this evidence that court held that in its natural state the slough was a navigable highway for the public.

The Supreme Court says in its opinion: "The question raised may be treated simply as a question of fact, viz.: Is the body of water spanned by the railroad bridge navigable in the sense of that term as used in the law? We think it is not."

On this question of disputed fact, so far as we have any right to inquire into it under this writ of error, we concur in the opinion held by the Supreme Court, and by the Circuit Court, and do not deem it necessary to set out in this opinion a comparison or examination of the evidence, which is voluminous, as it can serve no good purpose.

The decree of the Supreme Court of Illinois is

Affirmed.

WEBB & Another *v.* BARNWALL & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Argued December 17, 1885.—Decided January 4, 1886.

The cause of action in a suit in equity by the holder of an equitable title to real estate to restrain the owner of the legal title from enforcing a judgment in ejectment against him, and to compel the conveyance of the legal title to the owner of the equitable title, accrues on the entry of final judgment in the suit at law.

This bill of complaint brought by Amanda Sterling and her four sons against Barnwall and Gaynor, as assignees in bankruptcy, was dismissed on demurrer, solely, as appeared from the opinion of the circuit judge, because the suit was barred by the limitation of suits by or against assignees in bankruptcy found in section 5057 of the Revised Statutes, to wit:

"No suit, either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrued for or against such assignee."

The bill set out that on the 5th day of February, 1873, Robert W. Smith was the owner of certain real estate in the town of Selma, in the bill fully described, and on that day he and his wife, Sarah, conveyed the same to Cary W. Butt in trust for the use and benefit of said Robert W. Smith and Charles Walsh; that afterwards said Walsh and Smith, being indebted to Edwin A. Glover, in the sum of $20,000, caused the trustee, Butt, to convey this real estate, in which they had the sole beneficial interest, to said Glover, who received the same in satisfaction of the debt August 31, 1873; that Glover thereupon entered into possession of said property, and that he and his devisees have retained such possession ever since; that, by the will of Glover, who died in 1874, the real estate in question was devised to Amanda Sterling and her sons, the complainants.

Argument for Appellees.

The bill then alleged that Walsh and Smith were members of a copartnership with others under the name of Walsh, Smith & Co., which owed the debt to Glover already mentioned as the consideration of the conveyance to him by Butt, the trustee; that said partnership and the individual members thereof, including Walsh and Smith, were declared bankrupts by the proper court on June 12, 1874, and that Henry W. Barnwall and William E. Gaynor were appointed assignees in said proceeding, and all the estate, both real and personal, of said bankrupts, was by the register duly assigned to them. The bill proceeded to show that these assignees instituted an action of ejectment against complainants, who were in possession of the land under the will of Glover, to recover that possession. This suit was begun in the District Court of the United States for the Middle District of Alabama in October, 1876. A judgment was rendered against complainants, which was affirmed on appeal to the Circuit Court, December 19, 1877. Complainants alleged that the plaintiffs in that suit recovered on the ground that the legal title, which controls in a court of law, never was in Butt, the trustee, but by the statute of uses vested immediately in the said Walsh and Smith.

The bill then alleged that while the complainants might not have had the legal title, and so could not successfully defend the action at law, they had a perfect and just title in equity, which, in this suit, they asked the court to protect. They, therefore, prayed for a decree to compel defendants to convey to them the strict legal title which they held, and for an injunction against them in regard to the judgment, which they asked might be perpetual.

The bill was filed August 1, 1881, within fifteen months after final judgment in the action of ejectment.

Mr. William E. Earle (*Mr. H. A. Herbert* was with him) for appellants.

Mr. D. S. Troy and *Mr. H. C. Tompkins* for appellees, submitted on their brief. The words of the statute set up by the

demurrers are plain: "No suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid in any court whatsoever, unless the same shall be brought within two years from the time the cause of action shall have accrued for or against such assignee." As applicable to the case at bar, the statute expressly bars all suits in equity against the assignee, by any person claiming an adverse interest in or to the property or rights of property of the bankrupt, unless such suit is brought within two years from the time the cause of action shall have accrued. That which is barred is any suit touching the property, or rights of property, of the bankrupt; the time after which such suit is barred is two years after the cause of action accrues. There can be no doubt that this is a suit in equity touching the rights of property of the bankrupts, and it is by one claiming an adverse interest. It is for specific performance of a contract and to enjoin proceedings at law; the first might have been instituted over eight and the latter nearly five years prior to the filing of the bill in this cause, so, in no aspect of the case can the cause of action be said to have accrued within two years before its commencement. *Goodlet* v. *Hansell*, 66 Ala. 151; *Brewer* v. *Brewer*, 19 Ala. 481; *Pollack* v. *Gilbert*, 16 Geo. 398.

The purpose of the statute was to speedily quiet all titles to the property passing to the assignee, to enable him to sell it relieved of all doubt about the soundness of such title, and thereby realize its full value, and without delay distribute the proceeds among the creditors. To accomplish these ends this court has always given to the statute a liberal construction in favor of the bar. By this, no injustice is done to claimants of property, only a little greater diligence is required of them; ample time is given them in which to assert their rights; if they fail to do so they themselves are alone to blame. The policy of a law cannot be disregarded because apparent injustice may be done those who negligently fail to assert their rights within the time allowed by law. *Jenkins* v. *International Bank*, 106 U. S. 571; *Doe* v. *Hyde*, 114 U. S. 247.

Opinion of the Court.

Mr. Justice Miller delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The Circuit Court treating the bill as an original bill, and as the commencement of a new and independent suit, held that the period of limitation of such suits against the assignees began to run at the date of their appointment in 1874. The two years had, therefore, long been passed and the claim was barred.

But if we assume, as appellants argue, that the occasion for a suit in equity did not arise until the final judgment at law, then the bill in this case was in time.

We think the latter is the sound rule. Complainants were in possession under what they supposed to be a good title, until they were evicted, or their title held to be insufficient; they had no occasion to seek to establish their title by a suit in equity, and such a suit they brought within the time of the statute after they ascertained that it was necessary to protect their possession.

But if this were not so clear, it must be held in the courts of the United States, under previous decisions of this court, that the present bill in equity to enjoin the judgment at law, obtained on the mere legal title, while the equity is in the other party, is a continuation of that suit, and, therefore, the proceeding was commenced when the action of ejectment was brought.

In the case of *Simms* v. *Guthrie*, 9 Cranch, 19, Simms had obtained judgment in an action of ejectment in the Circuit Court on a patent from the State of Virginia against Guthrie. Thereupon Guthrie filed his bill in chancery in the same court setting up a superior equitable title by a prior entry to that on which Simms' patent had issued, and asking an injunction and a decree for the legal title. It was urged as an objection to this bill that there were necessary parties who could not be made defendants in the Circuit Court. But this court said that for omitting to bring in these parties an original bill might be dismissed. That, however, was a bill to enjoin a judgment in the Circuit Court, and the bill must be brought in the same court,

and the court would dispense with the parties who could not be brought in. In *Dunn* v. *Clark et al.*, 8 Pet. 1, where an equitable title was set up by bill in chancery against a judgment at law recovered in a Circuit Court of the United States, the court said: "The injunction bill is not considered an original bill between the same parties as at law." It also said if Graham, the successful party in the judgment at law, had lived, the court might have issued an injunction to his judgment at law without a personal service of process except on his attorney, and it is now the settled practice to order such substituted service on the attorney when the plaintiff in the judgment does not reside within the jurisdiction of the court.

In the case of *Dunlap* v. *Stetson*, 4 Mason, 349, Mr. Justice Story said: "I believe the general, if not the universal, practice has been to consider bills of injunction upon judgments in the courts of the United States, not as original but auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under control." This language is cited with approval and the point illustrated in the case of *Jones* v. *Andrews*, 10 Wall. 327, and in *Christmas* v. *Russell*, 14 Wall. 69.

The case before us comes precisely within the principle of these decisions.

The bill in chancery is a continuation of the litigation commenced by the action at law, and its object is to enjoin the judgment in that suit and to correct its injustice by an equity proceeding in the same court.

The bar of the statute as to this relief cannot become perfect until two years of inaction have justified a plea of that kind.

The decree of the Circuit Court is reversed and the case remanded to that court, with directions to overrule the demurrer, and for such further proceeding as to equity belongs.

DOE *v.* LARMORE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Submitted December 17, 1885.—Decided January 4, 1886.

The act of April 10, 1869, 16 Stat. 45, "to renew certain grants of land to the State of Alabama," which were granted by the act of June 3, 1856. 11 Stat. 17, is not to be construed as a new and original grant, but as an extension of the time named in the original act for the completion of the railroads referred to in it.

St. Louis, Iron Mountain and Southern Railway Co. v. *McGee*, 115 U. S. 469, affirmed and applied.

This was an action of ejectment brought in the Circuit Court of DeKalb County, Alabama. Judgment for the defendant, which was affirmed by the Supreme Court of the State. This writ of error was sued out to review the latter judgment. The facts which make the case are stated in the opinion of the court.

Mr. Samuel F. Rice for plaintiffs in error.

Mr. John T. Morgan for defendant in error.

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

This case cannot be distinguished in principle from *St. Louis, Iron Mountain and Southern Railway Co.* v. *McGee*, 115 U. S. 469, decided at the present term. The suit was ejectment to recover the possession of certain tracts of land granted June 3, 1856, by an act of Congress to the State of Alabama to aid in building a railroad "from Gadsden to connect with the Georgia and Tennessee line of railroad through Chattanooga, Wills' and Lookout Valleys." 11 Stat. 17, ch. 41. Sections 3 and 4 of this act are identical with sections 4 and 5 of the act involved in *McGee's* case, and they provided that if the road was not completed in ten years all unsold land should revert to the United States. On the 30th of January, 1858, the legislature of Alabama by a joint resolution transferred this grant to the Wills' Valley Railroad Company, "to be used and applied by said company upon the

terms, conditions, and under restrictions in said act of Congress contained." Sess. Laws Ala. 1857–8, 431. On the 29th of June, 1860, the lands involved in this suit were certified to the State by the Commissioner of the General Land Office under the grant, and on the 20th of February, 1861, they were sold by the company to Larmore, the defendant, and certain other persons who paid the purchase money and entered into possession. The proceeds of the sale were used in building the road, and, on the 7th of June, 1866, the company conveyed the lands in fee simple to the purchasers "against the claim and title of the said Wills' Valley Railroad Company, and of any person or persons claiming under said company." The other grantees named in the deed have since conveyed all their interest to Larmore, who is now in possession. The road was not completed within ten years after the passage of the act of Congress, and, on the 10th of April, 1869, another Act was passed, entitled "An Act to renew certain grants of land to the State of Alabama," 16 Stat. 45, ch. 24, by which this grant was "revived and renewed."

The name of the Wills' Valley Railroad Company was changed to Alabama and Chattanooga Railroad Company in 1868, and on the 2d of March, 1870, the company under that name obtained from the State a loan of State bonds to aid in the completion of its road. The road was afterwards finished so as to perfect title under the original grant. On the 8th of February, 1877, the State executed a deed to John A. Billups and John Swann, trustees, which purported to convey the lands in dispute, under a compromise agreement with the railroad company, to protect the interests of the holders of the State bonds which had been loaned to the company in 1870.

The claim of the plaintiff is that, as the lands in question were not fully earned when the sale was made under which Larmore holds title, and the road was not completed within the ten years fixed by the act of 1856, these lands, as well as those not sold at the end of the ten years, reverted at the end of that time to the United States, and passed again to the State under the act of 1869, which is to be construed as a new grant. We held otherwise in *McGee's* case, and under that

ruling the act of 1869 is to be treated as an extension of the time named in the original act for the completion of the road. As between the company and Larmore the title passed under the deed of 1866, which was executed to give effect to the sale in 1861. The completion of the road within the time fixed by the new act perfected the title of the company under the original grant, and this title inured at once to the benefit of Larmore. As the judgment below sustained Larmore's title and dismissed the suit, it was right, and it is consequently

Affirmed.

KINGS COUNTY SAVINGS INSTITUTION *v.* BLAIR.

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

Argued December 15, 1885.—Decided January 4, 1886.

A suit cannot be maintained against a collector of internal revenue to recover back taxes alleged to have been illegally exacted, when the tax-payer has failed within two years next after the cause of action accrued to present to the Commissioner of Internal Revenue his claim for the refunding in the manner pointed out by law.

This was an action at law to recover back taxes alleged to have been illegally exacted by a collector of internal revenue. The facts which make the case are stated in the opinion of the court.

Mr. Lewis Sanders for plaintiff in error. (*Mr. George N. Sanders* was with him on the brief.)

Mr. Solicitor-General for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

The Kings County Savings Institution, plaintiff in error, was the plaintiff in the Circuit Court. It brought its action, as for money had and received, against the defendant in error, as administrator of the estate of James Freeland, deceased, late col-

lector of internal revenue, to recover the amount of taxes illegally exacted from it, as it alleged, by the intestate of the defendant in error.

The defence relied on was pleaded by the defendant, as follows: "That the plaintiff herein did not present to the Commissioner of Internal Revenue its alleged claim for abatement, or for refunding the amount claimed in said complaint, within two years after the said alleged claim had accrued, as required by section 3228 of the Revised Statutes of the United States."

The bill of exceptions shows that, on the trial of the case by the circuit judge and a jury, the plaintiff, to sustain the issue on its part, proved that it made its return for internal revenue taxation for the six months ending May 31st, 1878, on the form prescribed by the Commissioner of Internal Revenue, in duplicate, and accompanying the same filed an amended return in duplicate. The prescribed return had the following words written upon its face:

"This return not exempting any part of accounts exceeding $2000—in the name of any one person, is made under protest by compulsion, to prevent a penalty from being assessed; but the accompanying is claimed to be the true and legal return exempting $2000—of all deposits made in the name of any one person; and if the assessment and collection are enforced in accordance with this return, suit will be brought for the excess."

The amended return showed the tax due, according to the construction placed upon the law by the plaintiff, to be $428.75, and had the following words written upon its face:

"In this amended return this savings bank, under advice of counsel, disregards as erroneous this printed form heretofore prescribed and enforced by the Commissioner and collector of Internal Revenue for the United States, and the amended exemption clause, 'less average amount of all deposits not exceeding $2000, made in the name of any one person,' is construed as exempting 'all deposits made in the name of any one person not exceeding $2000' of such deposit in his name.

"This bank claims that the tax be assessed according to this return."

It was shown that the prescribed return and amended return were delivered to the Commissioner of Internal Revenue on June 6, 1878, and to the collector of internal revenue, the intestate of the defendant, on or before that date. On June 18, 1878, the Commissioner of Internal Revenue assessed the amount of tax on the face of said prescribed return at $1796.25, which amount the plaintiff paid to the collector on July 1, 1878, by a check which bore upon its face the words, "Paid under protest to prevent distraint and penalty."

The bill of exceptions recites that the "plaintiff also proved that as a matter of fact the true amount of the tax which should have been assessed against it was the sum of $428.75, as shown by said amended return."

Proof of similar facts in respect to the tax due from the plaintiff for the six months ending November 30, 1878, was made, and that both the prescribed and amended returns for that tax were delivered to the Commissioner of Internal Revenue on December 9, 1878, and to the collector on or before that date. The plaintiff admitted that no other proceedings had been taken than those above detailed.

The defendant, to sustain the issue on his part, "proved," so the bill of exceptions states, "that for two years subsequent to the payments of the amounts assessed against the plaintiff, respectively, no appeal had been taken from such payments or claim made for refund to the Commissioner of Internal Revenue." He also put in evidence the treasury regulations prescribing the forms and procedure for the refunding of taxes in force from January 1, 1871, to December 31, 1878, as follows:

"Preparations of claims for the refunding of taxes and penalties claimed to have been erroneously or illegally collected.

(Form 46.)

"Claims for the refunding of taxes and penalties alleged to have been erroneously or illegally collected must be made out upon form 46 in this case. The burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should

be still further supported by the certificate of the assistant assessor of the proper division, and by the certificate of the assessor and collector. This form and those certificates should be respectively in form as follows."

Then follows the form of an affidavit to be made by the claimant, which, if observed, required him to state the business in which he was engaged, when and by what assessor he was assessed, the amount of the tax, and when he paid it and to what collector, and that in the belief of the claimant the tax was erroneous and improper, and for what reasons, and that by reason of the erroneous assessment and payment he was justly entitled to have a certain sum, naming it, refunded, and that he had not theretofore presented any claim for the refunding of said sum or any part of it. Then follows the form of the deputy collector's certificate to be indorsed on the claimant's affidavit, to the effect that he had carefully investigated the facts set out in the affidavit, and believed the statements in all respects to be true. Next follows the form of the collector's certificate, also to be indorsed on the affidavit, to the effect that he had carefully investigated the facts therein set forth and was satisfied that its statements were in all respects just and true; that upon personal examination he found a certain sum, naming the amount, reported against the claimant, giving the page and line of the list and the number and date of the form where it was to be found, and that the same was paid to him on a day named, and was included in his aggregate receipts for said list, which receipts amounted to a certain sum, naming it, and that the same was delivered to the assessor to be transmitted to the Commissioner of Internal Revenue, and that no claim for the assessment complained of had been theretofore presented.

The certificate of the clerk in charge of records in the office of the Commissioner of Internal Revenue was also required, to the effect that, from personal examination, he found a certain sum, naming it, reported against the claimant, on a certain page and line, naming them, of the list in form, giving the number and date of the form, on file in the office of the commissioner, and that the tax was included in the collector's aggregate

receipt for said list, transmitted by the assessor to the Commissioner of Internal Revenue.

This was all the evidence. Thereupon the court ordered the jury to return a verdict for the defendant, which was accordingly done. The plaintiff excepted to this ruling of the court. The court entered judgment for the defendant upon the verdict, and to reverse that judgment the plaintiff brought the present writ of error.

The regulations prescribed by the Secretary were made by authority of section 3220 of the Revised Statutes. That section provides that "the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

Section 3228, which the defendant pleaded in bar of the suit, declares "that all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued."

The suit of the plaintiff was to recover back taxes illegally collected. The defence pleaded was that the claim for the refunding of the tax so illegally collected was not presented to the Commissioner of Internal Revenue within two years after the claim had accrued, that is to say, after the payment of the alleged illegal tax. There was no demurrer to this plea, and it is not disputed that it was good in law. The bill of exceptions recites that the defendant proved that for two years subsequent to the payment of the tax no claim for the refunding of the tax had been made by the plaintiff to the Commissioner of Internal Revenue. Upon this state of the pleadings and proof, the direction of the court to the jury to return a verdict for the defendant was right, unless it is held that the facts

proven by the plaintiff show a claim made for the refunding of the tax within the meaning of the law.

These facts were the indorsement of a protest on the checks by which the taxes were paid, and the making of the prescribed and the amended return, with the protest and claim written thereon as above stated.

As it does not appear by the record that the protest upon the checks was ever brought in any way to the notice of the Commissioner, that fact may be eliminated from the case. The contention of the plaintiff in error, therefore, amounts to this, that a protest upon its return for taxation against the requirements of the form on which the return is made, accompanied by an amended return, made out according to the plaintiff's construction of the law, is such a claim to the Commissioner of Internal Revenue for the refunding of a tax illegally collected as is required by the law and the regulations of the Secretary of the Treasury.

We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards prescribed by the Secretary of the Treasury for the protection of the public interests, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government con-

sents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the tax-payer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham* v. *United States*, 92 U. S. 85; *Railroad Co.* v. *United States*, 101 U. S. 543; *Arnson* v. *Murphy*, 115 U. S. 579.

As the making of such a claim was not alleged or proven, but, on the contrary, the failure to present the claim was pleaded and was established by the testimony, the plaintiff failed to establish its cause of action.

But the plaintiff insists that the judgment of the Circuit Court should be reversed, because the bill of exceptions recites that the plaintiff "proved that the true amount of the tax which should have been assessed against it was the sum of $428.75, as shown by said amended return," and the defendant having allowed this proof to be made, it is now too late for him to contend that the mere technical preliminaries to establishing this proof were not observed. But the only proof of what the tax should have been, according to the plaintiff's theory, was his amended return, and this raised a question of law which could be presented, but could not be concluded by the bill of exceptions. Besides, it was shown by the record that the defendant insisted to the end of the case and proved that no claim had been made to the Commissioner within two years after its payment, for the refunding of the tax sued for. If, therefore, it be conceded that the tax exacted was illegal, the failure to make claim for its repayment is a bar to the suit.

Upon the whole case, therefore, the Circuit Court was right in directing the verdict for the defendant.

Judgment affirmed.

BROWN *v.* GRANT & Others.

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

Argued December 14, 15, 1885.—Decided January 4, 1886.

A statute of the Territory of Colorado authorized a board of managers to receive a conveyance of a site in Denver for the Capitol of the Territory. A., by warranty deed, conveyed a tract for such site to the board "for the purpose of erecting a capitol and other buildings thereon only." The Territory made no use of the tract before the admission of Colorado as a State. After its admission, A. executed and put on record a deed annulling the gift, and took possession of the tract, and was in possession when he brought this suit. The bill set forth these facts, alleged that the board was about to take possession of the tract for the purpose of erecting buildings thereon, and prayed an injunction. All parties to the suit were citizens of Colorado. *Held*, That if the facts raised any Federal question, they did not show that A. was about to be deprived of his property without just compensation.

This was an appeal from the final decree of the Circuit Court of the United States for the District of Colorado, dismissing, upon demurrer to the bill, a suit in equity instituted in that court by Henry C. Brown against James B. Grant, Governor, William H. Meyers, Lieutenant-Governor, Melvin Edwards, Secretary of State, and D. F. Urmy, Attorney-General of the State of Colorado, and against certain other persons constituting a Board of Managers for the erection of the capitol building for that State.

The case made by the bill was substantially as follows:

By the third section of an act of the Council and House of Representatives of the Territory of Colorado, entitled "An act to locate the seat of government of the Territory of Colorado," approved December 9, 1867, it was, among other things, provided that:

"SEC. 3. The persons appointed, as aforesaid, in section second of this act, shall, within sixty days after the date of their appointment, proceed to select a site for the capitol of said Territory, within the said city of Denver, which site shall contain not less than ten acres of land, and if the site so

selected shall be conveyed to the Territory of Colorado by the person or persons holding the title thereto, without charge to said Territory, and so as to vest the title to the same, absolutely and in fee simple, in said Territory, the site so selected shall be and remain the property of said Territory, for the purpose of erecting a capitol and other public buildings thereon."

On the 11th of January, 1868, the plaintiff, by deed duly acknowledged, conveyed to the Territory a tract of ten acres of land, part of a larger tract owned by him in the immediate vicinity of Denver. The consideration is stated to be one thousand dollars paid to the grantor by the Territory, but the land was, in fact, donated by him in the belief that the erection thereon of the capitol and other public buildings would enhance the value of his adjoining lands. The deed contained the following recitals:

"The said land being so conveyed to said Territory in pursuance of the act entitled 'An Act to locate the seat of government of the Territory of Colorado, approved the 9th day of December, A.D. 1867,' so as to vest the title to the same absolutely and in fee simple in said Territory, for the purpose of erecting a capitol and other public buildings thereon only; to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, its successors and assigns forever.

"And the said party of the first part, the aforesaid parcel of land unto the said party of the second part, its successors and assigns, against the claim or claims of all and every person whatsoever, he, the said Henry C. Brown, does and will warrant and forever defend by these presents."

Contemporaneously with the execution of the deed, the legislative assembly of the Territory adopted a memorial to Congress, asking, for reasons therein stated, a liberal appropriation for the erection of suitable capitol buildings for the use of the Territory. By an act of the Territorial legislature, approved February 9, 1872, it was directed that proposals be

received for the erection of a capitol building, and that it "be erected upon the ground heretofore donated to the Territory for that purpose by Henry C. Brown." On the same day another memorial to Congress was adopted asking an appropriation of $100,000, collected from internal revenue taxes within the Territory, for the purpose of assisting in the erection of a capitol building at the seat of government of the Territory. Thereafter, on the 13th of February, 1874, another act was passed providing for the appointment of capitol commissioners, with authority to have the custody of, and to expend in the improvement of the capitol grounds, and in the erection of capitol buildings thereon, money appropriated or donated for that purpose; to sell all lands and lots donated for capitol purposes, except the capitol site, the money so raised to be used in the erection of a capitol building or buildings, to be completed, paid for, and delivered to the Territory on or before January 1, 1876.

The bill alleged that the Territory of Colorado did, on or about the 1st day of August, 1876, "depart this life," and on the same day, "by proclamation of U. S. Grant, the then President of the United States of America, the State of Colorado was admitted into the Union," the "said Territory never having during its life occupied or made use of said tract of land donated to it by your orator, either for the purpose of erecting capitol or other public buildings thereon, or for any other purpose whatsoever."

The Constitution adopted by the people of Colorado under the Enabling Act of Congress provided that the general assembly should not change or locate the seat of government of the State, but at its first session, subsequent to the year 1880, should submit the question of its permanent location to the popular vote at a general election, until which vote no expenditure for capitol buildings should be made. The same Constitution provided "that all property, real and personal, belonging to the Territory of Colorado at the adoption of this Constitution shall be vested in and become the property of the State of Colorado."

On the 9th of May, 1879, the plaintiff took possession of the

ten-acre tract and constructed around it a substantial board fence. At the same time he executed and put on record a deed revoking and annulling his conveyance of 1868. The reason assigned in that deed for its execution is, that "neither the said Territory, nor its successor, the State of Colorado, have ever accepted the said conveyance, or located or erected a capitol or other public buildings on said tract of land as in and by said deed [of 1868] provided."

The bill alleged that plaintiff had been in complete possession of said land ever since May 9, 1879; that, at the general election, in 1881, the seat of government was located, by a popular vote, at Denver; and that her officers of State and Board of Managers for the erection of State Capitol Buildings at Denver, were about to take, and, unless restrained, would take, possession of said ten-acre tract for the purpose of erecting said buildings thereon.

He prayed that they be enjoined from disturbing his possession of the premises until he should receive just compensation therefor.

A demurrer to the bill having been sustained upon the ground that it did not set forth a cause of action, the suit was dismissed.

Mr. James H. Brown for appellant.

Mr. Thornton H. Thomas for appellees.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts in the language reported above, he continued:

As all the parties to this suit are citizens of the State of Colorado the Circuit Court was without jurisdiction, unless the suit is one arising under the Constitution or laws of the United States. It is not clear upon what precise ground the plaintiff contends that the suit belongs to that class. We suppose his claim to be that when the Territory became a State, the property he had given to the former became his again, and that the provision in the Constitution of the State, "that all property,

real and personal, belonging to the Territory of Colorado" at the adoption of that instrument "shall be vested in and become the property of the State of Colorado," deprived him of his property without due process of law, that is, it was thereby taken from him, for public use, without just compensation being first made, or in some legal mode secured, to him. Assuming that the suit, upon that basis, arises under the Constitution of the United States, it is difficult to conceive of one having less merit.

Before the execution of the deed of January 11, 1868, the Territorial Legislature had located the seat of government at Denver. It was there when the appellant's gift was made. The gift had direct reference to the Territorial enactment authorizing commissioners to accept a conveyance of not less than ten acres of land, without charge to the Territory, and so as to vest in it an absolute fee simple title. The title was so conveyed by Brown to the Territory, "its successors and assigns forever," for "the purpose of erecting a capitol and other public buildings thereon only." The deed was duly accepted; for, if the act under the authority of which the land was obtained, and the execution and registration of the deed, are not complete proof of such acceptance, surely the act of 1872 requiring the capitol building to be erected "upon the ground heretofore donated to the Territory for that purpose by Henry C. Brown," is ample evidence of that fact. It is idle to say that the Territory never accepted the conveyance. Upon what legal ground, then, can the appellant defend his resumption of possession in 1879? His conveyance contained no condition under which he could demand the erection of a capitol building within any specified time, in default of which the property would revert to him. The territorial legislature wisely invested commissioners with authority to accept a conveyance of an absolute fee-simple title, and reserved to itself the determination of all questions concerning the time within which the proposed building should be erected. And it cannot be said, in view of the allegations of the bill, that the Territory did not move as rapidly in creating indebtedness for that purpose as the public necessities permitted or the public interests required.

If it were conceded that the removal of the seat of government from Denver, or the abandonment of this land as the site of capitol buildings, would, under all the circumstances, entitle Brown to claim the property, or compensation therefor, it is sufficient to say that no such state of facts now exists.

But the appellant contends that he made this gift upon the implied condition that the *Territory*, not the State, should erect the public buildings in question. Apart from the fact that the terms of the deed are inconsistent with such a condition, the supposition cannot be indulged for a moment that the plaintiff did not look forward to the time when the Territory would become one of the States of the Union—an event which would necessarily tend to accomplish the very object that he had, as he avows, in making the donation, viz., to increase the value of other lands owned by him, of which the ten acres in question formed a part. The reference in the deeds of 1868 and 1879 to the successors of the Territory is persuasive evidence of the fact that the plaintiff contemplated the organization of its people as a State. Now that the State proposes to construct capitol buildings on the land donated for that very purpose, the plaintiff asks the intervention of a court of equity to prevent her agents from entering upon the premises until he receives compensation for what was in law a donation to the public as an organized body, whether under a territorial government, or as a State. He is not entitled to such aid.

The suggestion that the clause of the Constitution providing that the State is the owner of all the property which the Territory held upon its becoming a State deprived him of his property, is not entitled to serious consideration. Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon its admission into the Union. The provision in the State constitution to that effect was only declaratory of what was the law.

Judgment affirmed.

FORD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 18, 1885.—Decided January 4, 1886.

The jurisdiction of the Court of Claims over cases referred to it by one House of Congress is subject to provisions of general statutes of limitation regulating that jurisdiction.

This was an appeal from the Court of Claims. The facts are stated in the opinion of the court.

Mr. Gilbert Moyers and *Mr. George S. Boutwell* for appellant.

Mr. Attorney-General for appellee.

Mr. Justice Harlan delivered the opinion of the court.

By resolution of the Senate of the United States adopted on the 23d of February, 1885, a bill pending before that body for the relief of William G. Ford, administrator of John G. Robinson, deceased, was referred, "in accordance with the provisions of article one of section 1059 of the Revised Statutes, to the Court of Claims, together with the vouchers, papers, proofs, and documents appertaining thereto."

The bill to which the resolution referred was as follows:

"A bill for the relief of William G. Ford, administrator of John G. Robinson, deceased.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of William G. Ford, administrator of John G. Robinson, deceased, for the interests of the American legatees of the said Robinson, which were not provided for in the award of the mixed commission under the Treaty of Washington of the date of September twenty-fourth, eighteen hundred and seventy-three, be, and the same is hereby, referred to the Court of Claims, relieved from the bar of the statute of limitations; and the said Court of Claims is authorized to receive as evi-

dence, at its discretion, the testimony already taken by said mixed commission in the said case, as though taken over again, and either party may take further and additional testimony, under the order and rules of the court, as in other cases: Provided, That before final judgment shall be rendered by the said court the said William G. Ford shall duly execute, according to law, a new administration bond, in such penalty and with such sureties as the said court shall deem sufficient and approve."

The petition of the claimant was filed in the Court of Claims on the 10th of March, 1885. It represented that he was a citizen of the United States, and a resident of the city of New York; that John G. Robinson was born in England, and was a subject of Great Britain, residing during the recent civil war in New Orleans; that, on or about March 7, 1863, his intestate purchased of one Robert B. Hurt, of Madison County, Tennessee, 238 bales of cotton, worth about $88,260, which was delivered to said Robinson, at Ponchatoula, Louisiana, on or about the date last named; that the cotton "was seized by the United States military authorities, under command of General Banks, and under the direction of said authorities the same was sold in New Orleans, and the proceeds thereof appropriated to the use and benefit of the United States Government;" that his claim, as administrator of Robinson, for the proceeds of such sale, was, on or about the 25th of March, 1872, presented to the mixed commission on British and American claims, under the 12th article of the treaty of May 8, 1871, and by that commission was allowed to the extent of only $29,638, in gold, as the value of the interest of Mary G. Barker, the only surviving legatee under the will of Robinson, who was a British subject; that petitioner believed that award to be unjust to the devisees under the will of Robinson, who were citizens of the United States, and petitioned Congress for relief; that his petition, with vouchers, etc., were referred by the Senate to the Court of Claims, under § 1059 of the Revised Statutes; and that said Robinson died in Biloxi, Mississippi, on or about August 25, 1869, without having given any aid or

comfort to the rebellion. He prayed judgment against the United States for $66,195, which was the balance of the proceeds derived from the sale of the cotton.

In the Court of Claims the United States moved to dismiss the petition, upon the ground that the action was barred by the limitation of six years prescribed by § 1069 of the Revised Statutes. Subsequently, a general demurrer to the petition having been filed, the case was heard upon the motion to dismiss, as well as upon the demurrer. The motion to dismiss was denied, but the action, in the opinion of that court, being barred by the limitation of two years prescribed by the Captured and Abandoned Property Act of March 12, 1863, was dismissed.

By § 1059 of the Revised Statutes the Court of Claims has jurisdiction to hear and determine the following, among other matters: "First, all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress. . . . Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, ch. 120, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' or by the act of July 2, 1864, ch. 225, being an act in addition thereto: *Provided*, That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts, from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: *Provided also*, That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction, or appropriation of, or damage to, property by the Army or Navy engaged in the suppression of the rebellion." 18 Stat. 318, ch. 80.

The act of March 12, 1863, providing for the collection and

disposition of captured or abandoned property, permits any person claiming to have been the owner of any such property, "at any time within two years after the suppression of the rebellion," to "prefer his claim to the proceeds thereof in the Court of Claims." 12 Stat. 820.

Section 1069 provides that "every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition setting forth a statement thereof is filed in the court or transmitted to it by the Secretary of the Senate, or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred, if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." 12 Stat. 767, ch. 92.

The assignments of error assume that the reference by the Senate to the Court of Claims of the bill before that body for the relief of claimant, had the effect to invest that court with full jurisdiction to hear and determine his claim, relieved from any bar arising from limitation, whether the limitation of six years prescribed by § 1069 of the Revised Statutes, (which is brought forward from the act of March 3, 1863, amendatory of the act of 1855, establishing the Court of Claims), or that of two years, established by the Captured and Abandoned Property Act of March 12, 1863.

The statutes regulating the jurisdiction of the Court of Claims do not sustain this position. It is undoubtedly within the power of Congress to place claims referred to that court by the Senate or by the House of Representatives, on a better footing than other claims, by providing that they may be determined upon their merits, without reference to lapse of time, or any previous bar by limitation. But Congress had no pur-

pose by its general legislation to establish such a policy. It has, in special cases, invested the Court of Claims with jurisdiction to determine a claim, relieved of the bar of limitation. Such was Erwin's case, arising under the Captured and Abandoned Property Act, the purpose of the statute which referred it being construed as manifesting the intention of Congress, in respect of that particular claim, to remove the bar of limitation, and, without otherwise changing the claimant's position from what it would have been had he instituted suit in proper time, to permit an adjudication of the claim upon its merits. *Erwin* v. *United States*, 97 U. S. 392. No such result can be reached in this case, because Congress has not referred the demand of the claimant to the Court of Claims for determination. The clause of the statute investing that court with jurisdiction to hear and determine all claims referred to it "by either House of Congress," must be interpreted in the light of other clauses defining its jurisdiction, and fixing in respect of all claims, the period within which they must be asserted against the United States. Congress, by statute, which has received the approval of the President, has declared that all claims specifically for the proceeds of captured or abandoned property, must be brought within two years after the suppression of the rebellion; that the jurisdiction of the Court of Claims shall not extend to claims growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion; and that except where the claimant is laboring under certain disabilities, that have no application here, every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless filed in that court, or transmitted to it by certain officers, within six years after the claim first accrued. The argument here is that these statutory provisions are suspended in their operation as to every claim belonging to either of these classes, which one branch of Congress chooses to refer to the Court of Claims. Any such interpretation must be rejected. It is unreasonable to suppose that Congress intended to invest one of its branches with authority to suspend a general statute of limitation. Every claim cognizable by

the Court of Claims must be determined with reference to the limitation prescribed for claims of the class to which it belongs, unless Congress, by statute, otherwise directs. The Court of Claims has jurisdiction to hear and determine a claim referred to it by either House of Congress, because, and only because, the law-making power has so declared; but unless Congress otherwise prescribes, that reference will not itself entitle the claimant to a judgment, if his claim is not well founded in law, or, when so referred, was barred by limitation. He acquires no new right by the reference, except to demand that his claim be heard and determined by the court, just as would have been done, had it been one of which the court could have taken cognizance by the voluntary suit of the claimant. Had he chosen, before going to Congress, to sue in the Court of Claims, he would have been confronted with the statute of limitations. He cannot avoid that obstacle by procuring from one branch of Congress a reference of his claim to that court.

This construction of the statutes requires an affirmance of the judgment; for, if it was intended by the petition to present a claim under the Captured and Abandoned Property Act of 1863, it is barred by the limitation of two years prescribed for all claims under that statute; if it was intended to present a claim growing out of the appropriation of property by the army engaged in the suppression of the rebellion, the act of February 18, 1875, 18 Stat. 318, now the last proviso in subdivision four of § 1059 of the Revised Statutes, excludes all jurisdiction to hear and determine it; and, if his claim is of the class defined in § 1069, it is barred by the limitation of six years.

Judgment affirmed.

MILWAUKEE *v.* KŒFFLER.

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

Submitted December 18, 1885.—Decided January 4, 1886.

A bill in equity to set aside and restrain the collection of a personal tax, or a tax levied upon personal property by a municipal corporation, cannot be maintained on the sole ground of the illegality of the tax by reason of the non-residence within the limits of the municipality of the person against whom the tax is levied.

This was an appeal from the Circuit Court for the Eastern District of Wisconsin.

The bill, originally filed in a State court, and afterwards removed into the Circuit Court of the United States, prayed for an injunction to restrain the collection of a tax assessed by the city of Milwaukee against Kœffler. The tax was assessed against him as a resident of that city on account of his personal property, and his complaint alleged that he did not reside in Milwaukee in the year for which the tax was levied against him, nor for some years before or since, and that the assessment was therefore void.

The answer of defendant, filed in the State court before the removal of the case, denied complainant's allegation as to non-residence, and averring his citizenship and residence there, added:

"And for a further and separate answer and defence, the defendants allege and show unto the court that the plaintiff, if he is able to prove the allegations of his complaint herein, has a complete and sufficient remedy at law, and that for this reason this court, as a court of equity, should not and will not interfere, assume, or take jurisdiction of this action, and the defendants object for that reason to any and all interference of this court, as a court of equity, in the matter of which plaintiff complains, and ask that this action be dismissed."

Replication being filed, the case was heard on these issues, and on a considerable mass of testimony as to the question of residence in Milwaukee.

Argument for Appellee.

On the hearing it appeared that the judges of the Circuit Court, assuming that complainant was not a resident of that city, were divided in opinion on the question of the jurisdiction of the court, as a court of equity, to grant relief. This question they presented in the following certificate:

"The case coming on to be heard at this term upon the pleadings and proofs, it occurred as a question whether a bill in equity to set aside and restrain the collection of a personal tax or a tax levied upon personal property by a municipal corporation can be maintained on the sole ground of the illegality of the tax by reason of the non-residence within the limits of such municipality of the person against whom the tax is levied.

"On which question the opinions of the judges were opposed.

"Whereupon, on motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified according to the request of the plaintiff by his counsel, and the law in that case made and provided, to wit:

"That Charles A. Kœffler, the plaintiff, in 1882, when the assessment and levy of tax against him on account of personal property were made, was not, and for several years prior thereto had not been, a resident of the city of Milwaukee, but was and had been a resident of the town of Wauwatosa, in the county of Milwaukee, Wisconsin."

The assessment was set aside, and the city restrained from collecting the tax; from which decree an appeal was taken to this court.

Mr. Joshua Stark for appellant.

Mr. James G. Jenkins for appellee. This case is a proper subject for equitable cognizance. It might have been otherwise had the objection gone to the regularity of the proceed-

ings, or had the tax been a State tax. But the objection goes to the jurisdiction (this distinction is recognized in *West* v. *Ballard*, 32 Wisc. 168, 172); and the tax is not a State tax, but a municipal tax; a distinction recognized in the *State Railroad Tax Cases*, 92 U. S. 575, 615. See also *Cummings* v. *National Bank*, 101 U. S. 153; *Allen* v. *Baltimore & Ohio Railroad Co.*, 114 U. S. 311, 314. As the complainant was not a resident in the municipality of Milwaukee, as his personal property was not subject to be taxed there, as he was assessed and paid taxes on it in another municipality, the officers of Milwaukee had no jurisdiction over it, and a case is made for equitable relief. *Barber* v. *Farr*, 54 Iowa, 57, and cases cited; *Brandirff* v. *Harrison County*, 50 Iowa, 164; *Beverly* v. *Sabin*, 20 Ill. 357; *Ottawa* v. *Walker*, 21 Ill. 605, 610; *Darling* v. *Gunn*, 50 Ill. 424; *Munson* v. *Miller*, 66 Ill. 380; *Lebanon* v. *Ohio & Mississippi Railroad Co.*, 77 Ill. 539; *Kimball* v. *Loan & Trust Co.*, 89 Ill. 611; *Union Trust Co.* v. *Weber*, 96 Ill. 346, 357; *Commissioners* v. *Markle*, 46 Ind. 96, 103–105; *Knight* v. *Turnpike Co.*, 45 Ind. 134, 139; *Shoemaker* v. *Grant County*, 36 Ind. 175; *Riley* v. *Western Union Telegraph Co.*, 47 Ind. 511; *St. Clair School Board Appeal*, 74 Penn. St. 252; *Dodge* v. *Woolsey*, 18 How. 331; *Dorn* v. *Fox*, 61 N. Y. 264; *Mohawk & Hudson Railroad Co.* v. *Clute*, 4 Paige, 384, 396; *Gould* v. *Atlanta*, 55 Geo. 678; *Union Pacific Co.* v. *Carr*, 1 Wyoming, 96; *Horne* v. *Green*, 52 Mississippi, 452; *Lapene* v. *McCan*, 28 La. Ann. 749; *Robinson* v. *Reid*, 50 Ala. 69; *Grass* v. *Hess*, 37 Ind. 193; *Earl* v. *Matheney*, 60 Ind. 202; *Smith* v. *Pearce*, 6 Baxter, 72.

The bill is also maintainable on the ground of fraud, and preventing multiplicity of suits. *Pacific Hotel Co.* v. *Lieb*, 83 Ill. 602, 611; *Illinois Central Railroad Co.* v. *McLean*, 17 Ill. 291; *Railroad Co.* v. *Marquette*, 35 Mich. 504.

It may also be sustained on the ground that the complainant has not a plain, adequate and complete remedy at law. As to the meaning of those words see *Oelrichs* v. *Spain*, 15 Wall. 228. See also *Boyce* v. *Grundy*, 3 Pet. 215; *Parker* v. *Winnipiseogee*, 2 Black, 551; *Bunce* v. *Gallagher*, 5 Blatchford, 481; *Hunt* v. *Danforth*, 2 Curtis, 603. A judgment to recover

back the taxes illegally collected, and mandamus to enforce a tax to pay the judgment, would fall far short of a complete remedy. See *State* v. *Jennings*, 56 Wisc. 113; *Weston* v. *Charleston*, 2 Pet. 449, 464; *Holmes* v. *Jennison*, 14 Pet. 560, 563, 565; *McBane* v. *People*, 50 Ill. 503.

Mr. Justice Miller delivered the opinion of the court. After stating the facts in the language above reported, he continued:

In accordance with the opinion of the presiding justice a decree was made setting aside the assessment of the tax and enjoining the city and its officers from collecting it.

We are of opinion that both this court and the Supreme Court of Wisconsin are committed to a contrary doctrine.

The case of *Dows* v. *The City of Chicago*, 11 Wall. 108, 109, 110, was a bill in equity in the Circuit Court for the Northern District of Illinois, brought by Dows, a citizen of New York, to restrain the city of Chicago from collecting a tax upon the shares of stock which he owned in a national bank located in that city. He alleged that the tax was illegal because his shares were assessed at a higher rate than other moneyed capital in the city; and because, not being a resident of Chicago, but of New York, his personal property belonged to his domicile, and any tax levied on it by the city of Chicago was void.

The bill was dismissed on demurrer, on the ground that a court of equity had no jurisdiction to give relief, for the reasons stated in the bill. It will be observed that in that case, as in this, the tax was resisted as a tax on the person on account of personal property, on the ground that the party assessed did not reside within the city, and the corporation, therefore, had no power to tax him.

The property for which the tax was assessed was in each case intangible property. In the first case it was bank shares, the certificates of which were undoubtedly held at the residence of Dows in New York, and in the present case it was for money loaned on mortgages.

Looking at the case then made by the bill, one in which the assessment of the tax was not only irregular but void, the court, in the language of Mr. Justice Field, said:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived."

The opinion contains an examination of the adjudged cases, by which the proposition is sustained, in one of which, that of *Cook County* v. *Chicago, Burlington and Quincy Railroad Co.*, 35 Ill 460, 465, the general principle is well stated by the Supreme Court of Illinois, namely, "that while a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed on property not subject to taxation, it had never held that jurisdiction would be taken in those excepted cases, without special circumstances, showing that the

collection of the tax would be likely to produce irreparable injury, or cause a multiplicity of suits."

In the case of *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 548, the principle is thus stated: "It has been the settled law of the country for a great many years that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction. This was decided as early as the days of Chancellor Kent, in *Mooers* v. *Smedley*, 6 Johns. Ch. 28, and has been so held from that time onward."

In the *State Railroad Tax Cases*, 92 U. S. 575, 614, these decisions are reviewed with others, and the whole question very fully considered, as the importance of the cases and the ability of the counsel who argued them required; and after citing the language in *Dows* v. *Chicago*, and *Hannewinkle* v. *Georgetown*, the court adds: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of the taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

An intimation in the opinion in that case to the effect that, in cases of taxes assessed by counties, towns, or cities, a more liberal use of the control of courts of equity may be necessary, has been cited in the brief in the present case as affording ground for sustaining the injunction here. But no class of cases was there mentioned as justifying this interference, and it is evident that the mere facts that the tax was levied by a local corporate body, and was also illegal, were not in themselves supposed to be sufficient; for the cases cited in the sentences preceding that remark, of *Dows* v. *Chicago* and *Hannewinkle* v. *Georgetown*, were both cases of taxes by towns,

to which the doctrine of the restricted powers of a court of equity was applied.

The rule against the interference of a court of equity, and the exceptions to the rule, are restated with careful accuracy in the very recent case in this court of the *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525.

As to the decisions of the Supreme Court of Wisconsin, its language, in the case of *Quinney* v. *The Town of Stockbridge*, 33 Wisc. 505, is as emphatic as that of this court. "The complainant," says the court, "charges the seizure of certain personal property belonging to plaintiffs by the treasurer, under and by virtue of the warrant for the collection of the taxes, and asks an injunction to prevent the treasurer from selling the same. It is well settled, in this court at least, that the writ of injunction will not be granted for such a purpose, and that the illegal seizure and threat of the officer to sell the goods and chattels of the plaintiff, constitute no ground for equitable interference." In the case of *Van Cott* v. *Supervisors of Milwaukee County*, 18 Wisc. 247, which, like the present case, was a bill to enjoin the collection of a tax on personal property, and in nearly every other respect is like this, except that the county of Milwaukee was defendant there, and here it is the city, the same court gave the reasons for the rule adopted by it in the following language: "Our reasons, in brief, are, that by the wrong such as is complained of here no irreparable mischief is threatened, no cloud is thrown over the title to real estate, which a court of equity may be called upon to remove, and the plaintiff has an ample remedy at law. To say nothing of the special remedies given by statute, which, with diligence and attention on the part of the tax-payer, will always prove effectual, and nothing of the remedies by *certiorari*, *mandamus*, prohibition, &c., as heretofore applied in such cases, it seems to us that the remedy by action against the assessors, in cases where they exceed their jurisdiction, and the right which the party always has to recover back the money paid for taxes illegally imposed, if collected by distress and sale of his goods, or if, upon levying a warrant, he pays to save his property, constitute a complete answer to the application of a court of equity to restrain or

prevent the collection." It is then shown that the corporation, being liable in an action to recover back the tax wrongfully exacted, the return of this sum is, both in law and equity, full compensation.

There is nothing to take the case before us out of the principle here laid down, and the decision of the highest court of Wisconsin, that the remedy at law is ample, must command our respect.

In the latest case in Michigan, *Youngblood* v. *Sexton*, 32 Mich. 406, Cooley, J., says: "It was decided at an early day in this State that equity had no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal, the ordinary legal remedies being ample for the parties' protection," citing *Williams* v. *Detroit*, 2 Mich. 560, and *Henry* v. *Gregory*, 29 Mich. 68. He also shows by additional citations that the same principle has been asserted in the courts of Massachusetts, New Hampshire, Connecticut, California, North Carolina, Rhode Island, Ohio, Missouri, New York, and Maryland.

In the case before us we see no reason for departing from the settled doctrine both of this court and of the Supreme Court of Wisconsin.

There is nothing here presented which brings the case under any of the recognized heads of equity jurisdiction, and the mischiefs which must attend the exercise of the right to contest in the courts of equity every tax which is asserted to be illegal or unauthorized, are too serious to justify any such departure.

The question on which the judges of the Circuit Court divided is, therefore, answered in the negative, and as that court has no equitable jurisdiction in the case its decree is

Reversed and the case remanded, with directions to dismiss the bill.

CONEY & Another *v.* WINCHELL.

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

Submitted December 18, 1885.—Decided January 4, 1886.

In a suit in Connecticut for a strict foreclosure of a mortgage of real estate brought against a grantee of the mortgagor, if the mortgagee seeks to charge the mortgagor with any insufficiency in the appraised value of the land to pay the mortgage debt, the latter is a necessary party to the suit so as to prevent a removal of it to a Federal court by his grantee, if he and the mortgagee are citizens of the same State.

This was an appeal from an order remanding a case to a State court. The facts are stated in the opinion of the court.

Mr. Simeon E. Baldwin and *Mr. John H. Whiting* for appellants.

Mr. John W. Alling for appellee.

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

This is an appeal under § 5 of the act of March 3, 1875, 18 Stat. 470, ch. 137, from an order of the Circuit Court remanding a case which had been removed from a State court. The facts are these:

On the 10th of May, 1881, Peter R. Carll, a citizen of Connecticut, gave his three notes to Alvred E. Winchell for $10,000, $6000 and $5000 respectively, all payable five years from that date, with interest at six per cent. per annum. To secure the payment he executed to Winchell a mortgage on certain property in New Haven, Connecticut. He afterwards conveyed his "title, right and interest" in the mortgaged property to George E. Coney, a citizen of New York.

A statute of Connecticut, passed in 1878 and still in force, is as follows:

"Sec. 1. The foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure.

"SEC. 2. Upon the motion of any party to a foreclosure, the court shall appoint three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor in any further suit or action upon the mortgaged debt, note, or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim."

On the 16th of January, 1885, Winchell brought this suit against both Carll and Coney in the Superior Court of New Haven County, Connecticut, for 1, "a foreclosure of said mortgage," and 2, "possession of the mortgaged premises." In his bill he sets out the making of the notes and mortgage by Carll; the conveyance of the mortgaged property by Carll to Coney; a claim for $4120 interest unpaid, and that Coney, "with the said Carll, is now in possession of the" property. Carll and Coney filed separate demurrers to the bill, and on the 9th of May, 1885, which was in time, Coney petitioned for the removal of the cause to the Circuit Court of the United States under the second clause of § 2 of the act of 1875, on the ground that there was in the suit a controversy wholly between himself, a citizen of New York, and Winchell, a citizen of Connecticut, which could be fully determined between them, and as to which Carll was only a nominal party. On the presentation of this petition, the State court declined to proceed further in the suit, but the Circuit Court, when the case was docketed there, ordered it to be remanded. From that order this appeal was taken.

In *Ayres* v. *Wiswall*, 112 U. S. 187, it was decided that in a suit for the foreclosure of a mortgage by sale, in which it was sought to charge the mortgage debtor with the payment of any balance of the mortgage debt that might remain due after the security was exhausted, the debtor was a necessary party, and that, if his citizenship stood in the way, the suit could not be

removed, even though, were he not a party, the persons with whom he had been joined, and to whom he had conveyed the property after the mortgage, would be entitled to a removal. Such a case we held did not fall within either the first or second clause of § 2 of the act of 1875.

The principle of that case governs this. In Connecticut mortgages are not foreclosed by a sale of the mortgaged property, but by strict foreclosure. If there is a failure to redeem within the time limited in the decree, the mortgage debtor remains liable for the debt, after deducting the value of the property foreclosed. Under the old practice this value was ascertained in the suit to collect the deficiency. In this connection counsel for the appellants say:

"In ordinary cases this suit might not be brought for four or five years after the foreclosure, and, in case of non-negotiable notes, for ten or fifteen years. It was, therefore, often difficult, in such suit, to ascertain the value of the property at the time of foreclosure. To meet this difficulty the statute of 1878 was passed. It furnishes a way in which the value of the mortgaged premises can be ascertained at the time the title becomes absolute; provides that such value so found shall be conclusive in any further suit upon the note; authorizes the joining of the maker of the note as a party, so that he can have an opportunity to obtain such appraisal, and be heard as to such value, and bars any further suit against the maker, unless he is so made a party."

And again:

"Before the statute, as now, the foreclosure of the property reduced the obligation by the value of the property. By the statute this value is to be ascertained by an appraisal, and it is conclusively presumed to equal the obligation, unless the maker of the note is given an opportunity to be heard as to this appraisal. This gives him no interest in the property, no equity of redemption to be extinguished, no right whatever except the right to have an appraisal. And the appraisal, and only the appraisal, is made final and conclusive in the future action on the obligation."

This is a suit brought to foreclose under the statute, that is,

to get the property without releasing the debtor from liability for the debt over the value of the property, and in so doing to fix the value. It is true there is not in the bill a prayer for appraisal, but that is not necessary. Any party to the suit can call for an appraisement by simply making a motion to that effect. The appraisement is one of the incidents of a suit for foreclosure when the person liable for the payment of the debt is a party. As in this case Carll, the mortgagor, conveyed the land to Coney after the mortgage was made, Winchell in foreclosing had his election to sue Coney alone, or Coney and Carll together. If he sued Coney alone, he would get the land, in case it should not be redeemed, but Carll, upon the foreclosure, would be discharged from all liability for the debt. If, however, he sued both Coney and Carll he would not only get the land, but hold Carll for the full amount of the debt over its value. He did elect to sue both. He has but a single cause of action and that his mortgage. The relief he seeks is a decree which shall give the foreclosure, and at the same time save the liability of Carll for what may remain due on the debt. This he cannot do unless he makes Carll a party, because in such a suit the mortgage debtor has the right to have it determined to what extent the mortgage debt is paid by the foreclosure. To use again the argument of counsel, he is entitled to an opportunity to obtain an appraisal and to be heard as to the value of the foreclosed property. True, there can be no recovery against him in the foreclosure suit for the balance that may remain due, but the value of the mortgaged property can be determined in a way that will conclude him when he is sued for the debt. This being the case, he is not only a necessary but an indispensable party to a suit for the relief which is asked in this case. The mere fact that he is made a party determines the character of the suit to be for foreclosure and the saving of his liability for the debt. An adjudication of value binding on him is within the scope of the bill, and as it may be had upon mere motion as an incident to the decree of foreclosure which is prayed for, the suit is to be looked upon as brought for that purpose with the rest. We can see no difference, so far as a right to removal is concerned, between a suit

for foreclosure which seeks a money decree against the mortgagor for a balance of the mortgage debt, and one in which his liability for the debt is to be saved, and the value of the mortgaged property applied in payment to be conclusively settled against him.

The order remanding the suit is affirmed.

SOUTHWESTERN RAILROAD COMPANY *v.* WRIGHT.

SAME *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

Argued December 16, 1885.—Decided January 4, 1886.

The Southwestern Railroad Company of Georgia as to those parts of its road which extend from Americus to Albany ; from Albany to Arlington ; and from Cuthbert to Eufaula, is subject to the general laws of the State for the taxation of railroads, without regard to the exemption in its original charter.

It is again decided that the surrender of the power to tax, when claimed, must be shown by clear and unambiguous language, admitting of no reasonable construction consistent with the reservation of the power.

These were suits in equity to restrain the collection of taxes. The facts are stated in the opinion of the court.

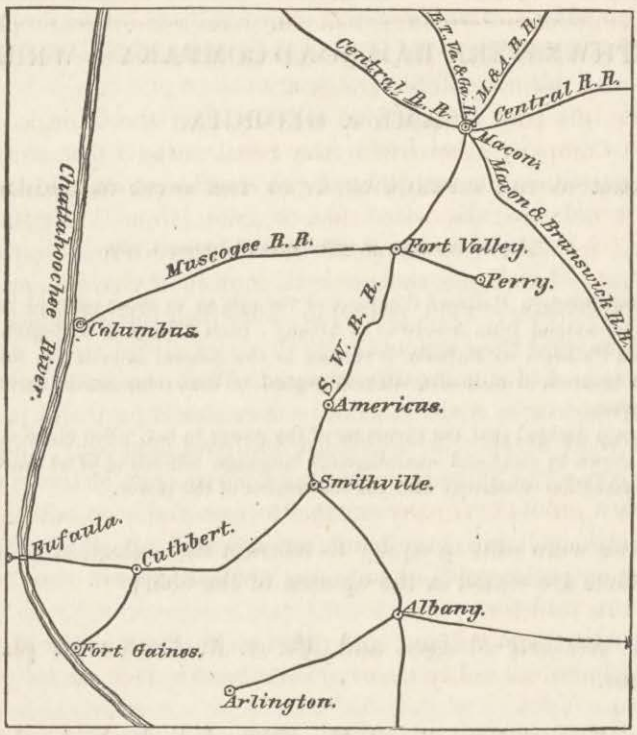
Mr. Richard F. Lyon and *Mr. A. R. Lawton* for plaintiff in error.

Mr. Samuel Barnett and *Mr. Clifford Anderson* for defendants in error.

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

These suits relate to the liability of the Southwestern Railroad Company, a Georgia corporation, for taxes on different parts of its railroad, and the Federal question involved arises

under a claim of a charter contract of exemption from all taxation beyond "a tax of one-half of one per cent. upon its annual net income." The company owns and operates, 1, a road from Macon through Fort Valley, Americus, Smithville, and Cuthbert to Fort Gaines; 2, a road from Smithville to Albany; 3, a road from Albany to Arlington; 4, a road from Cuthbert to Eufaula; and, 5, a road from Fort Valley to Columbus. The line of all these roads is shown on the following plat:



The road from Macon to Americus and from Smithville to Fort Gaines was built under the original charter of the company granted December 14, 1845. Section 14 of this charter is as follows:

"§ 14. That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed

higher than one-half of one per cent. upon its annual net income."

From Americus through Smithville to Albany the building was done by the Georgia and Florida Railroad Company, under a charter granted January 22, 1852. Section 2 of this charter is as follows:

"That the Georgia and Florida Railroad Company may, at any time, incorporate their stock with the stock of any other company, on such terms as may be mutually agreed upon by such companies: *Provided*, that the road and other property of this company shall be subject to such taxation as the legislature may deem equitable and just."

After this part of the road was finished the Georgia and Florida Company agreed with the Southwestern Company to consolidate its stock with that of the Southwestern, and thereupon it delivered its road, then running from Americus to Albany, into the possession of the Southwestern Company. This having been done, the general assembly of Georgia, on the 19th of December, 1859, passed an act which recited what had been done, and then enacted:

"Section 2. Be it further enacted, That the said railroad from Americus to Albany, shall be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay the State the same tax that the rest of the Southwestern Railroad Company is liable to pay, and such additional tax as the legislature may hereafter impose."

The Southwestern Company now holds this part of its road under this transfer.

The road from Albany to Arlington was built under an act of the general assembly passed December 18, 1860, as follows:

"An Act to amend the several acts of the general assembly relating to the Southwestern Railroad Company, and to authorize the said company to construct a branch railroad, and for other purposes."

"Section 1. Be it enacted, etc., That the Southwestern Railroad Company, of this State, are hereby authorized to construct a branch railroad from Albany, or Dawson, or any point west

of Dawson, on their line of road, to such place on the Chattahoochee River, or on the Florida line, as the said company may select, and that said company shall have for these purposes all the rights, privileges, and powers conferred by their charter of incorporation and the act amendatory thereof.

"Section 2. Be it further enacted, etc., That said company are hereby empowered and authorized to increase their capital stock $1,000,000.00, and said additional stock shall be subject and liable to pay the same rates of tax to the State of Georgia that is now required of the said Southwestern Railroad Company, and such additional tax as the legislature may hereafter impose."

The road from Cuthbert to Eufaula was built under the following act, passed February 23, 1850:

"An Act to amend an act entitled 'An act to incorporate the Southwestern Railroad Company, with power to extend branches to Albany, in the county of Baker, and Fort Gaines, in the county of Early, and to points below those places on the Chattahoochee and Flint Rivers, and to punish those who may wilfully injure the same, assented to December 27th, 1845, and for other purposes.'

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in general assembly met, and it is hereby enacted by the authority of the same, That from and after the passage of this act said railroad company shall have power and authority to construct a branch of said road from some point on said road to any point on the Chattahoochee River, below the town of Florence, in the county of Stewart, which said company may deem most advisable and proper, under the rules and restrictions as they are now authorized to construct said Southwestern Railroad: *Provided*, That if said company do not build the main trunk of said road to or below Fort Gaines within two years from the time that the same is completed to the point at which the said branch road, if commenced, may intersect, then said company shall be liable to refund to the stockholders, now residing in Early and Ran-

dolph Counties, or their assigns, the amount of stock held by them, with interest from the time the same was paid."

The road from Fort Valley to Columbus was built by the Muscogee Railroad Company, under a charter granted December 27, 1845, which contained a clause upon the subject of taxation, substantially like § 14 of the charter of the Southwestern Company. The two companies were afterwards consolidated, and, when the case in which the State of Georgia appears as defendant in error was before this court on a former writ of error, it was decided that this road and that part of the road of the Southwestern Company which was built under the original charter, were exempt from taxation beyond one-half of one per cent. upon their annual net income. *Southwestern Railroad Co.* v. *Georgia*, 92 U. S. 676.

The Supreme Court of the State has decided in both these cases that the roads from Americus to Albany, from Albany to Arlington, and from Cuthbert to Eufaula were subject to the general laws of the State for the taxation of railroads, without regard to the exemption in the original charter of the company. To reverse judgments to this effect these writs of error were brought.

There is no question now as to the exemption from general taxation of that part of the road built under the original charter. That we have already decided, and there is no dispute about it now. The language of the exempting clause is somewhat unusual. It is not that the company or its stock shall be taxed in a certain way and otherwise exempt, but that the "said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher," &c. This clearly means the railroad specified in the charter, and none other. Possibly, if the company had acquired the road between Americus and Smithville from the Florida & Georgia Company without any special limitation by the State upon the exemption of its own charter, that part of the Florida & Georgia road might have been brought under the exemption. But this was not done, for the State, while recognizing the transfer of the Florida and Georgia road, was careful to provide that the road should be liable to pay not only the

same tax as the rest of the road of the Southwestern Railroad Company, "but such additional tax as the legislature may hereafter impose." This is nothing less than an express reservation of power by the State to tax the part of the Southwestern Company's road between Americus and Albany as other railroads in the State are taxed when there is no charter exemption.

The same is true of the road between Albany and Arlington, for the power to build that line is coupled with a reservation of the right to tax. Such is evidently the meaning of § 2 of the act authorizing its construction.

The language of the authority to build the road from Cuthbert to Eufaula is somewhat different. There nothing is said about taxation; but that the original charter of the company did not give the right to build this part of the road is shown by the fact that this amendment was deemed necessary. In building this extension or branch the company was placed "under the rules and restrictions" they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent the old road was exempted. That exemption was only for that road, and as the amending act does not in terms or by fair implication apply the exemption to the additional road which was to be built under it, we must presume that nothing of the kind was intended, and that the State was left free to tax that road like other property. No rule is better settled than that a contract of exemption from taxation is never to be presumed. A surrender of the power to tax when claimed "must be shown by clear and unambiguous language which will admit of no reasonable construction consistent with the reservation of the power." *The Delaware Railroad Tax Case*, 18 Wall. 206.

This disposes of all the Federal questions in the two cases, and as they were rightly decided in the court below, it follows that the judgments must be affirmed without an examination of the other errors assigned, which involve questions of State law only. *Murdock* v. *City of Memphis*, 20 Wall. 590. If the roads are not exempt under their charters from the operation of the general laws of the State for the taxation of railroads, the errors, if any, of the court below in fixing the value

and ascertaining the amount of tax under the law are not reviewable here. No complaint is made of the law itself, if it applies to this company, so far as the disputed portions of its road are concerned. The administration of the law by the officers or the courts of the State involves no questions of which we can take jurisdiction. The law being valid, the courts of the State have exclusive jurisdiction, appellate or otherwise, of all cases brought before them involving proceedings for its enforcement.

The judgment in each of the cases is affirmed.

BROWN & Others *v.* DAVIS & Others.

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

Argued December 17, 1885.—Decided January 11, 1886.

Claim 2 of reissued letters patent No. 8589, granted to Charles F. Davis and William Allen, February 18, 1879, for an "improvement in grain drills" (the original patent, No 74,515, having been granted to said Davis as inventor, February 18, 1868), namely: "The shoes or hoes of a seed planter, attached to the main frame, substantially as described, in combination with a lever, or its equivalent, whereby they can be shifted at the pleasure of the operator, from a straight to a zigzag line, or *vice versa*," makes the lever, or its equivalent, an essential element of the combination; and the claim is not infringed, where the lever is dispensed with and the human hand is substituted, although in the patent the hand is applied to work the lever.

In view of a prior invention, claims 1 and 3 of the reissue, which were not made in the original patent, were held to be limited to the special shifting apparatus of the patent, because, if extended to cover shifting arrangements not substantially using a rotating crank-shaft, they became claims which could not lawfully have been granted in the original patent, and, as claims in a reissue, were invalid, because the application for the reissue was made nearly eleven years after the original patent was granted, and after machines effecting the shifting by other means than a rotating crank-shaft had gone into use subsequently to the date of the original, and no sufficient excuse was given for the laches and delay.

It appeared as a fact, that new matter was introduced into the specification of the reissue for the purpose of reaching machines which the claims of the

original patent would not reach, and of laying a foundation for claims 1 and 3 of the reissue.

Claims 4, 5 and 6 of the reissue were held not to be infringed, because the shifting mechanism of the patent, with its rotating crank-shaft, was an element in each claim, in view of a prior invention, and was not used by the defendant.

This was a suit in equity on an alleged infringement of a patent. The facts are stated in the opinion of the court.

Mr. E. E. Wood and *Mr. B. F. Thurston* for appellants.

Mr. S. D. Bentley (*Mr. William F. Cogswell* was with him on the brief) for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of New York, on reissued letters patent No. 8589, granted to Charles F. Davis and William Allen, February 18, 1879, for an "improvement in grain drills," the original patent, No. 74,515, having been granted to said Davis, as inventor, February 18, 1868. The application for the reissue was filed January 24, 1879. The defences set up in the answer are, want of utility and novelty, invalidity of the reissue, and non-infringement. The specifications of the original and reissued patents are here placed side by side, the parts in each not found in the other being in italic:

Original.	*Reissue.*
"Be it known that I, Charles F. Davis, of Auburn, *in the* county of Cayuga, *and* State of New York, have invented certain new and useful improvements in grain drills; *and I do hereby declare* the following *to be* a full, clear, and exact description *of the same*, reference being had to the ac-	"Be it known that I, Charles F. Davis, of Auburn, county of Cayuga, State of New York, have invented certain new and useful improvements in grain drills, *of which* the following *is* a full, clear and exact description, reference being had to the accompanying drawings, making part of this specification,

companying drawings, making *a* part of this specification, in which Figure 1 represents a *top* plan of the drill, with the seed-box removed, but its position shown by *red* lines, to show the parts underneath it. *Figure* 2 represents the crank-rod or shaft to which the front ends of the drag-bars are attached, *when* detached from the machine. *Figure* 3 represents an end view of the drill, with the wheel removed, to show the parts behind it, and representing, by *black*, dotted *and red* lines, the several operative parts, and their positions under the changes of the machine or its parts. Similar letters of reference, *where they occur in the separate figures*, denote *like* parts in all *of* the *drawings*.

The object and purpose of my invention *are* to shift or change the seeding shoes or hoes from a straight to a zigzag line, and *vice versa*, and, further, to so hang the shoes or hoes, as, in addition to the shifting process, to admit of being raised separately, or the whole series together, as may be found necessary.

To enable others skilled in the art to make and use my invention, I will proceed to

in which Figure 1 represents a plan *or top view* of the drill, with the seed-box removed, (but its position shown by *dotted* lines,) to show the parts underneath it. *Fig.* 2 represents the crank-rod or shaft to which the front ends of the drag-bars are attached, detached from the machine. *Fig.* 3 represents an end view of the drill, with the wheel removed, to show the parts behind it, and representing, by *full and* dotted lines, the several operative parts, and their positions under the changes of the machine or its parts. Similar letters of reference denote *corresponding* parts in all the *figures*.

The object and purpose of my invention *is* to shift or change the seeding shoes or hoes from a straight to a zigzag line, and *vice versa*, and further, to so hang the shoes or hoes, as, in addition to the shifting process, to admit of being raised separately, or the whole series together, as may be found necessary.

To enable others skilled in the art to make and use my invention, I will proceed to

describe the same with reference to the drawings:

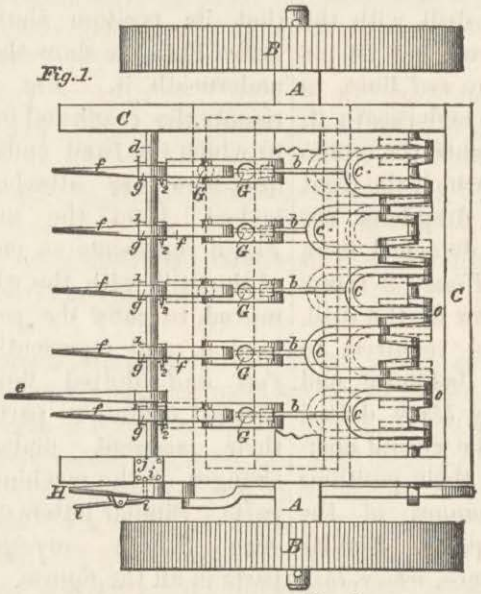


Fig. 2.

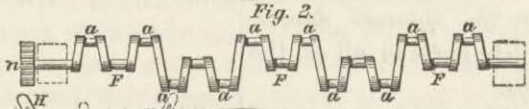
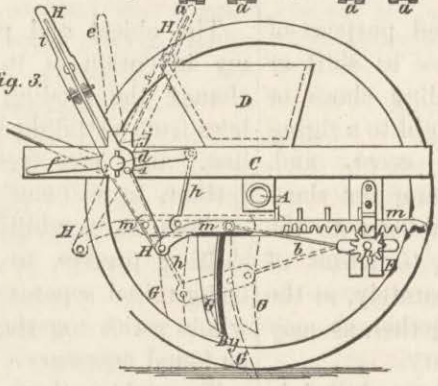


Fig. 3.



describe the same with reference to the drawings:

Upon an axle, A, supported on the usual carrying wheels,

Upon an axle, A, supported on the usual carrying-wheels,

B B, is mounted a main frame, C, and on the main frame a seed-box, D, the slides of which may be operated in any of the well-known ways. In bearings, E, in the front portion of the main frame, is hung, so as to rock or turn therein, a zigzag or crank shaft, F, (shown detached in Fig. 2,) and to the cranks or wrists, *a a a*, of this shaft are connected, *seriatim*, the drag-bars, *b b b*, by means of bows or yokes, *c*, each bow or yoke taking two of said wrists, as shown in Fig. 1. To the rear ends of these drag-bars, *b*, are attached the shoes or hoes, G, in any of the usual well-known ways. In the projecting rear portion of the main frame C there is hung a shaft, *d*, upon which there is a lever, *e*, by which it can be rocked or rolled in its bearings. At suitable distances upon this shaft *d* there is placed a series of levers, *f f*, one for each shoe or hoe, which are kept in their proper positions on the shaft by pins, 1, 1, or other suitable devices, but which can be moved independent of the shaft or of each other, or all together, as will be explained. The levers *f* have a hub or swell, *g*, at their central portions, where they are slipped on to the shaft

B B, is mounted a main frame, C, and on the main frame a seed-box, D, the slides of which may be operated in any of the well-known ways. In bearings, E, in the front portion of the main frame, is hung, so as to rock or turn therein, a zigzag or crank-shaft, F, (shown detached in Fig. 2,) and to the cranks or wrists, *a a a*, of this shaft are connected, *seriatim*, the drag-bars, *b b b*, by means of bows or yokes, *c*, each bow or yoke taking two of said wrists, as shown in Fig. 1. To the rear ends of these drag-bars, *b*, are attached the shoes or hoes, G, in any of the usual well-known ways. In the projecting rear portion of the main frame C there is hung a shaft, *d*, upon which there is a lever, *e*, by which it can be rocked or rolled in its bearings. At suitable distances upon this shaft *d* there is placed a series of levers, *f f*, one for each shoe or hoe, which are kept in their proper positions on the shaft by pins, 1, 1, or other suitable devices, but which can be moved independent of the shaft or of each other, or all together, as will be explained. The levers *f* have a hub or swell, *g*, at their central portions, where they are slipped on to the shaft

d; and into each one of these hubs is set a pin, 2, which is above the pins 1, 1, in the shaft, so that each lever can be turned upon the shaft; but, when the shaft is rocked or turned, then all the levers are worked simultaneously. To the forward ends of these levers *f* the shoes or hoes are respectively connected by a link or hinged rod, *h*, the rearward-projecting ends of said levers serving as handles for the operator to seize and work separately, when necessary to do so, or he can raise the whole series by seizing and working the lever *e*. One end of the shaft *d* projects through the timber of the main frame, for convenience of placing the parts, and upon it is a lever, H, and a spring-locking lever, *i*, connected with it, both of which levers the operator may grasp at once, and by pressure first unlock the catch, and then move the main lever, H, and the shaft *d*, as well as the parts connected with it. The catch or locking-lever *i* takes into or against *a* stop-plate, *j*, on the main frame, when not otherwise controlled. The upper portion of the lever H serves as a handle to work it by, and to the lower end of it is pivoted a rack-bar, *m*, which takes into a pinion *n*,

d; and into each one of these hubs is set a pin, 2, which is above the pins 1, 1, in the shaft, so that each lever can be turned upon the shaft; but, when the shaft is rocked or turned, then all the levers are worked simultaneously. To the forward ends of these levers *f* the shoes or hoes are respectively connected by a link or hinged rod, *h*, the rearward-projecting ends of said levers serving as handles for the operator to seize and work separately, when necessary to do so, or he can raise the whole series by seizing and working the lever *e*. One end of the shaft *d* projects through the timber of the main frame, for convenience of placing the parts, and upon it is a lever, H, and a spring-locking lever, *i*, connected with it, both of which levers the operator may grasp at once, and by pressure first unlock the catch and then move the main lever, H, and the shaft *d*, as well as the parts connected with it. The catch or locking-lever *i* takes into or against *the* stop-plate, *j*, on the main frame, when not otherwise controlled. The upper portion of the lever H serves as a handle to work it by, and to the lower end of it is pivoted a rack-bar *or connecting-rod*, *m*, which

fastened on the end of the crank or zigzag shaft F, and, when the pinion *n* is turned, the crank shaft is also turned, and, as it is turned, it shifts the shoes or hoes into a zigzag or a straight line, as the case may be. When the lever H, and the zigzag shaft F, and their several connected and operative parts, are in the positions shown by the *black* lines in Figs. 1 and 3, the shoes or hoes G are then in a straight line across the machine; but, when the lever H is shifted into the position shown by the *red* lines in Fig. 3, it turns the shaft and moves the parts connected with them, and the shoes or hoes will then stand in a zigzag line across the machine, as shown by the *red* lines, or in what may be termed two lines, one in advance of the other; and, that the shoes or hoes may be thus moved into one or two lines, and still be susceptible of being raised up separately, or in their series capacity, their connections and attachments must all be hinged or yielding. When there is an odd number of shoes or hoes on the machine, the odd one should be in the rear series, in which case there would be no necessity of locking the lever H when the shoes *were* so

takes into a pinion, *n*, fastened on the end of the crank or zigzag shaft F, and, when the pinion *n* is turned, the crank-shaft is also turned, and, as it is turned, it shifts the shoes or hoes into a zigzag or a straight line, as the case may be. When the lever H, and the zigzag shaft F, *and the connecting-bar m*, and their several connecting and operative parts, are in the positions shown by the *full* lines in Figs. 1 and 3, the shoes or hoes G are then in a straight line across the machine; but, when the lever H is shifted into the position shown by the *dotted* lines in Fig. 3, it turns the shaft and moves the parts connected with them, and the shoes or hoes will then stand in a zigzag line across the machine, as shown by the *full* lines, or in what may be termed two lines, one in advance of the other; and, *in order* that the shoes or hoes may be thus moved into one or two lines, and still be susceptible of being raised up separately, or in their series capacity, their connections and *the* attachments must all be hinged or yielding. When there is an odd number of shoes or hoes on the machine, the odd one should be in the rear series, in which case there would be no

arranged, as the greater resistance on the greater number would always keep them so. But, if an even number of shoes be used, and an equal number in each row, then the lever would have to be locked or fastened in both of its positions.

It is obvious that other mechanical devices may be used for shifting the shoes or hoes from a straight into a zigzag line, or *vice versa.* I have devised several ways of accomplishing this movement, *as, for instance,* a sheave, pulley, or chain wheel may be keyed to the end of the crank shaft, and to this sheave or wheel a chain may be attached, and, passing around it, *extend thence to the lever,* so that, by *working the lever,* the same effect *would* be attained as by the rack and pinion.

Another plan may be as follows: A crank or cross arms may be placed on the turning shaft, and, by means of con-

necessity of locking the lever H when the shoes *are* so arranged, as the greater resisttance on the greater number would always keep them so. But, if an even number of shoes be used, and an equal number in each row, then the lever would have to be locked or fastened in both of its positions.

It is obvious that other mechanical devices may be used for shifting the shoes or hoes from a straight into a zigzag line, or *vice versa.* I have devised several ways of accomplishing this movement. *The rack-bar or connecting-bar m may be used for this purpose, and thereby the shoes or hoes may be shifted from a straight to a zigzag line, or vice versa, said connecting-bar m being held in position, if desired, by any of the usual mechanical devices for that purpose; second, by means of* a sheave, pulley or chain wheel, *which* may be keyed to the end of the crank-shaft, and to this sheave or wheel a chain may be attached, and, passing around it, so that, by *means thereof,* the same effect *can* be attained as by the rack and pinion.

Another plan may be as follows: A crank or cross arms may be placed on the turning shaft, and, by means of *a* con-

necting rods, *which connect the cranks or arms with the levers*, the shaft may be turned, and the shoes thus thrown into a straight or zigzag line, as may be desired; or, instead of the crank-shaft *to shift the shoes*, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross-bars or heads at their ends. Now, by shifting these two bars, *they will* shift the shoes attached to them, *and change them* into the positions hereinabove described. When the hoes are set in a zigzag line, as above mentioned, and are in that position raised up, a pin, 3, in the extreme end of the shaft *d*, will take against a pin, 4, in the lever H, and thereby shifting the hoes into more nearly a straight line, as they rise, or into quite a straight line, depending upon the extent to which they are raised.

Having *thus fully* described my invention, what I claim *therein* as new and desire to secure by letters patent, is:

1. *So attaching the shoes or hoes of a seed-planter to the main frame, as that, by means of a lever, or its equivalent, said shoes may be shifted from a straight to a zigzag line, or*

necting *rod or* rods, the shaft may be turned *by the operator*, and the shoes thus thrown into a straight or zigzag line, as may be desired; or, instead of the crank-shaft, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross-bars or heads at their ends. Now, by shifting *the relations of* these two bars, *and by the means aforesaid, or by the connecting-rod m, the operator can* shift the shoes *or hoes* attached to them into the positions hereinabove described. When the hoes are set in a zigzag line, as above mentioned, and are in that position raised up, a pin, 3, in the extreme end of the shaft *d*, will take against a pin, 4, in the lever H, and thereby shifting the hoes into more nearly a straight line, as they rise, or into quite a straight line, depending upon the extent to which they are raised.

Having *now* described my invention, what I claim as new and desire to secure by letters patent, is:

1. *The shoes or hoes of a seed-planter, attached to the main frame, substantially as described, whereby they may be simultaneously shifted from a straight to a zigzag line, or*

vice versa, at pleasure, substantially as described.

2. *I also claim, in combination with a series of shoes or hoes that are capable of being changed from a straight to a zigzag line, or vice versa, the so connecting of said shoes, by independent levers, to the lifting-bar, as that they may be raised by the operator individually, or as a whole, substantially as described.*

3. *I also claim hinging the shoe to both its drag-bar and its individual lever, so that the shoe may be raised and lowered in either of its changed positions, by a lever that is permanently located, substantially as described.*"

vice versa, by a single movement.

2. *The shoes or hoes of a seed-planter, attached to the main frame, substantially as described, in combination with a lever or its equivalent, whereby they can be shifted, at the pleasure of the operator, from a straight to a zigzag line, or vice versa.*

3. *The shoes or hoes of a seed-planter, attached to the main frame, substantially as described, in combination with a rod or its equivalent, whereby they can be shifted from a straight to a zigzag line, or vice versa.*

4. *A series of shoes or hoes that are capable of being changed from a straight to a zigzag line, or vice versa, in combination with independent levers, connecting said shoes or hoes with the lifting-bar, whereby they can be raised by the operator individually or as a whole, substantially as described.*

5. *The shoe hinged to both its drag-bar and its individual lever, so that it can be raised or lowered, in either of its changed positions, by a lever that is per-*

> *manently located, substantially as described.*
>
> 6. *In combination with a series of shoes or hoes that are capable of being changed by the operator at the rear of the machine, from a straight to a zigzag line, or vice versa, a shaft and lifting lever connected therewith, whereby the whole series can be raised at once by the operator, to pass obstructions, substantially as described.*"

The cause was heard in the Circuit Court, on pleadings and proofs, and a decision rendered in May, 1881, *Davis* v. *Brown*, 19 Blatchford, 263, in pursuance of which an interlocutory decree was entered, in June, 1881, declaring the reissued patent to be valid, and to have been infringed as to all its claims, and awarding a recovery of profits and damages and a perpetual injunction. On the report of a master, a final decree was entered in February, 1882, by which the plaintiffs recovered $5689.91, as damages and costs. The defendants have appealed to this court.

The specification of the original patent stated the purpose of the invention to be, to change the seeding shoes or hoes from a straight to a zigzag line, and *vice versa;* and, also, to so hang the shoes or hoes, as, in addition to the shifting process, to allow the shoes or hoes to be raised all together, or any one separately. The mechanical means described in that specification, for shifting the shoes, are these: In the front part of the machine is a rotating shaft, with cranks on it, so arranged that the shaft does not have a straight continuous axis, but has sets of axes in different lines, alternating, so that, yokes being attached, each to two of the cranks, and each two of the cranks having axes in a different line from the line of the axes of the next two adjoining cranks, the yokes being of substantially equal length, and being connected by drag-bars, at

the rear ends of the drag-bars, to the shoes, a rotating motion given to the crank-shaft will shift the shoes, by moving all of them, each alternate shoe moving in an opposite direction from that in which the shoe next to it moves, and thus a space being opened or closed, of double the distance through which any shoe travels. To rotate the crank-shaft, there is a cross shaft in the rear of the machine, on the end of which is an upright lever, which extends upwards to form a handle, and has pivoted to it below a bar, which extends forward, and the forward end of which is formed into a rack, which works into a pinion on the end of the crank-shaft. By moving the lever, the rack and pinion are worked, and the crank-shaft is rotated, and the shoes are shifted. The extent of the rotating movement of the crank-shaft is about half a circle, back and forth. The original specification says, that, instead of employing the crank-shaft, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross-bars or heads, at their ends; and that, by shifting these two bars, the shoes attached to them will be shifted. But there is no more specific description of mechanism for the purpose, nor any drawing of such mechanism.

In the defendants' machine, every alternate shoe is connected with an immovable part of the frame, and every other alternate shoe is connected with a swinging cross-bar, which hangs down so as to have a motion back and forth in the arc of a circle, by reason of its being hung in bearings in the side of the frame. A rod extends from near the middle of the width of the swinging cross-bar to the rear part of the frame, behind the line from which the shoes are suspended, which rod is supported in the centre of its length, and terminates, at its rear end, in a handle, so that an operator can work it, and, by pulling it, shift simultaneously all the shoes that are attached to the swinging cross-bar. Two coiled springs are so arranged, that, when the rod is pulled, the springs are compressed, and, when the rod is released, the action of the springs tends to throw the swinging cross-bar and the shoes attached to it towards the front of the frame again, restoring them to the position from which the pulling of the rod moved them. Thus,

only alternate shoes are shifted, but the positions of the toes of the shoes, relatively to each other, can be simultaneously changed, and a wider space, in a straight line, be opened between any two toes at any time. The shoes are so set that their toes are never in a straight line across, but, when nearest to each other, are somewhat out of a straight line, and the pulling of the rod causes the distance between them to increase. The shoes which move in increasing such distance do so through the rotating motion to and fro of the swinging cross-bar to which they are attached, such motion being imparted by the pulling, at the rear of the machine, of the rod attached to the swinging cross-bar. In the plaintiffs' machine, the shoes which move, in increasing such distance, do so through the rotating motion to and fro of the crank-shaft to which they are attached, such motion being imparted by the pushing at the rear of the machine of the rod that carries the rack, the rod being worked by a lever.

An examination of the claims of the original and reissued patents shows that claim 2 of the reissue is substantially the same as claim 1 of the original; that claim 4 of the reissue is substantially the same as claim 2 of the original; and that claim 5 of the reissue is substantially the same as claim 3 of the original.

The Circuit Court held that claim 2 of the reissue was infringed, although in the defendants' machine there is no lever such as the lever H of the patent, and no equivalent or substitute for it. The view taken was, that claim 2 was infringed, because the defendants use a rod, the end of which is pushed and pulled by the hand of the operator, while in the patent the lever H pulls and pushes the end of the rod. But the lever, or its equivalent, as a mechanical instrument, is made an essential element in claim 2, and dispensing with the lever, and using instead the human hand, is not the use of an equivalent, although in the plaintiffs' machine the hand is applied to work the lever. *Water Meter Co.* v. *Desper*, 101 U. S., 332, 337; *Gage* v. *Herring*, 107 U. S. 640, 648; *Fay* v. *Cordesman*, 109 U. S. 408, 420, 421; *Sargent* v. *Hall Safe and Lock Co.*, 114 U. S. 63, 86.

In order to determine what construction ought to be given to the other claims of the reissue, it is necessary to consider an invention made by one Powers, at Madison, Wisconsin, in 1862, the invention of Davis being carried back only to September, 1866. During the winter of 1861–2, and the spring of 1862, Powers was selling, at Madison, grain drills with iron drag-bars. During the season of 1862, noticing the working of drills in the field, he conceived the idea that the shoes could be put into single and double ranks by a more easy method than that then used. He worked out a plan, and made a model of it, and applied for a patent, November 10, 1862. The patent was ordered to issue December 6, 1862, but was never issued. The reason is not stated. The specification filed states that the "invention consists of a device to enable the shovels or plows of a drill to be set in single or double rows or ranks, with greater ease and facility than hitherto." The method described and shown in the drawings is to have a cross row of stationary shovels; and a cross row of other shovels, attached to a cross-bar, which is arranged, at each end of it, so as to slide to the extent of eight inches to and fro, in a groove. Thus, two rows may be made, or the sliding cross-bar may be set at a point where all the shovels will be in a line, and one row be formed. The movable cross-bar is moved by hand, and secured, when set, by bolts. The claim covers "the method of double and single ranking the drill teeth, by the adjustment of the sliding cross-bar A, to which are attached the alternate drill teeth or shovels, to different positions between the side pieces of the frame." The description states, that, "by this device, double or single ranking can be effected in a moment, instead of the more tedious process of other similar machines," and that "double and single ranking is a highly important feature in a drill, to adapt it to different soils and circumstances." Powers put this shifting arrangement "on to two or may be three drills" which he had on hand. He testifies to the use of two of them, and says they worked perfectly, so far as changing the rank of the drill was concerned. This was a completed invention. The idea of changing the relative positions of the shoes by having one row of them stationary and moving the other, which is the idea de-

veloped in the defendants' machine, was fully embodied in Powers' machine. It had no lever and rod to do the work of the hand in moving the sliding cross-bar, and that cross-bar was held in position, when set, by bolts.

In view of this invention of Powers, we are of opinion that the invention of the Davis patent must be limited, so far as the shifting apparatus is concerned, to the special arrangement of the rotating crank-shaft described, and shown in the drawings. The words "substantially as described," found in each of the first two claims of the original patent, properly confined those claims to the shifting mechanism described. If claim 1 of the reissue is given a construction which includes any arrangement for shifting not substantially using a rotating crank-shaft, it becomes a claim which could not lawfully have been granted in the original patent; and, as a claim in a reissued patent, it is invalid, within the defences set up in the answer, because the application for the reissue was made nearly eleven years after the original patent was granted, and after machines effecting the shifting by other means than a rotating crank-shaft had gone into use subsequently to the date of the original patent, and no sufficient excuse is given for the laches and delay. The same remarks apply to claim 3 of the reissue.

In view of the rulings of this court on the subject of reissued patents, made since the decision in this case was made by the court below, in May, 1881, this case must be considered in view of the fact that the new matter introduced into the specification of the reissue was put in for the purpose of reaching machines which the claims of the original patent would not reach, and of laying a foundation for claims 1 and 3 of the reissue. The inventor and patentee, Davis, distinctly says this, in his testimony. The principal interpolation is in these words: "The rack-bar or connecting-rod *m* may be used for this purpose, and thereby the shoes or hoes may be shifted from a straight to a zigzag line, or *vice versa*, said connecting-bar *m* being held in position, if desired, by any of the usual mechanical devices for that purpose." In the original specification *m* is called a "rack-bar," because it is pivoted at one end to the lower end of the lever H, and has on its other end a rack tak-

ing into a pinion on the end of the crank-shaft. But, in the reissue, *m* is called "a rack-bar or connecting-rod." Again, in the reissue, the reference to the letter H, as connected with and working the chain to be used with the sheave or wheel, in the second suggested alternative means of shifting, is erased, so as not to make the use of the lever H necessary. Before these changes, the defendants' machine, which has no lever and no rotating crank-shaft, would not have been within the scope of the original claims, but, if the rack-bar were to become a connecting-rod, it was thought it might cover the rod in the defendants' machine. Claim 3 of the reissue was framed on this view, of shifting by a rod alone, while claim 1 is made so broad as to seem to claim shifting by any means, by a single movement.

As to claims 4, 5 and 6 of the reissue, the shifting mechanism of the patent, with its rotating crank-shaft, must, in view of the Powers invention, be considered as an element in each claim; and that mechanism is not used by the defendants.

It follows from these views, that

The decree of the Circuit Court must be reversed, and the case remanded, with a direction to dismiss the bill, with costs.

PRESSER *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Argued November 23, 24, 1885.—Decided January 4, 1886.

The doctrine that statutes, constitutional in part only, will be upheld as to what is constitutional, if it can be separated from the unconstitutional provisions, reasserted.

A State statute providing that all able-bodied male citizens of the State between eighteen and forty-five, except those exempted, shall be subject to military duty, and shall be enrolled and designated as the State militia, and prohibiting all bodies of men other than the regularly organized volunteer militia of the State and the troops of the United States from associating together as military organizations, or drilling or parading with arms in any city of the State without license from the governor, as to

Statement of Facts.

these provisions is constitutional and does not infringe the laws of the United States: and it is sustained as to them, although the act contains other provisions, separable from the foregoing, which it was contended infringed upon the powers vested in the United States by the Constitution, or upon laws enacted by Congress in pursuance thereof.

The provision in the Second Amendment to the Constitution, that "the right of the people to keep and bear arms shall not be infringed," is a limitation only on the power of Congress and the national government, and not of the States. But in view of the fact that all citizens capable of bearing arms constitute the reserved military force of the national government as well as in view of its general powers, the States cannot prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security.

The provision in the Fourteenth Amendment to the Constitution that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not prevent a State from passing such laws to regulate the privileges and and immunities of its own citizens as do not abridge their privileges and immunities as citizens of the United States.

Unless restrained by their own Constitutions, State legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations, except those which are authorized by the militia laws of the United States.

Herman Presser, the plaintiff in error, was indicted on September 24, 1879, in the Criminal Court of Cook County, Illinois, for a violation of the following sections of Art. XI. of the Military Code of that State, Act of May 28, 1879, Laws of 1879, 192.

"§ 5. It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State, without the license of the Governor thereof, which license may at any time be revoked: *And provided, further*, that students in educational institutions, where military science is a part of the course of instruction, may, with the consent of the Governor, drill and parade with arms in public, under the superintendence of their instructors, and may take part in any regimental or brigade encampment, under command of their military instructor; and while so encamped shall be governed by the provisions of this act. They shall be entitled only to transporta-

tion and subsistence, and shall report and be subject to the commandant of such encampment: *Provided*, that nothing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords.

"§ 6. Whoever offends against the provisions of the preceding section, or belongs to, or parades with, any such unauthorized body of men with arms shall be punished by a fine not exceeding the sum of ten dollars ($10), or by imprisonment in the common jail for a term not exceeding six months, or both."

The indictment charged in substance that Presser, on September 24, 1879, in the county of Cook, in the State of Illinois, "did unlawfully belong to, and did parade and drill in the city of Chicago with an unauthorized body of men with arms, who had associated themselves together as a military company and organization, without having a license from the Governor, and not being a part of, or belonging to, 'the regular organized volunteer militia' of the State of Illinois, or the troops of the United States."

A motion to quash the indictment was overruled. Presser then pleaded not guilty, and both parties having waived a jury the case was tried by the court, which found Presser guilty and sentenced him to pay a fine of $10.

The bill of exceptions taken upon the trial set out all the evidence, from which it appeared that Presser was thirty-one years old, a citizen of the United States and of the State of Illinois, and a voter; that he belonged to a society called the Lehr und Wehr Verein, a corporation organized April 16, 1875, in due form, under chapter 32, Revised Statutes of Illinois, called the General Incorporation Laws of Illinois, "for the purpose," as expressed by its certificate of association, "of improving the mental and bodily condition of its members, so as to qualify them for the duties of citizens of a republic. Its members shall therefore obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises;" that Presser, in December, 1879, marched at the head of said company, about four hundred in number, in the streets of the city

of Chicago, he riding on horseback and in command; that the company was armed with rifles and Presser with a cavalry sword; that the company had no license from the governor of Illinois to drill or parade as a part of the militia of the State, and was not a part of the regular organized militia of the State, nor a part of troops of the United States, and had no organization under the militia law of the United States. The evidence showed no other facts. Exceptions were reserved to the ruling of the court upon the motion to quash the indictment, to the finding of guilty, and to the judgment thereon. The case was taken to the Supreme Court of Illinois, where the judgment was affirmed. Thereupon Presser brought the present writ of error for a review of the judgment of affirmance.

Mr. Allan C. Story for plaintiff in error, argued the following Federal points.—I. The Illinois act is in conflict with Article I., section 8, subdivisions 12, 14, 15, 16 and 18 of the Constitution of the United States. *Houston* v. *Moore*, 5 Wheat. 1, 51, 68; *Gibbons* v. *Ogden*, 9 Wheat. 1, 209; *Passenger Cases*, 7 How. 283; *Railroad Co.* v. *Husen*, 95 U. S. 465; *McCulloch* v. *Maryland*, 4 Wheat. 315; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Opinions of Justices*, 14 Gray, 614; *United States* v. *Cruikshank*, 92 U. S. 542; *Martin* v. *Mott*, 12 Wheat. 19.—II. It is also in conflict with Article 1, section 18, subdivision 3, of the Constitution. *Luther* v. *Borden*, 7 How. 1; *Texas* v. *White*, 7 Wall. 700; *Green* v. *Biddle*, 8 Wheat. 1; *Poole* v. *Fleeder*, 11 Pet. 185; and cases cited above. —III. It is also in conflict with Article II. of the Amendments to the Constitution. See cases cited under Point I.—IV. It is also in conflict with Amendment XIV. to the Constitution. *Slaughter-House Cases*, 16 Wall. 36, 74; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Crandall* v. *Nevada*, 6 Wall. 35, 49; *Dred Scott* v. *Sandford*, 19 How. 393, 580; *United States* v. *Cruikshank*, cited above.—V. It is also in conflict with Article I., section 9, subdivision 3 of the Constitution. *Fletcher* v. *Peck*, 6 Cranch, 87; *Cummings* v. *Missouri*, 4 Wall. 277; *Lapeyre* v. *United States*, 17 Wall. 191, 206; *Carpenter*

v. *Pennsylvania*, 17 How. 456; *Ex parte Garland*, 4 Wall. 333.

Mr. Lyman Trumbull also filed a supplemental brief for plaintiff in error, contending as follows:

I. The power of organizing, arming and disciplining the militia being confided by the Constitution to Congress, when Congress acts upon the subject and passes a law to carry into effect the constitutional provision, such action excludes the power of legislation by the State on the same subject. This is manifest, not only from the grant of power to Congress to organize, arm and discipline the militia, but from the restriction which the Constitution puts upon the States, limiting them simply to the appointment of the officers, and to the authority to train the militia as Congress shall prescribe. The power of each government in regard to the militia is distinctly stated in the Constitution itself. As well might the Federal government arrogate to itself the appointment of the officers of the militia as for the States to assume to organize and arm them in a different mode from that prescribed by Congress. Congress has exercised its functions, and covered, so far as it deemed expedient, the ground assigned to it by the Constitution, by providing for organizing, arming and disciplining the militia. See *Houston* v. *Moore*, 5 Wheat. 1, especially the language of the court on page 24. Counsel on the other side contend this case was overruled in *Sturges* v. *Crowninshield*, 4 Wheat. 122. That is a remarkable statement, as *Sturges* v. *Crowninshield*, was decided a year before *Houston* v. *Moore*. Moreover there is nothing in the former in conflict with the latter. The Military Code of Illinois differs from the act of Congress not only in details, but in its whole scope and object. Congress aims to arm, organize and discipline all able-bodied male citizens of the specified age. Illinois aims to prevent such arming, organizing and disciplining. Only 8000 are allowed to associate together and drill, and even those are not enrolled and organized as required by Congress.

II. The provisions for organizing, arming and disciplining the Illinois National Guard are in conflict with that clause of

the Constitution which declares that no State shall, without the consent of Congress, keep troops in time of peace. Congress has never given its assent to that organization, and it is apparent that the guard are "troops" within the sense of the Constitution. The militia acts of Congress only excepted from their operation certain military organizations then existing, of which the Illinois National Guard was not one. It consists of 8000 men, raised for five years, formed into companies and regiments, with staff officers different in number and rank from those provided for by Congress; is divided into infantry, cavalry and artillery; is required to drill often, to practise at target shooting and rifle practice, and is required to conform to the laws of the United States organizing the militia only in matters not provided for in the act. If these provisions do not constitute the Illinois National Guard "troops," the keeping of which in time of peace by the State is prohibited by the Constitution of the United States, I am at a loss to conceive what kind of troops it is that a State may not keep.

III. The provision of the State statute which prohibits other organizations than that of the "Illinois National Guard," from associating together as military companies, or to parade with arms, without the license of the governor, is in conflict with the act of Congress for the organization, &c., of the militia, and also violates Articles II. and XIV. of the Amendments to the Constitution. It may be admitted that Article II., securing to the people the right to keep and bear arms, by itself is a prohibition against the power of Congress, and not of the States, to interfere with that right, except when the keeping and bearing of arms is connected with some national purpose. When it is so connected, no State can pass any law abridging the right without a violation of the Second and Fourteenth Amendments.

The Fourteenth Amendment makes all persons born or naturalized in the United States, citizens of the United States, and of the State wherein they reside, and then declares that no State shall make any law which shall abridge the privileges and immunities of citizens of the United States. The citizen

of the United States has secured to him the right to keep and bear arms as part of the militia which Congress has the right to organize, and arm, and to drill in companies. This is a national right which the national government has the power and which it is its duty to enforce.

This right of the people to keep and bear arms for the purpose of forming a well regulated militia, like "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such, under the protection of, and guaranteed by the United States." *United States* v. *Cruikshank*, 92 U. S. 542, 552.

Whether a State may not prohibit its citizens from keeping or bearing arms for other than militia purposes is a question which need not be considered, as the Illinois statute is aimed against the organizing, arming and drilling of bodies of men as militia, except they belong to the Illinois National Guard of eight thousand.

It is contended that the Illinois act does not conflict with the act of Congress until the militia is actually mustered into the service of the United States. This is a mistaken view of the Constitution and of the object and intent of the law of 1792. The power of Congress to *organize* the militia is not limited to a period of war, or to such time as they may be employed in the service of the United States. It is only the power to *govern* them that is thus limited. The clause in the Constitution authorizing the President to call out the militia and put it into the service of the United States is separate and distinct from that which authorizes Congress to legislate for its organization, arming, and discipline. The manifest intent of the Constitution is to provide for an organized militia in time of peace, which may be called upon to execute the laws of the Union, and thus dispense with a standing army.

The acts of 1792 and 1795, authorizing the President to use military force to enforce the laws of the Union, suppress insurrections, and repel invasions, limited him to the use of the militia for such purposes. It was not until 1807 that he had

authority to employ the land and naval forces of the United States therefor. Act of March 3, 1807, 2 Stat. 443.

The militia acts make definite provisions as to the persons to serve in the militia, the officers of that body, the times of parade and service, the returns to be made to the President, &c. It is absurd to suppose that these have no force till the militia is mustered into the service of the Union. State laws making other provisions are in conflict with it as much before as after such muster.

If it were admitted that State laws for organizing the militia are valid, except in so far as they conflict with the execution and operation of national laws on the same subject, the admission does not help the defendant in error, because it is insisted, and, as I think, shown, that the whole spirit, intent and effect of the Illinois statute is in conflict with the provisions of the act of Congress. If a State law is incompatible with the Constitution of the United States, or any law of Congress in pursuance thereof, it is invalid, whether the conflict arise in the execution and operation of the act of Congress, or in an attempt to put the State law in operation. It is enough if the State law, when sought to be put into execution and operation, conflicts with the national law on the same subject. It may be that a State law in partial execution of the military act of Congress, and conforming to its provisions, would be valid to that extent, upon the principle that power to organize all the militia implies the power to organize a part; but this principle can have no application to the Military Code of Illinois, for the reason that the organization of the Illinois National Guard, provided for by that code, does not, as has been already shown, conform to the act of Congress. It does not constitute any part of the militia upon which the President may call to enforce the laws of the United States, when resisted by combinations too powerful to be overcome by the ordinary course of judicial proceedings. Act of February 28, 1795, 1 Stat. 424; Rev. Stat. §§ 5298, 5299. It is purely a State force, sworn to serve the State in its military service, subject at all times to the orders of the governor, prohibited from leaving the State without his consent under a penalty, and so far from being part of

the militia organized in pursuance of the act of Congress, the Illinois National Guard, in its organization, arming, and the purpose for which it is organized, contravenes the spirit and intent of the national act, and if permitted to stand, it prevents the organizing, arming and disciplining all the male citizens of the State, as Congress has prescribed.

Mr. George Hunt, Attorney-General of Illinois, for defendant in error.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The position of the plaintiff in error in this court was, that the entire statute under which he was convicted was invalid and void, because its enactment was the exercise of a power by the legislature of Illinois forbidden to the States by the Constitution of the United States.

The clauses of the Constitution of the United States referred to in the assignments of error, were as follows:

Art. I., sec. 8. "The Congress shall have power . . . To raise and support armies. . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress. . . . To make all laws which shall be necessary and proper, for carrying into execution the foregoing powers," &c.

Art. I., sec. 10. "No State shall, without the consent of Congress, keep troops . . . in time of peace."

Art. II. of Amendments. "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

The plaintiff in error also contended that the enactment of the 5th and 6th sections of Article XI. of the Military Code

was forbidden by subdivision 3 of section 9, Art. I., which declares "No bill of attainder or *ex post facto* law shall be passed," and by Art. XIV. of Amendments, which provides that "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."

The first contention of counsel for plaintiff in error is that the Congress of the United States having, by virtue of the provisions of Article I., section 8, above quoted, passed the act of May 8, 1792, entitled "An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States," 1 Stat. 271, the act of February 28, 1795, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," 1 Stat. 424, and the act of July 22, 1861, "to authorize the Employment of Volunteers to aid in enforcing the Laws and protecting Public Property," 12 Stat. 268, and other subsequent acts, now forming "Title XVI., The Militia," of the Revised Statutes of the United States, the legislature of Illinois had no power to pass the act approved May 28, 1879, "to provide for the organization of the State militia, entitled the Military Code of Illinois," under the provisions of which (sections 5 and 6 of Article XI.) the plaintiff in error was indicted.

The argument in support of this contention is, that the power of organizing, arming, and disciplining the militia being confided by the Constitution to Congress, when it acts upon the subject, and passes a law to carry into effect the constitutional provision, such action excludes the power of legislation by the State on the same subject.

It is further argued that the whole scope and object of the Military Code of Illinois is in conflict with that of the law of Congress. It is said that the object of the act of Congress is to provide for organizing, arming, and disciplining all the able-bodied male citizens of the States, respectively, between certain ages, that they may be ready at all times to respond to the call of the nation to enforce its laws, suppress insurrection, and

repel invasion, and thereby avoid the necessity for maintaining a large standing army, with which liberty can never be safe, and that on the other hand, the effect if not object of the Illinois statute is to prevent such organizing, arming, and disciplining of the militia.

The plaintiff in error insists that the act of Congress requires absolutely all able-bodied citizens of the State between certain ages, to be enrolled in the militia; that the act of Illinois makes the enrolment dependent on the necessity for the use of troops to execute the laws and suppress insurrections, and then leaves it discretionary with the governor by proclamation to require such enrolment; that the act of Congress requires the entire enrolled militia of the State, with a few exemptions made by it and which may be made by State laws, to be formed into companies, battalions, regiments, brigades, and divisions, that every man shall be armed and supplied with ammunition, provides a system of discipline and field exercises for companies, regiments, &c., and subjects the entire militia of the State to the call of the President to enforce the laws, suppress insurrection, or repel invasion, and provides for the punishment of the militia officers and men who refuse obedience to his orders. On the other hand, it is said that the State law makes it unlawful for any of its able-bodied citizens, except eight thousand, called the Illinois National Guard, to associate themselves together as a military company, or to drill or parade with arms without the license of the governor, and declares that no military company shall leave the State with arms and equipments without his consent; that even the eight thousand men, styled the Illinois National Guard, are not enrolled or organized as required by the act of Congress, nor are they subject to the call of the President, but they constitute a military force sworn to serve in the military service of the State, to obey the orders of the governor, and not to leave the State without his consent; and that, if the State act is valid, the national act providing for organizing, arming, and disciplining the militia is of no force in the State of Illinois, for the Illinois act, so far from being in harmony with the act of Congress, is an insurmountable obstacle to its execution.

We have not found it necessary to consider or decide the question thus raised, as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the act were invalid. For it is a settled rule "that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable." *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Penniman's Case*, 103 U. S. 714, 717; *Unity* v. *Burrage*, 103 U. S. 459. See also *Trade Mark Cases*, 100 U. S. 82.

We are of opinion that this rule is applicable in this case. The first two sections of Article I. of the Military Code provide that all able-bodied male citizens of the State between the ages of eighteen and forty-five years, except those exempted, shall be subject to military duty, and be designated the "Illinois State Militia," and declare how they shall be enrolled and under what circumstances. The residue of the Code, except the two sections on which the indictment against the plaintiff in error is based, provides for a volunteer active militia, to consist of not more than eight thousand officers and men, declares how it shall be enlisted and brigaded, and the term of service of its officers and men; provides for brigade generals and their staffs, for the organization of the requisite battalions and companies and the election of company officers; provides for inspections, parades, and encampments, arms and armories, rifle practice, and courts martial; provides for the pay of the officers and men, for medical service, regimental bands, books of instruction and maps; contains provisions for levying and collecting a military fund by taxation, and directs how it shall be expended; and appropriates $25,000 out of the treasury, in advance of the collection of the military fund, to be used for the purposes specified in the Military Code.

It is plain from this statement of the substance of the Military Code, that the two sections upon which the indictment against the plaintiff in error is based may be separated from the residue of the Code, and stand upon their own independent provisions. These sections might have been left out of the

Military Code and put in an act by themselves, and the act thus constituted, and the residue of the Military Code, would have been coherent and sensible acts. If it be conceded that the entire Military Code, except these sections, is unconstitutional and invalid, for the reasons stated by the plaintiff in error, these sections are separable, and, put in an act by themselves, could not be considered as forbidden by the clauses of the Constitution having reference to the militia, or to the clause forbidding the States, without the consent of Congress, to keep troops in time of peace. There is no such connection between the sections which prohibit any body of men, other than the organized militia of the State and the troops of the United States, from associating as a military company and drilling with arms in any city or town of the State, and the sections which provide for the enrolment and organization of the State militia, as makes it impossible to declare one, without declaring both, invalid

This view disposes of the objection to the judgment of the Supreme Court of Illinois, which judgment was in effect that the legislation on which the indictment is based is not invalid by reason of the provisions of the Constitution of the United States, which vest Congress with power to raise and support armies, and to provide for calling out, organizing, arming and disciplining the militia, and governing such part of them as may be employed in the service of the United States, and that provision which declares that "no State shall without the consent of Congress . . . keep troops . . . in time of peace."

We are next to inquire whether the 5th and 6th sections of article XI. of the Military Code are in violation of the other provisions of the Constitution of the United States relied on by the plaintiff in error. The first of these is the Second Amendment, which declares: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities

and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. It was so held by this court in the case of *United States* v. *Cruikshank*, 92 U. S. 542, 553, in which the Chief Justice, in delivering the judgment of the court, said, that the right of the people to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to what is called in *The City of New York* v. *Miln*, 11 Pet. [102] 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States." See also *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *The State of Ohio*, 5 How. 410; *Twitchell* v. *Commonwealth*, 7 Wall. 321, 327; *Jackson* v. *Wood*, 2 Cowen, 819; *Commonwealth* v. *Purchase*, 2 Pick. 521; *United States* v. *Cruikshank*, 1 Woods, 308; *North Carolina* v. *Newsom*, 5 Iredell, 250; *Andrews* v. *State*, 3 Heiskell, 165; *Fife* v. *State*, 31 Ark. 455.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think

it clear that the sections under consideration do not have this effect.

The plaintiff in error next insists that the sections of the Military Code of Illinois, under which he was indicted, are an invasion of that clause of the first section of the Fourteenth Amendment to the Constitution of the United States which declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. The inquiry is, therefore, pertinent, what privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of Article XI. of the Military Code of Illinois?

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred. For, as was said by this court in *United States* v. *Cruikshank*, 92 U. S. 542, 560, 551, the government of the United States, although it is "within the scope of its powers supreme and above the States," "can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction." "All that cannot be so granted or so secured are left to the exclusive protection of the State."

We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the Constitution which, upon any pretence, could be said to have any relation whatever to his right to associate with others as a military company is found in the First Amendment, which declares that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances." This is a right which it was held in *United States* v. *Cruikshank*, above cited, was an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. But it was held in the same case that the right peaceably to assemble was not protected by the clause referred to, unless the purpose of the assembly was to petition the government for a redress of grievances.

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

It cannot be successfully questioned that the State governernments, unless restrained by their own Constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are

authorized by the militia laws of the United States. The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.

In the case of *New York* v. *Miln*, 11 Pet. 102, 139, this court said: "We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated," namely, by the Constitution and laws of the United States. See also *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *Gilman* v. *Philadelphia*, 3 Wall. 713; *License Tax Cases*, 5 Wall. 462; *United States* v. *Dewitt*, 9 Wall. 41; *United States* v. *Cruikshank*, 92 U. S. 542. These considerations and authorities sustain the power exercised by the legislature of Illinois in the enactment of sections 5 and 6 of Art. XI. of the Military Code.

The argument of the plaintiff in error that the legislation mentioned deprives him of either life, liberty or property without due process of law, or that it is a bill of attainder or *ex post facto* law, is so clearly untenable as to require no discussion.

It is next contended by the plaintiff in error that sections 5 and 6 of Art. XI. of the Military Code, under which he was indicted, are in conflict with the acts of Congress for the organization of the militia. But this position is based on what seems to us to be an unwarranted construction of the sections referred to. It is clear that their object was to forbid voluntary military associations, unauthorized by law, from organizing or

drilling and parading with arms in the cities or towns of the State, and not to interfere with the organization, arming and drilling of the militia under the authority of the acts of Congress. If the object and effect of the sections were in irreconcilable conflict with the acts of Congress they would of course be invalid. But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law. *Parsons* v. *Bedford*, 3 Pet. 433; *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261; *Marshall* v. *Grimes*, 41 Mississippi, 27. If we yielded to this contention of the plaintiff in error we should render the sections invalid by giving them a strained construction, which would make them antagonistic to the law of Congress. We cannot attribute to the legislature, unless compelled to do so by its plain words, a purpose to pass an act in conflict with an act of Congress on a subject over which Congress is given authority by the Constitution of the United States. We are therefore of opinion that fairly construed the sections of the Military Code referred to do not conflict with the laws of Congress on the subject of the militia.

The plaintiff in error further insists that the organization of the Lehr und Wehr Verein as a corporate body, under the general corporation law of the State of Illinois, was in effect a license from the governor, within the meaning of section 5 of Article XI. of the Military Code, and that such corporate body fell within the exception of the same section "of students in educational institutions where military science is a part of the course of instruction."

In respect to these points we have to say that they present no Federal question. It is not, therefore, our province to consider or decide them. *Murdock* v. *Memphis*, 20 Wall. 590.

All the Federal questions presented by the record were rightly decided by the Supreme Court of Illinois.

Judgment affirmed.

Statement of Facts.

UNITED STATES *v.* SPIEGEL.

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

Submitted December 11, 1885.—Decided January 11, 1886.

It is no offence against § 12 of the internal revenue act of March 1, 1879, to have in one's possession a cancelled stamp, or a stamp which has been used, or which purports to have been used, upon any cask or package of imported liquors, unless the same was removed from the cask or package by some person intentionally, without being defaced or destroyed at the time of the removal.

The difference between § 12 of the act of March 1, 1879, 20 Stat. 342, and Rev. Stat. § 3324, shown.

The defendant was indicted in the Circuit Court of the United States for the Southern District of New York for an alleged offence set out in the first count of the indictment, the other three being substantially similar, as follows:

"The jurors of the United States of America within and for the district and circuit aforesaid, on their oaths, present that Morris Spiegel, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the eighteenth day of April, in the year of our Lord one thousand eight hundred and eighty-three, at the southern district of New York, and within the jurisdiction of this court, did feloniously, knowingly, and fraudulently have in his possession a certain United States stamp of the kind and description provided and required by law to be affixed to packages containing distilled spirits imported into the United States in packages, the said stamp being then and there in form as prescribed by the Secretary of the Treasury, and numbered in figures as follows: '350,460,' a more particular description of which said stamp is to the jurors as yet unknown, which said stamp had been theretofore removed from a certain package which had contained imported spirits, to wit, brandy, and which said stamp had not been defaced and destroyed at the time of such removal, then and there against the peace of the United States and their dignity, and contrary to the form of

the statute of the said United States in such case made and provided."

The indictment was founded upon provisions contained in the act of March 1, 1879, "to amend the laws relating to internal revenue," 20 Stat. 327, 342, the 11th section of which provides as follows:

"That all distilled spirits, wines, and malt liquors, imported in pipes, hogsheads, tierces, barrels, casks, or other similar packages, shall be first placed in public store or bonded warehouse, and shall not be removed therefrom until the same shall have been inspected, marked, and branded by a United States customs gauger, and a stamp affixed to each package, indicating the date and particulars of such inspection; and the Secretary of the Treasury is hereby authorized to prescribe the form of, and provide, the requisite stamps, and to make all regulations which he may deem necessary and proper for carrying the foregoing requirements into effect."

And section 12, so far as relevant, provides:

"Every cask or other package from which the stamp for imported liquors required by this act to be placed thereon shall not be effaced, obliterated, or destroyed, on emptying such package, shall be forfeited, and the same may be seized by any officer of internal revenue wherever found; and all the provisions and penalties of section thirty-three hundred and twenty-four of the Revised Statutes of the United States, relating to empty casks or packages from which the marks, brands, or stamps have not been effaced or obliterated, and relating to the removal of stamps from packages, and to having in possession any stamps so removed, shall apply to the stamps for imported spirits herein provided for, and to the casks or other packages on which such stamps shall have been used."

Section 3324 of the Revised Statutes, referred to in § 12 of the foregoing act, is in these words:

"Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law, shall at the time of emptying such cask or package, efface and obliterate

said mark, stamp, or brand. Every such cask or package from which said mark, brand, or stamp is not effaced and obliterated as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found. And every railroad company or other transportation company, or person who receives or transports, or has in possession with intent to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark, or stamp, required by law to be placed on any cask or package containing distilled spirits, shall forfeit three hundred dollars for each such cask or package, or any part thereof, so received or transported, or had in possession with the intent aforesaid; and every boat, railroad car, cart, dray, wagon, or other vehicle, and all horses and other animals used in carrying or transporting the same, shall be forfeited to the United States. Every person who fails to efface and obliterate said mark, stamp, or brand, at the time of emptying such cask or package, or who receives any such cask or package, or any part thereof, with the intent aforesaid, or who transports the same, or knowingly aids or assists therein, or who removes any stamp provided by law from any cask or package containing, or which had contained, distilled spirits, without defacing and destroying the same at the time of such removal, or who aids or assists therein, or who has in his possession any such stamp so removed as aforesaid, or has in his possession any cancelled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony, and shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years."

The case was brought into this court by the following certificate:

"At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the second circuit, begun and held at the United States court-

rooms, in the city of New York, on the third Monday of October, in the year of our Lord one thousand eight hundred and eighty-four—

"Present, the honorable William J. Wallace, the honorable Charles L. Benedict, judges.

"The United States
vs.
Morris Spiegel.

"This case coming on to be heard at this term before judgment upon the verdict of guilty, upon a motion in arrest of judgment and also upon a motion for a new trial, before the two judges above mentioned, at such hearing the following questions occurred:

"First. Whether the indictment states an offence created by the laws of the United States.

"Second. Whether in a prosecution for having possession of stamps removed from imported liquors, instituted under the laws of 1879, ch. 125, sec. 12, it is necessary for the Government, in addition to proving that the stamps in question had been removed from casks containing imported spirits, also to prove that such stamps had been so removed by some person.

"Third. The prosecution on the trial having failed to prove that the stamps named in the indictment were removed by a person, was it or not error for the court to refuse to direct the jury to acquit the defendant on the ground that the prosecution had not proven an offence under the statute.

"Fourth. Whether or not the offer on the part of the defence to prove that the stamps named in the indictment fell accidentally from the casks and were not removed by any person was properly overruled.

"Fifth. Whether the exception taken to that portion of the charge to the jury where it was said: 'It is sufficient to make the possession of the stamps unlawful if they came off such casks without being destroyed, whether they came off by accident or design,' was properly overruled.

"Sixth. Whether or not it was error to refuse to charge as requested by the defendant as follows: 'If you believe the Government has failed to prove the stamps named in the in-

dictments were removed by a person or persons from casks containing, or which had contained, imported distilled spirits, your verdict should be for the defendant, as an accidental, or by action of the weather, falling or coming off of these stamps and possession thereafter by defendant will not constitute an offence under this statute.'

"Seventh. Whether in a prosecution for having in possession stamps removed from casks of imported spirits in violation of the laws of 1879, ch. 125, sec. 12, it is necessary for the prosecution to aver that the stamps so removed had been removed by some person.

"Eighth. Whether the indictment is sufficient to warrant judgment upon the verdict.

"In respect to each of which questions the judges aforesaid were divided in opinion.

"Wherefore, at the same term, upon request of the United States attorney, they have caused the points above stated to be certified, under the seal of this court, together with a copy of the indictment and an abstract of the record, to the Supreme Court of the United States for final decision according to law.

"Wm. J. Wallace.

"Chas. L. Benedict."

Mr. Assistant Attorney-General Maury for plaintiff.

Mr. William P. Fiero for defendant.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The twelfth section of the act of March 1, 1879, does not define the offence of removing stamps from packages of imported liquors, or of having in possession stamps so removed, except by adopting the provisions of Rev. Stat. § 3324, defining such offences in relation to stamps upon packages of other distilled spirits, not imported, and applying them in the case of imported liquors. In doing this its language is that of reference merely, and not of definition. For the precise and statutory descrip-

tion of the offence described we must have recourse to the words of Rev. Stat. § 3324, in the context there found, there being nothing in the act of 1879 showing an intention to qualify their original meaning.

Referring for that purpose to the section of the Revised Statutes in question, we find that the felonies therein defined are as follows:

1. The removal by any person of any stamp provided by law from any cask or package containing, or which had contained, distilled spirits without defacing and destroying the same at the time of such removal, or aiding or assisting therein.

2. Having in possession any such stamp so removed as aforesaid.

3. Having in possession any cancelled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits.

Of these the offences described in the last division are not adopted by the act of March 1, 1879, and applied to casks or packages of imported liquors. It is not an offence, therefore, under this act for one merely to have in his possession any cancelled stamp provided by law to be affixed to each package of imported liquors, or any stamp which has been used on such package, or which purports to have been so used. To constitute the offence of unlawfully having in possession any such stamps they must have been removed from the package on which they were once placed without being defaced and destroyed at the time of such removal. But every such stamp, once in use upon such package, to come afterwards into the possession of a person, must in one sense have been removed; that is, must in some way and by some means have ceased to be affixed to the package on which it was used, and have become detached and separated from it. This may have happened without the agency of a human will, by mere accident, or as the effect of unintelligent causes, and without design on the part of any person.

But it is not in this sense, that possession of removed stamps is made an offence in the previous clause of the section; for so to construe it would be to obliterate the statutory distinction

between the two crimes, that of having in possession removed stamps, and of having in possession used stamps. A stamp, once in use, may have accidentally fallen off the package, yet afterwards to have it in possession is an offence under § 3324. But it is not an offence under the act of March 1, 1879. To have in possession stamps that have been removed, without at the time of removal having been defaced and destroyed, is an offence under both laws, one in the case of domestic distilled spirits, the other in that of imported liquors. The removal, therefore, which describes a removed stamp, possession of which is thus made unlawful, must be a designed removal from the package by human agency, without defacing and destroying it at the time; such removal as by the first division of the described offences, constitutes the guilty act of the person removing it. It is the possession of such a stamp, "so removed as aforesaid," in the language of the clause defining the offence, that must be shown to constitute guilt; that is, possession of a stamp, not merely once used and afterwards found and taken into possession, but possession of a stamp, which some person, although he may be unknown, has removed intentionally and by design, and failed, by neglect or otherwise, at the time of removal, to deface and destroy. So to remove such a stamp is one offence; to aid and assist in such a removal is another; the third is, to have in possession such a stamp, "so removed as aforesaid;" and these are all of that class of offences embraced by the 12th section of the act of March 1, 1879.

It follows, from this view of the law, that the indictment in the present case is substantially defective, because it does not set out an offence under the statute. It does not describe the crime intended in the language of the act, inasmuch as it does not charge that the defendant had in his possession a stamp of the kind and description mentioned, which stamp had been theretofore removed in the manner prohibited by the law; that is, by some person, without defacing and destroying the same at the time of such removal. It also follows that whatever presumptions may arise as to the manner of removal, when properly charged, from the circumstances in proof accompanying the fact of possession, it is competent for the defendant to

introduce evidence in explanation of those circumstances, and tending to show that the stamp in question was not removed by any person, without defacing and destroying the same at the time of removal, but was in fact detached and removed from the cask or package without human agency, and by the accidental intervention of other causes.

Proceeding to dispose of the questions certified specifically, we answer the first, fourth, fifth and eighth questions in the negative, and the seventh in the affirmative. The second, third and sixth questions we decline to answer, because the answers given to the other questions necessarily dispose of the whole case, and because we cannot answer them without a more complete statement of the facts on which they are supposed to have arisen than is furnished by the present record.

The cause is remanded, with directions to take further proceedings therein, not inconsistent with this opinion; and it is so ordered.

RENAUD *v.* ABBOTT.

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

Argued April 7, 8, 1885.—Decided January 4, 1886.

A service of citation of a writ of error to a court of a State, made upon the defendant in error in another State by the marshal of the latter State, is an irregularity which can only be taken advantage of by motion to dismiss made promptly, on an appearance limited to that special purpose.

Upon a writ of error to a State court, the question whether on the death of a party after judgment another party was properly substituted in that court, before the suing out of the writ of error, is a question of practice which the State court has exclusive right to determine, and is not reviewable here.

This court, upon writ of error to the highest court of a State, takes judicial notice of the law of another State, where by the local law that court takes judicial notice of it.

Under Art. IV. section 1 of the Constitution, and § 905 of the Revised Statutes, a judgment recovered in one State against two joint defendants, one of whom has been duly summoned and the other has not, and which is valid and enforceable by the law of that State against the former alone, will support an action against him in another State.

Argument for Defendant in Error.

This was an action of debt in the Supreme Court of New Hampshire, on a judgment recovered in a court of Louisiana in favor of one Wilbur, as syndic for his creditors, on a joint cause of action against Joseph S. Abbott and Edward A. Abbott as copartners. The record in Louisiana showed that service was made against Joseph S. Abbott alone, and that judgment was entered against both. The action in New Hampshire was brought against the administrator of Joseph S. Abbott, (who had died), without joining Edward A. Abbott. The plea was *nul tiel record.* Other facts in the case are stated in the opinion of the court, to which reference is made. The case was referred to a referee, whose report of the facts was "reserved and assigned for the consideration of the whole court." The whole court held that though the judgment was valid in Louisiana, it was invalid in New Hampshire as "the record showed in the joint judgment the fatal defect of notice to one only of the defendants," and gave judgment for defendant. After the entry of judgment, Renaud appeared and by petition informed the Supreme Court of New Hampshire of the decease of Wilbur, and of his own election as syndic in Wilbur's place, and prayed to be substituted as plaintiff in Wilbur's place for the purpose of removing the cause into this court by writ of error, and the writ was allowed in Renaud's name.

Mr. Assistant Attorney-General Maury for plaintiff in error. *Mr. Thomas J. Semmes* and *Mr. Robert Mott* filed a brief for same.

Mr. Samuel C. Eastman for defendant in error.—I. There is no Federal question before the court. *a.* It is true that the Supreme Court of New Hampshire considered and passed upon the effect of a certain judgment of the Fifth District Court of New Orleans, and decided that for want of jurisdiction it was an invalid judgment. Whether the State court made or did not make a mistake as to the particular reason for want of jurisdiction, still if the want of jurisdiction plainly appears from the record there is no Federal question, for the State court could and properly should have decided as it did. *Murdock*

v. *Memphis*, 20 Wall. 590; *Brown* v. *Atwell*, 92 U. S. 327, 329; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140. *b.* Plaintiff declares on a joint judgment against J. S. and E. A. Abbott. No reason is given for not joining the latter, while it appears that he could have been joined. This could have been taken advantage of by motion in arrest of judgment if judgment had been against defendant. *Gilman* v. *Rives*, 10 Pet. 298. Therefore the State judgment should stand, whether right or wrong.

II. The Supreme Court of New Hampshire held that a general joint judgment against two non-residents upon default, on service on one only, is void as to both. In this there is no error. To maintain a suit on a judgment in any other State than that where rendered, when there was no appearance, the record must show service on the defendants within the limits of the State whose court is claiming the jurisdiction. *Harris* v. *Hardeman*, 14 How. 334; *Hart* v. *Sansom*, 110 U. S. 151. There was no service on E. A. Abbott. The judgment as to him is therefore a nullity. *D'Arcy* v. *Ketchum*, 11 How. 165; *Board of Public Works* v. *Columbia College*, 17 Wall. 521; *Hall* v. *Lanning*, 91 U. S. 160, 167. The judgment declared on, being void as to one of the defendants, is void as to both, and cannot be the foundation of an action in any other State. *Hall* v. *Williams*, 6 Pick. 232; *Holbrook* v. *Murray*, 5 Wend. 161; *Richards* v. *Walters*, 12 Johns. 434; *Rangely* v. *Webster*, 11 N. H. 299; *Steel* v. *Smith*, 7 W. & S. 447; *Smith* v. *Smith*, 17 Ill. 482; *Buffum* v. *Ramsdell*, 55 Maine, 252; *Knapp* v. *Abell*, 10 Allen, 485; *Mackay* v. *Gordon*, 34 N. J. 286; *Hanley* v. *Donoghue*, 59 Maryland, 239. These cases are all in State courts. But this court has impliedly adopted the principle. *Gilman* v. *Rives*, above cited; *Thompson* v. *Whitman*, 18 Wall. 457. Mere error makes a judgment voidable; want of jurisdiction makes it void, and unavailable for any purpose. *Eaton* v. *Badger*, 33 N. H. 228, 237; *Carleton* v. *Washington Ins. Co.*, 35 N. H. 162; *Judkins* v. *Union Ins. Co.*, 37 N. H. 470; *Conery* v. *Rotchford*, 34 La. Ann. 520; *Boswell's Lessee* v. *Otis*, 9 How. 336; *Bischoff* v. *Wethered*, 9 Wall. 812; *Laurent* v. *Beelman*, 30 La. Ann. 363. This justifies the conclusion of the

New Hampshire court. This court has uniformly held that a writ of error, sued out by one of two persons, against whom a joint judgment is rendered, without a summons and severance or equivalent proceeding, must be dismissed. *Feibelman* v. *Packard*, 108 U. S. 14. This is the rule of common law. Comyn's Dig., Pl. 3, B. 9.

III. A judgment may be valid by the law of a State, and yet the courts of other States are not estopped to examine it as to jurisdictional facts. See *Hall* v. *Lanning*, above cited; *Pennoyer* v. *Neff*, 95 U. S. 714; *Ins. Co.* v. *Bangs*, 103 U. S. 435; *St. Clair* v. *Cox*, 106 U. S. 350, 353; *Pana* v. *Bowler*, 107 U. S. 529, 545. No court, deriving its authority from another government, will recognize a merely constructive service as bringing a person within the jurisdiction of the court. *Hart* v. *Sansom*, cited above.

IV. The judgment in No. 17,608, called the nullity suit, was only that the record in No. 16,987 as to service could not be contradicted. The Supreme Court of New Hampshire did not contradict this fact by its findings. The only judgment pronounced in the nullity suit was on jurisdictional facts, which can always be examined into. No suit is brought on that judgment. Its validity and effect are therefore not in controversy, and the court might have passed it by without a word. If the first judgment is valid, there is no need of resorting to this to support it. If the first judgment is a nullity, nothing which occurs afterwards will give it vitality. "The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently." *Pennoyer* v. *Neff*, 95 U. S., above cited.

Mr. Justice Matthews delivered the opinion of the court.

The writ of error in this case was sued out and allowed by the Chief Justice of the Supreme Court of New Hampshire, on June 13, 1882, returnable to October Term, 1882, of this court. The transcript of the record was filed here July 14, 1882, and the defendant in error entered his appearance, through counsel, on July 28, 1882, which, though special in terms, was not limited to any particular purpose.

Opinion of the Court.

At October Term, 1883, a motion was filed to dismiss the cause on two grounds: 1, because the citation had been served on the defendant in error in Massachusetts by the marshal of that district; and, 2, because the present plaintiff in error had been improperly substituted as successor to the plaintiff in the judgment sought to be reviewed. This motion to dismiss, although submitted to the court at that term, was postponed until the hearing on the merits. So far as the first ground is involved it comes too late. The alleged irregularity in the service of the citation could, at any rate, only have been taken advantage of by a motion to dismiss, made promptly on an appearance limited to that special purpose, and was cured by such an appearance as was entered in this case. *United States* v. *Yates*, 6 How. 606, 608; *Buckingham* v. *McLean*, 13 How. 150.

The judgment sought to be reviewed was rendered in favor of the defendant, in a suit brought by Isaac L. Wilbur upon a judgment rendered in his favor, as syndic of his creditors under the laws of Louisiana, in the Fifth District Court of New Orleans, in that State. Wilbur having died in July, 1881, after the judgment against him in the Supreme Court of New Hampshire, William H. Renaud thereupon, on June 12, 1882, on his petition, showing that he had been appointed under the laws of Louisiana to succeed Wilbur as syndic of his creditors, was substituted as plaintiff in the judgment, and allowed to prosecute a writ of error to this court. It was the province of the Supreme Court of New Hampshire to permit this substitution, and its action in doing so is not open to objection by the defendant in error in this court. We receive the transcript of the record in the cause as it is certified to us by that court, in answer to the precept of the writ of error allowed and issued to that end. When brought here it is open to examination only for the purpose of deciding whether it contains a Federal question within our jurisdiction, and if so, whether there is error in the decision of that question by the Supreme Court of the State. Whether the present plaintiff in error ought to have been substituted for the deceased plaintiff in the judgment to be reviewed was a question of practice under the laws

of New Hampshire, which the Supreme Court of that State had the exclusive right to determine. It is not open to any inquiry on our part under the present writ.

The action was in debt brought by Wilbur upon a judgment alleged to have been recovered by him in the Fifth District Court of the City of New Orleans, in the State of Louisiana, against Joseph S. Abbott, then in full life, and one Edward A. Abbott, for the sum of $23,383.69, with interest thereon from November 1, 1862, as damages in a certain cause then pending in said court between the said plaintiff and the said Joseph S. Abbott and Edward A. Abbott, as copartners under the name of J. S. & E. A. Abbott, and for costs of suit. Edward A. Abbott, as administrator of Joseph S. Abbott, alone was sued. The plea was *nul tiel record.*

The plaintiff offered in evidence a duly certified transcript of the record of the judgment sued on. From that it appeared that the citation and copy of the petition were returned by the sheriff, served on J. S. Abbott, one of the defendants, personally, on December 28, 1866. No service on the other defendant appears to have been made. Judgment was afterwards entered therein as follows:

"I. L. Wilbur, Syndic, &c.,
vs.
J. S. & E. A. Abbott. } No. 16,987.

"On motion of E. C. Mix, of counsel for plaintiff, and on introducing due proof of the claim of said plaintiff—

"It is ordered and adjudged that the default herein entered on the eleventh of January, 1867, be now confirmed and made final, and that plaintiff, I. L. Wilbur, in his capacity as syndic of his creditors and of the creditors of Wilbur and Borge, recover of the defendants, Joseph S. and Edward A. Abbott, who reside in Concord, in the State of New Hampshire, are commercial partners there doing business under the style and firm of J. S. & E. A. Abbott, *in solido*, the sum of twenty-three thousand three hundred and eighty-three $\frac{69}{100}$ dollars, with legal interest from the first of November, 1862, until paid, and costs of suit.

"Judgment rendered 19th January, 1867. Signed 24th January, 1867.

(Signed) CHAS. LEAUMONT, *Judge.*"

The defendant objected to this transcript as evidence on the ground that the record disclosed a judgment that was void, because it was a joint judgment against two with service [of] process upon one only.

But the plaintiff supplemented the proof by offering in evidence the transcript of another judgment rendered in the same court, in a proceeding numbered 17,608, in which Joseph S. Abbott and Edward A. Abbott were plaintiffs and the said Isaac L. Wilbur was defendant, being a suit in which the plaintiffs sought to obtain a decree of nullity of the judgment against them in the former action numbered 16,987.

The petition in this suit of nullity set forth the judgment it sought to annul, recited the proceedings in which it was rendered, and averred "that no service of a copy of the petition or citation in said suit was ever made on them, either individually or collectively, personally or otherwise," and "that the return of the sheriff that personal service of a copy of the petition and citation was made on J. S. Abbott, one of your petitioners and defendant in said suit, is not true." The prayer was that, for this reason, the said judgment be declared to be absolutely null and void and of no effect.

To this petition Wilbur, the defendant therein, answered as follows:

"Now comes the defendant, I. L. Wilbur, syndic, &c., of his creditors and the creditors of Wilbur & Co., Wilbur & Arnot, and Wilbur & Borge, and for answer to the petition of the plaintiffs denies all and singular the allegations therein contained, and avers that the judgment in suit No. 16,987 on the docket of this court, sought to be annulled, is a valid judgment rendered on citation of proper parties, and cannot be impeached.

"This respondent further pleads that the plaintiffs have judicially admitted that they were properly cited in said suit No. 16,987, and are estopped to deny citation in said suit for

this: That said plaintiffs after the institution of said suit against them in this court, and after judgment rendered in said suit No. 16,987, did institute a suit in the Third District Court of New Orleans against Frank Borge, as a partner of the firm of Wilbur & Borge, said suit being entitled J. S. & E. A. Abbott *vs.* Frank Borge, and numbered 21,376 on the docket of said Third District Court, and the said Frank Borge, to protect himself as a partner, as aforesaid, from the unjust demand of the plaintiffs, set up and made in said suit in the Third District Court a reconventional claim or demand against the plaintiffs for the matters and things, and for the same cause of action which constituted the basis of the judgment now sought to be annulled, and this respondent intervened and made himself, as syndic, a party to said reconventional demand, and the said plaintiffs in this suit and the plaintiffs in said suit No. 21,376, in the Third District Court aforesaid, being the same parties, did, for the purpose of defeating and causing the dismissal of said reconventional demand in the Third District Court aforesaid, plead to the same the judgment aforesaid rendered against them by this court in said suit No. 16,987, now sought to be annulled, and set the same up and made use thereof as a defence to said reconventional demand as in the nature of a plea of *lis pendens*, and the said Third District Court recognized said plea of *lis pendens*, and refused to hear any evidence as to the reconventional demand of said Borge as partner, as aforesaid, and dismissed the same, and gave judgment in favor of plaintiffs for their original demand.

"Wherefore this respondent avers that plaintiffs, having used the said suit No. 16,987 and the judgment therein rendered in manner aforesaid, are precluded from alleging that no such suit was pending and no such judgment was rendered, as in point of law there is no suit and no judgment without citation, and hence respondent avers that plaintiffs have judicially confessed they were parties defendants to said suit No. 16,987, and to the judgment therein rendered, and that said suit and judgment were valid."

This action of nullity resulted in a judgment, signed May 7, 1868, as follows: "This cause came on to-day for trial, when,

after hearing pleadings, evidence, and counsel, and for the reasons orally assigned, it is adjudged and decreed that this suit be dismissed with judgment in favor of defendant, I. L. Wilbur." From this judgment a devolutive appeal was granted and taken to the Supreme Court of Louisiana, by which court it was affirmed for reasons set out in an opinion forming part of the record put in evidence in the present case, and thus embodied in the record before us. The following extract from that opinion sufficiently shows the ground of the judgment:

"Returning to the facts of this case, we find the plaintiffs in the Third District Court defeating a large demand of defendant by the plea that there was then pending in the Fifth District Court a suit against them for the same demand by the same party. They thus declared judicially that they had been cited in the Fifth District Court, and they made this assertion to their own benefit and to the injury of the opposite party, and they cannot be heard now to say that their assertion was false, and that the person on whom service of citation was made was not of the commercial firm." *Abbott* v. *Wilbur*, 22 La. Ann. 368.

There was no evidence in the present case, except the foregoing two transcripts, and it is upon them that the questions of law, decided by the Supreme Court of New Hampshire, have arisen.

That court, whose opinion is certified to us in the record, in affirming the judgment of the court of original jurisdiction in New Hampshire in favor of the defendant, proceeded on the ground that, by the common law in force in New Hampshire, a joint judgment against two defendants is void as to both where only one is served with process, and, although valid by the law of Louisiana where it was rendered, can have no other effect when sued on in New Hampshire than if it had been rendered in the latter State. This court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley* v. *Donoghue*, *ante*, 1. But the Supreme Court of New Hampshire took judicial notice, and

rightfully, we are bound to assume, under the law and practice of that State, of the law of Louisiana on the point, citing Article 182 of the Code of Practice of 1853, as follows: "Nevertheless, if the defendants are husband and wife, or minors interdicted, or absent persons having the same curator, or persons represented by the same attorney in fact, or partners of the same firm or members of the same corporation, it will be sufficient to deliver one citation and one single copy of the petition to the person representing such defendants." It thereupon says: "This statute sustains the plaintiffs' contention on this point, and shows that the judgment on which this suit is brought is valid in Louisiana. But it is nevertheless invalid in New Hampshire because it is invalid by New Hampshire law; would be invalid if it had been rendered in New Hampshire, and because the Constitution and laws gave it no more force or effect than it would have if it had been rendered here."

So the judgment in the action of nullity, in which both the Abbotts were actors and by which they were both bound, is a direct adjudication by the Supreme Court of Louisiana that the original judgment now sued on, although process was served upon one defendant only, was a valid judgment by the laws of that State. And on the point of the estoppel, based on the judgment in the action of nullity, the Supreme Court of New Hampshire said: "The *res adjudicata* is the Louisiana decision that these defendants asserted that the first judgment was valid in Louisiana by the law of that State, and were by Louisiana law estopped to assert the contrary. The defendants do not now assert the contrary. They assert that if in Louisiana, by the law of that State, the first judgment is valid, with notice given to one of the defendants, it is not valid here, and that if they are estopped to assert that it is invalid in Louisiana upon the law of Louisiana, they are not estopped to assert that it is invalid in New Hampshire by the law of New Hampshire."

But the act of Congress of May 26, 1790, ch. 11, 1 Stat. 122, now § 905 of the Revised Statutes, passed in pursuance of the express authority of the first section of the fourth article

of the Constitution of the United States, prescribes the manner in which the records and judicial proceedings of the courts of any State shall be authenticated and proved, and enacts that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." In *Hanley* v. *Donoghue*, *ubi supra*, it was said: "By the settled construction of these provisions of the Constitution and statutes of the United States a judgment of a State court, in a cause within its jurisdiction and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered."

The act of Congress has been restricted in its application by a series of decisions of this court to judgments of State courts, when they had jurisdiction of the cause and of the parties; and in actions brought on such judgments in other States, it has always been held that it was open to a defendant, whether sued alone or jointly with others, to show by plea and proof that he had not been served with process or had not voluntarily appeared. *D'Arcy* v. *Ketchum*, 11 How. 165; *Thompson* v. *Whitman*, 18 Wall. 457; *Knowles* v. *Gas-light and Coke Co.*, 19 Wall. 58; *Hall* v. *Lanning*, 91 U. S. 160. On the other hand, it has never been denied, that, as was said in *Hanley* v. *Donoghue*, *ubi supra*, "It is within the power of the legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action." In *Hall* v. *Lanning*, *ubi supra*, it was said: "Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the State, but not

the separate property of those not served; and whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding on the latter."

It is not material in the present case to inquire into or to know what effect the laws of Louisiana purport to give to the judgment sued on in respect to Edward A. Abbott, one of the defendants not served with process and who did not appear in the action, because he is not sued in the present action. If he had been joined in this action, the record itself showing that he was not subject to the jurisdiction of the court rendering the judgment, his defence would have been apparent and perfect; and the judgment in the action of nullity might perhaps be restrained as an estoppel, to prevent him only from asserting the invalidity of the judgment, to the extent and for the purposes merely for which he had used and enforced it judicially in Louisiana. However that may be, it is not and cannot be denied that the judgment in Louisiana here sued on is effective and conclusive as a personal obligation against Joseph S. Abbott, who was within the jurisdiction of the court by personal service of process, and enforceable within that State against him severally, notwithstanding it was a joint judgment against two, of whom he alone was served. The same effect should have been given to it when the administrator of Joseph S. Abbott was sued upon it in New Hampshire, for such is the requirement of the act of Congress. The principle which protects a person against the operation of judicial proceedings to which he is not a party is one of universal jurisprudence, because it is the dictate of common justice. *Pennoyer* v. *Neff*, 95 U. S. 714. But the rule that exonerates a defendant actually served with process from the obligation of a judgment, because rendered also against another who has not been served, and therefore is not bound, is purely technical, and when by the local law, according to which such a judgment has been rendered, a different rule has been established, which enforces the personal obligation of the defendant who has been served or who has appeared in the action, the act of Congress requires that the same effect shall be

given to it in every other State in which it may be sued on, whatever may be the rule that there prevails in respect to its domestic judgments. Such was the ground of decision in *Burt* v. *Delano*, 4 Cliff. 611, 618, and in *Stockwell* v. *McCracken*, 109 Mass. 84, as well as in the case of *Hanley* v. *Donoghue*, already referred to.

The judgment of the Supreme Court of New Hampshire is reversed, and the cause is remanded, with instructions to to take such further proceedings therein as are not inconsistent with this opinion.

MOBILE *v.* WATSON.

SAME *v.* UNITED STATES, *ex rel.* WATSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

Argued December 10, 11, 1885.—Decided January 4, 1886.

When a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new corporation as its legal successor; and powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation.

The object of the first of these suits was the recovery of a judgment for money, and of the second the enforcement, by the writ of mandamus, of the judgment recovered in the first. They were argued as one case. In the first case Henry Watson, the defendant in error, was the plaintiff in the Circuit Court. He brought his action against the Port of Mobile to recover the principal money due on certain bonds issued by the City of Mobile, under its corporate name, "The Mayor, Aldermen and Common Council of the City of Mobile," and the

interest on the same shown to be due by certain coupons thereto appended. The bonds were issued December 31, 1859, were for $1000 each, and were payable to the order of the Mobile and Great Northern Railroad Company on the first day of January, 1879, with interest at the rate of eight per cent. per annum. Upon the margin of each bond was the following recital: "In pursuance of the terms of the contract between the corporate authorities of the City of Mobile and the Mobile and Great Northern Railroad Company, an ordinance approved on the 30th December instant, provides for the sum of $95,000 by a special tax annually to be applied to the payment of $1,000,000 of bonds to be issued by the City of Mobile to aid in the construction of the Mobile and Great Northern Railroad."

The declaration averred that the defendant, The Port of Mobile, was "the legal successor of the said The Mayor, Aldermen and Common Council of the City of Mobile, and bounden for its debts and for the payment of the said bonds and coupons."

The defendant pleaded "that the said alleged bonds and coupons were issued by the Mayor, Aldermen and Common Council of the City of Mobile, a different municipal corporation, and not by this defendant, nor by any one authorized to bind this defendant in the premises; that this defendant is not the successor in law nor in fact of the said The Mayor, Aldermen and Common Council of the City of Mobile, nor is this defendant legally bounden to pay the said debt."

In the record there was a paper, entitled "Agreement of Facts," signed by the counsel for the parties. By this paper it was admitted that the contract between the City of Mobile and the Mobile and Great Northern Railroad Company, recited in the margin of the bonds, had been made and the ordinance therein referred to had been passed, and that the plaintiff became the legal holder of the bonds and coupons for value before maturity by the assignment of the railroad company. It was further agreed that two acts were passed by the legislature of Alabama on the 11th day of February, A.D. 1879, one entitled "An Act to vacate and annul the charter and dissolve

the corporation of the City of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation," and the other "An Act to incorporate the Port of Mobile and to provide for the government thereof;" said acts were referred to and made part of the agreement. It was further agreed that all the territory now embraced in the Port of Mobile was formerly embraced in the City of Mobile; that the territorial extent of the City of Mobile was about seventeen square miles, and of the Port of Mobile about eight square miles; that the Port of Mobile covered all the thickly settled and closely built portion of the City of Mobile; that the taxable property within the latter, according to the last assessment made by it prior to the passage of the acts of February 11, 1879, was $16,255,093, and that all of said taxable property was embraced within the limits of the Port of Mobile, except about $900,000, and that about fourteen-fifteenths of the resident inhabitants of the City of Mobile were resident inhabitants of the Port of Mobile. It was further admitted that the total indebtedness of the City of Mobile on February 11, 1879, was about $2,500,000, and that it had nominal assets of $775,000, which were largely reduced for the general creditor by prior liens and exemption from levy by execution.

It appeared by the record that the case was submitted to the jury on June 29, 1880, which, on that day, returned a general verdict for the plaintiff, and assessed his damages at $7308.80, upon which the court at once rendered judgment in his favor. A writ of error sued out by the Port of Mobile brought this judgment under review.

The only question raised upon the trial was, whether as matter of law, upon the statutes of the State of Alabama, the Port of Mobile was the legal successor of the City of Mobile, and bound for the payment of the bonds and coupons sued on. The validity of the judgment in the case of The Port of Mobile, plaintiff in error, against Watson, would therefore depend upon the answer to that question.

The plaintiff having obtained his judgment against the Port of Mobile, sued out, May 27, 1881, execution thereon, which, on the same day, was returned by the marshal "no property

found." Afterwards, on the 19th day of January, 1882, he filed in the Circuit Court his petition, in which he prayed for the writ of mandamus, and charged that the Police Board of the Port of Mobile had the right, and it was their duty, to assess and levy a special tax for the satisfaction of his judgment. He therefore prayed for the writ to compel the Port of Mobile and its officers charged with the levying and collection of taxes to assess, levy, and collect a special tax for the payment of his judgment.

In order to understand the questions raised by this petition, it will be necessary to state more fully the contract made by the City of Mobile with the Mobile and Great Northern Railroad Company in reference to the issue of the series of bonds in question, and the legislation of the State of Alabama in reference to the City of Mobile and the Port of Mobile.

By the act of the legislature, approved February 29, 1859, the City of Mobile was authorized to aid the construction of the railroad of said company by an issue to the company of bonds of the city to the amount of $1,000,000, under such contract as the city might make with the railroad company, and was vested with power to adopt the ordinances necessary to carry out such contract. In pursuance of this authority the City of Mobile, on Dec. 30, 1859, entered into a contract with the railroad company, in which, among other things, it was provided that the city should issue to the railroad company, on or before Jan. 2, 1860, its bonds to the amount of $1,000,000, and that the city should annually, after January 1, 1860, provide the sum of $95,000, to be applied to the payment of the bonds and coupons thereto attached as they became due, by a special tax to be levied and collected by the city for that purpose, and that the city should pass the by-laws and ordinances necessary to that end. In pursuance of this contract the City of Mobile, on December 30, 1859, passed an ordinance which provided that for the year 1860, and annually thereafter, there should be levied and collected a special tax upon the assessed value of all the taxable property in the City of Mobile sufficient to produce the said sum of $95,000, and that the money so raised should be pledged to the payment of said bonds and the interest coupons.

Upon the faith of the act of the legislature referred to, and the contract and ordinance of the City of Mobile, bonds of the city to the amount of a million dollars were issued to the railroad company and by it assigned and sold.

The City of Mobile having, in the year 1878, made default in the payment of the interest on its debt, which then exceeded $2,500,000, the legislature, on February 11, 1879, passed "An Act to vacate and annul the charter and dissolve the corporation of the City of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation."

This act, by its first section, repealed the charter of the City of Mobile, and declared that the corporation of the City of Mobile, known as "The Mayor, Aldermen and Common Council of the City of Mobile," was thereby dissolved and abolished.

The act then provided for the appointment by the governor of the State of three commissioners, whose duty it should be to take possession of all the property and assets of the City of Mobile, to hold such property and assets upon the same trusts and subject to the same liens and charges that the same were under when in the possession of the City of Mobile, and, under the direction and pursuant to the orders of the Chancery Court of the County of Mobile, collect the debts and taxes due the city and sell its property and apply the taxes and debts collected and the proceeds of the property sold to the payment of the debts of the city, the floating debt to be first paid. The act declared that the commissioners should have no power to levy any tax or assessment whatever, but that it should be their duty to treat with the holders of the funded debt of the City of Mobile with a view to its adjustment and settlement, and to report to the governor the result of their negotiations, together with the draft of such act as might be proper to carry into effect any scheme of adjustment that might result from such negotiations; all of which it was made the duty of the governor to submit to the legislature.

On the same day, to wit, February 11, 1879, the legislature passed "An Act to incorporate the Port of Mobile, and provide for the government thereof."

Statement of Facts.

This act incorporated, under the name of The Port of Mobile, the inhabitants residing within certain specified boundaries, which included no territory not embraced within the limits prescribed by the charter of the City of Mobile. The act provided for the election of eight persons to be styled the Mobile Police Board, for a tax collector, and other officers, and made it the duty of the tax collector to collect all taxes and license charges, and to perform and discharge all such other duties as might be required of him by the Police Board. It empowered the Police Board to levy and collect, for each year of its existence, upon the assessed value of all property and subjects of State taxation within the Port of Mobile, a tax of six-tenths of one per centum for the purpose of defraying the expenses of carrying out the provisions of the act, and made the assessment returned by the assessor of Mobile County for the preceding year that on which the tax should be levied and collected. The act further provided that the Police Board should have and exercise the powers thereby conferred on them and no other, and repealed all conflicting acts and parts of acts.

After the recovery by the plaintiff of his judgment against the Port of Mobile, on June 29, 1880, the legislature of Alabama, on December 8, 1880, passed an act which declared that the Police Board should not levy any other tax than the six-tenths of one mill on the dollar authorized by the seventeenth section of the act of February 11, 1879, "to incorporate the Port of Mobile and provide for the government thereof," and the license taxes authorized by § 30 of that act.

The legislature, on December 8, 1880, also passed "An Act to adopt and carry into effect the plans for the adjustment and settlement of the existing indebtedness of the late corporation," the city of Mobile, &c. This act was subsequently, on February 24, 1881, reënacted with material amendments.

The amended act provided for an issue of $2,500,000 of the bonds of the City of Mobile, to be dated January 1, 1881, and to be payable in twenty-five years, with interest at three per cent. for five years, four per cent. for fifteen years, and five per cent. for the remaining five years. These bonds were to

be used by exchanging them for the bonds of the City of Mobile of the issue of May 1, 1875, but no available provision was made in the act for the payment or satisfaction of the issue of which the plaintiff's bonds formed a part. The act further required the Commissioners of the City of Mobile, immediately after its passage, to turn over to the Police Board of the Port of Mobile "all the real and personal property which was formerly held and owned" by the city of Mobile "for public use and governmental purposes," such as public buildings, markets, squares, parks, fire-engines, engine-houses, hose and hose carriages, engineering instruments, and all other property of like character and use, except only the wharves.

Such was the legislation of Alabama in reference to the City of Mobile and the Port of Mobile when the plaintiff filed his petition for the writ of mandamus. The defendants to the petition, namely, the Port of Mobile and the Police Board of the Port of Mobile, filed a demurrer and also an answer to the petition. In the latter they denied that the Port of Mobile was the successor of the City of Mobile, bound for its debts and the performance of its duties in reference to said judgment, and denied that the Port of Mobile or its Police Board had any power, or that it was their special duty to assess, levy, or collect the special tax for the purpose of paying said judgment.

The plaintiff demurred to this answer, and upon final hearing upon the demurrer to the petition and the demurrer to the answer, the Circuit Court ordered "that the respondents, the Port of Mobile, the Mobile Police Board, Richard B. Owen, President, James W. Monette, Robert Adams, Sylvester J. Russell, Daniel McNeill, Patrick J. Hanlon, John Henry, Frank P. Andrews, and William Paton, Commissioners of the Port of Mobile and members of said Police Board, do forthwith assess, levy, and cause to be collected a special tax upon the property, real and personal, subject to tax by them, the said Port of Mobile and Mobile Police Board, sufficient to pay and satisfy the said judgment of the relator against the Port of Mobile for the debts of the said relator, with interest thereon, and the same to cause to be collected in lawful money,

and as collected, in whole or in part, the same to pay over, or cause to be paid over, to said Henry Watson, or his lawful attorney, to satisfy the said judgment, with interest thereon."

This judgment also was brought up for review by the writ of error sued out by the Port of Mobile.

Mr. Hannis Taylor and *Mr. J. Little Smith* for plaintiff in error. *Mr. Braxton Bragg* was with them on the brief.

There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to him. *United States* v. *Railroad Co.*, 17 Wall. 322; *Tippecanoe County* v. *Lucas*, 93 U. S. 108; *People* v. *Morris*, 13 Wend. 325; *Philadelphia* v. *Fox*, 64 Penn. St. 169; *Montpelier* v. *East Montpelier*, 29 Vt. 12. When a legislature confers upon a municipal corporation a new charter with new grants of power, but relating to the same territorial organization and the same population, it merely makes a change in the name, form of government, or powers originally conferred on the old corporation. But when the new grants of power are given to a new corporation by a new name, and with a different territorial organization, they do not revive or reanimate an old corporation, but create a new and distinct corporation in the place of the old one. *Colchester* v. *Seabur*, 3 Burrow, 1866; *The King* v. *Passmore*, 3 T. R. 199, 241; *Scarborough* v. *Butler*, 3 Lev. 237; *Haddock's Case*, T. Raymond, 435, 439. The case of *Milner* v. *Pensacola*, 2 Woods, 632, 639, is in entire harmony with these English decisions. So is *Broughton* v. *Pensacola*, 93 U. S. 266. It is true the court speaks of the reorganization of the city of Pensacola as producing a new organization of a municipal corporation which embraces *substantially* the same corporators and the same territory. But in fact, the corporators and the territory were identically the same, both before and after the reorganization, and the court itself put no stress upon the use of the adverb "substantially." What the court

meant was that the mere changes of form and powers, required by the Constitution of 1868 and the act of 1869, were intended to be applied to all existing municipalities for the sake of uniformity, and that the mere repeal of the charters suspended the active operation of the corporations by means of the old instrumentalities, until they complied with said requirements. So that they merely put on new clothes, and in that sense were said to be substantially the same old corporations, dressed up anew, having the same old corporators in new attire. This is the sense also in which this word "substantially" is used in the case of the *City of Olney* v. *Harvey*, 50 Ill. 453, 455, in which the court, in declaring that the original corporation (a town) was not destroyed, and that the city is the same municipality as the town, uses this language: "It has merely changed the machinery of its government and the title of its officers, and is called a city instead of a town. But it is the same municipality. It consists of the same people." So in *Waring* v. *Mobile*, 24 Ala. 701, the territory and inhabitants or their successors were exactly the same after amendment of the charter as before. *Mobile & Spring Hill Railroad* v. *Kennerly*, 74 Ala. 566, did not turn on questions involved in this case.

The constitutional prohibition against the passage of State laws impairing the obligation of contracts extends, as to municipal corporations, only to the particular corporation which owes the obligation, and should not be applied to a new corporation which has contracted no debt, unless it is in doubt what the legislature intended. Courts cannot by construction make the legislature say what it did not intend to say. *Milner* v. *Pensacola*, 2 Woods, 639.

The proposition that any State legislature which declares that it, then and there, absolutely destroys one of the State's municipal corporations, which owes debts at the time, is ineffectual to destroy the corporation and its agencies, unless it retains or provides means and remedies by which the creditor can collect his debt or enforce the fulfilment of the obligation due to him through the courts, is erroneous. This court has held the very reverse of this to be true. *Merriwether* v. *Gar-*

rett, 102 U. S. 472, 511, 518, 520; *Wolff* v. *New Orleans*, 103 U. S. 358, 364. Even if it be true that when a legislature confers on a municipal corporation the power to create debts, that this grant of power, alone, by implication, carries with it the authority and duty on the part of that corporation to levy taxes to pay the debt, if the exercise of that authority becomes necessary, and the charter contains no provision in it when the debt is contracted which negatives this implication; yet the proposition does not tend to show that the Port of Mobile is the City of Mobile, which contracted the debt. If it is the same corporation, then there is no need of the implication, because the facts agreed on show that the legislation which authorized the City of Mobile to contract the debt expressly granted power to levy taxes for its payment. So that in no aspect of the case is this principle applicable.

In order to "ascertain whether a charter creates a new corporation or merely continues the existence of an old one, we must look to its terms, and give them a construction consistent with the legislative intent." *Bellows* v. *Hallowell & Augusta Bank*, 2 Mason, 31, 44; *Wyman* v. *Hallowell & Augusta Bank*, 14 Mass. 58, 62; Angell & Ames on Corporations, § 780; Dillon, Municipal Corporations, § 55; Grant on Corporations, 304, 305. A careful examination shows that any legitimate construction of the acts in question must declare that the corporation known as the City of Mobile was abolished and destroyed, and that the Port of Mobile was neither a continuation nor a revivor of that corporation, but was a new and independent corporation not bound for the liabilities of the City of Mobile.

Nor is mandamus the proper or adequate remedy. The Port of Mobile has no power to levy the special tax ordered in this case, or to assess any special tax. The tax machinery which it possesses by law is inadequate, as it has no jurisdiction over the territory of the former city which is excluded from its limits; and the bondholder in this case can never successfully prosecute his remedy in any forum to which tax-payers residing outside of the limits of the Port of Mobile are not amenable. Contribution from them is indispensable.

Mr. Gaylord B. Clark and *Mr. James E. Webb* for defendants in error.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language reported above, he continued:

It is not disputed that the bonds issued by the City of Mobile upon which the plaintiff brought suit and recovered judgment against the Port of Mobile, were the valid obligations of the City of Mobile, which was bound by its contract to levy and collect annually a tax of $95,000, to be applied to the payment of the principal and interest of the issue of bonds of which those held by the plaintiff formed part. It is apparent from the statement of the case that the act of February 11, 1879, "to vacate and annul the charter of the City of Mobile and provide for the application of the assets thereof in discharge of the debts of said corporation," and the act of the same date, "to incorporate the Port of Mobile and provide for the government thereof," and the several acts subsequent thereto on the same general subject, make no adequate provision for the payment of the bonds held by the plaintiff, and other bonds of the same issue, of which, according to the answer of the Port of Mobile to the petition for the writ of mandamus, there still remain, unsatisfied, bonds to the amount of $323,914. The effect of this legislation is to take from the officers of the City of Mobile all power to lay a tax for their payment, and to leave no means for their satisfaction. The assets of the City of Mobile turned over to the commissioners appointed by authority of the act to vacate its charter being largely reduced for the general creditor by prior liens and exemptions from levy by execution, and their proceeds being first required to be applied to the floating debt of the city, have afforded no satisfaction to the plaintiff, and it is not pretended that payment could or would be made to him out of the proceeds of such assets. If, therefore, the plaintiff cannot exact payment from the Port of Mobile, the effect of the legislation referred to is to deprive him of all remedy upon the bonds issued by the City of Mobile and the contract providing for their payment, valid when

made, and valid still. It is, therefore, a vital question in the case whether the Port of Mobile is the legal successor of the City of Mobile, and bound for its debts. The "agreement of facts" made in the suit upon the bonds is conceded to be a true statement of the facts therein recited. From this paper and other admissions made in the answer of the Port of Mobile to the rule to show cause, and the legislation of the State of Alabama made a part of the record, it appears that on the day when the act was passed vacating and annulling the charter, and dissolving the corporation of the City of Mobile, another act was passed to incorporate the Port of Mobile; that all the territory embraced within the limits of the Port of Mobile was formed of part of the territory, and included all the thickly settled and closely built portion of the City of Mobile; that out of more than $16,000,000 of taxable property of the City of Mobile, all but $900,000 was included within the limits of the Port of Mobile; and that fourteenth-fifteenths of the inhabitants of the City of Mobile were inhabitants of the Port of Mobile. While, therefore, the area of territory of the Port of Mobile was little more than half that of the City of Mobile, it is apparent that the former included substantially the same taxable property, and the same body of people, as the City of Mobile. It further appears that all the property, except its wharves, of the City of Mobile, used by it for public and governmental purposes, was by the authority of the act of February 24, 1881, turned over and delivered to the Port of Mobile for its use without compensation to be paid therefor.

We are of opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the City of Mobile, and liable for its debts. The two corporations were composed of substantially the same community, included within their limits substantially the same taxable property, and were organized for the same general purposes.

Where the legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for

the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new. In illustration and support of this proposition, the following cases are in point:

In *Girard* v. *Philadelphia*, 7 Wall. 1, it was held by this court that the annexation to the city of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs, and townships of various territorial extent, and the changing of its name, did not destroy its identity or impair its right to hold property devised to it.

So in *Broughton* v. *Pensacola*, 93 U. S. 266, 270, it was said by Mr. Justice Field, in delivering judgment, that when "a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization."

In *O'Connor* v. *Memphis*, 6 Lea, 730, the Supreme Court of Tennessee went so far as to say that—"Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession

of the corporation if the people and territory reincorporated constitute an integral part of the corporation abolished . . . The corporators and the territory are the essential constituents of the corporation, and its rights and liabilities naturally adhere to them."

In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, a municipal corporation had been dissolved and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred, were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. See also *Colchester* v. *Seaber*, 3 Burrow, 1866; *Cuddon* v. *Eastwick*, 1 Salk. 192; *People* v. *Morris*, 13 Wend. 325; *New Orleans Railroad Co.* v. *City of New Orleans*, 26 La. Ann. 478.

In the case of *Amy* v. *Selma*, recently decided by the Supreme Court of Alabama, and not yet reported, a question almost identical with the one now in hand was considered. The legislature of Alabama had passed an act, approved December 11, 1882, entitled "An Act to vacate and annul the charter and dissolve the corporation of the City of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof." That act repealed the charter of the City of Selma and all acts amendatory thereof, and declared the corporation dissolved, and all offices held under any of said acts, except for the purposes and during the period provided by the repealing act, abolished, and that all powers of taxation given to the City of Selma by acts of the legislature were resumed by and lodged in the legislature. It transferred to the custody and control of the State of Alabama all property, real and personal, held and used by the corporation for governmental or other public purposes, and declared that the inhabitants and territory within the territorial limits and jurisdiction of said corporation were resolved into the body of the State. The residue of the act was substantially similar to the

act of February 11, 1879, "to vacate and annul the charter and dissolve the corporation of the City of Mobile," etc.

This was followed by an act approved February 17, 1883, "to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation, since dissolved, styled the City of Selma, and to establish a local government therefor."

This act, after reciting the dissolution of the City of Selma and the repeal of its charter, among many other provisions, formed the inhabitants residing within the territory formerly covered by the City of Selma into a municipal corporation under the name and style of "Selma;" provided for officers of the municipality and prescribed their duties; authorized them to levy taxes, but declared that no funds derived by the corporation thereby created from taxes or any other source should be used for the payment of any of the debts of the City of Selma, and transferred and made over to Selma the property which had been held and used by the City of Selma, to be held and used for the same uses and trusts to which it had been devoted while in the possession of the City of Selma.

This act was followed by an act approved February 19, 1883, to carry into effect any plan or scheme for the compromise, adjustment, and settlement of the existing indebtedness of the late corporation, known as the City of Selma, which might be be agreed upon between the creditors of the said City of Selma and commissioners appointed under and by virtue of the act . . . of December 11, 1882. With this series of acts in force the Supreme Court of Alabama, in the case mentioned, was called on to construe the act "to vacate and annul the charter and dissolve the corporation of the City of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof." It held that this act was without operation upon the debts and liabilities of the City of Selma lawfully contracted; that the act of February 19, 1883, to incorporate the inhabitants and territory formerly embraced within the limits of the City of Selma was a reorganization, under the corporate name of Selma, of the same corporators, and embraced substantially the same territory as the City of

Selma; that the corporation called Selma was the successor of the City of Selma, and bound for the payment of its debts; and that a suit at law, founded on a judgment against the City of Selma, was maintainable against its successor, Selma.

This construction of these statutes of the State of Alabama by its highest court being in accord with our own views, and in harmony with former decisions of this court on the same general subject, is decisive of the question in hand, unless there is some material difference between the legislation concerning the City of Selma and that concerning the City of Mobile. The only difference that can be supposed to have any bearing upon the question under discussion is, that the act incorporating Selma embraced the same territory as that covered by the City of Selma, whereas the Port of Mobile covered little more than half the territory embraced by the City of Mobile. We think this difference between the two cases is an immaterial one. The Supreme Court of Alabama, in the case of the *Mobile and Spring Hill Railroad Co.* v. *Kennerly*, 74 Ala. 566, assumed that the City of Mobile and the Port of Mobile had substantially the same corporators and the same boundaries. And we are of opinion that the exclusion from the limits of the Port of Mobile of the sparsely settled suburbs of the City of Mobile, a territory of little value, as fairly appears by the record, and consisting, as stated by the counsel for plaintiff, without contradiction, largely of fields, swamps and land covered with water, will not serve to distinguish this case from the case of *Amy* v. *Selma*. We repeat, therefore, that in our judgment the Port of Mobile is the legal successor of the City of Mobile, and bound for its debts.

It follows from this proposition that the remedies necessary to the collection of his debt, which the law gave the creditor of the City of Mobile, remain in force against the Port of Mobile. The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the States, for the convenient administration of their affairs, and are subject to legislative

control. But when empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals. *Broughton* v. *Pensacola*, 93 U. S. 266; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514.

Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Edwards* v. *Kearzey*, 96 U. S. 595; *Ralls County Court* v. *United States*, 105 U. S. 733; *Louisiana* v. *Pillsbury*, 105 U. S. 278; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285. These propositions receive strong support from the decisions of the Supreme Court of Alabama. *Commissioners of Limestone County* v. *Rather*, 48 Ala. 433; *Edwards* v. *Williamson*, 70 Ala. 145; *Slaughter* v. *Mobile County*, 73 Ala. 134.

It follows that the contract by which, under authority of the legislature, the City of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the Port of Mobile.

All laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded. Mr. Justice Field, when delivering the judgment of this court in *Wolff* v. *New Orleans*, 103 U. S. 358, 368, said: "The courts, therefore, treating as invalid and void the legislation abrogating or

restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her and upon the continuance of which alone they can be enforced, can proceed, and by mandamus compel, at the instance of the parties interested, the exercise of that power, as if no such legislation had ever been attempted." And so in *Ralls County Court* v. *United States*, 105 U. S. 733, 738, it was said by the Chief Justice, speaking for the court, that "all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and, under the well settled rule of decision in this court, the Circuit Court had authority, by mandamus, to require the County Court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent."

The Port of Mobile has the machinery and officers requisite for the assessment of property and for the levy and collection of taxes to carry on the city government. There is no reason why the taxes necessary to pay the judgment of the plaintiff cannot be levied and collected by the same officers. There is no obstacle to the full and complete performance by the Port of Mobile and the Mobile Police Board of the duties required by the peremptory writ of mandamus issued by the Circuit Court.

It follows from the views we have expressed that the judgment of the Circuit Court in favor of the plaintiff for $7308.80 and costs against the Port of Mobile, and the judgment directing the peremptory writ of mandamus to be issued against the Port of Mobile and the Mobile Police Board for the satisfaction of such judgment, are both warranted by law.

Judgments affirmed.

Syllabus in Stone v. Farmers' Loan & Trust Co.

RAILROAD COMMISSION CASES.

Argued October 13, 14, 1885.—Decided January 4, 1886.

STONE & Others *v.* FARMERS' LOAN & TRUST COMPANY.

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

The right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction, cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law.

A statute which grants to a railroad company the right "from time to time to fix, regulate and receive, the tolls and charges by them to be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated.

An act of incorporation, which confers upon the directors of a railroad company the power to make by-laws, rules and regulations touching the disposition and management of the company's property and all matters appertaining to its concerns, confers no right which is violated by the creation of a State Railroad Commission, charged with the general duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State, and with the enforcement of reasonable police regulations for the comfort, convenience and safety of travellers and persons doing business with the company within the State.

A railroad forming a continuous line in two or more States, and owned and managed by a corporation whose corporate powers are derived from the legislature of each State in which the road is situated, is, as to the domestic traffic in each State, a corporation of that State, subject to State laws not in conflict with the Constitution of the United States.

This court agrees with the Supreme Court of Mississippi, that a statute creating a commission, and charging it with the duty of supervising railroads, is not in conflict with the Constitution of that State.

The provisions of the statute of Mississippi of March 11, 1884, creating a railroad commission, are not so inconsistent and uncertain as to necessarily render the entire act void on its face.

This was a suit brought by the Farmers' Loan and Trust Company, a New York corporation, to enjoin the Railroad

Commission of Mississippi from enforcing against the Mobile and Ohio Railroad Company the provisions of the statute of Mississippi passed March 11, 1884, entitled "An Act to provide for the regulation of freight and passenger rates on railroads in this State, and to create a commission to supervise the same, and for other purposes." That act was as follows:

"SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the track of every railroad in this State is a public highway, over which all persons have equal rights of transportation for passengers and freights on the payment of just compensation to the owner of the railroad for such transportation; and any person or corporation engaged in transporting passengers or freights over any railroad in this State, who shall exact, receive, or demand more than the rate specified in any bill of lading issued by such person or corporation, or who, for his or its advantage, or for the advantage of any connecting line, or for any person or locality, shall make any discrimination in transportation against any individual, locality, or corporation, shall be guilty of extortion."

Sections 2 and 3 related to the punishment of those so guilty and their liability in double damages to parties injured.

Sections 4 and 5 provided for the appointment of three commissioners, to be known as the Railroad Commission of the State of Mississippi, prescribed their qualifications and tenure of office, fixed their salaries, and subjected them to penalties and punishment for violation of duty.

Section 6 was as follows:

"SEC. 6. Be it further enacted, That it shall be the duty of all persons or corporations who shall own or operate a railroad in this State, within thirty days after the passage of this act, to furnish the commission with its tariff of charges for transportation of every kind; and it shall be the duty of said commission to revise said tariff of charges so furnished, and determine whether or not, and in what particular, if any, said charges are more than just compensation for the services to be rendered, and whether or not unjust discrimination is made in such tariff of charges against any person, locality, or corporation, and when said charges are corrected, as approved by said

commission, the commission shall then append a certificate of its approval to said tariff of charges; but in revising or establishing any and every tariff of charges it shall be the duty of said commission to take into consideration the character and nature of the services to be performed and the entire business of such railroad, together with its earnings from the passenger and other traffic, and so revise such tariffs as to allow a fair and just return on the value of such railroad, its appurtenances, and equipments; and it shall be the duty of said commission to exercise a watchful and careful supervision over every such tariff of charges, and continue such tariff of charges from time to time as justice to the public and each of said railroad companies may require, and to increase or reduce any of said rates according as experience and business operations may show to be just; and said commission shall accordingly fix tariffs of charges for those railroads failing to furnish tariffs as above required. And it shall be the duty of said railroad companies or persons operating any railroad in this State to post at each of its depots all rates, schedules, and tariffs for the transportation of passengers and freights, made or approved by said railroad commission, with said certificate of approval, within ten days after said approval, in some conspicuous place at such depot; and it shall be unlawful for any such person or corporation to make any rebate or reduction from such tariff in favor of any person, locality, or corporation which shall not be made in favor of all other persons, localities, or corporations by a change in such published rates, except as may be allowed by the commission; and when any change is contemplated to be made in the schedule of passenger or freight rates of any railroad by the commission, said commission shall give the person or corporation operating or managing said railroad notice in writing at least ten days before such change of the time and place at which such change will be considered."

Section 7 made it unlawful for a company to grant reductions or rebates prohibited by the act, and fixed a penalty for so doing.

Section 8 allowed reduced rates for certain kinds of transportation.

Section 9 was as follows:

"SEC. 9. Be it further enacted, That it shall be the duty of said commission to hear all complaints made by any person against any such tariff of rates so approved, on the ground that the same in any respect is for more than just compensation, or that such charges, or any of them, amount to or operate so as to effect unjust discrimination; such complaint must be in writing, and specify the items in the tariff against which complaint is made; and if it appears to the commission that there may be justice in the complaint, or that the matter ought to be investigated, the commission shall forthwith furnish to the person or corporation operating the railroad a copy of the complaint, together with notice, which said notice shall be served as other legal process is now required by law to be served on railroad companies, that at a time and place stated in the notice the tariff as to said items will be revised by the commission, and at such time and place it shall be the duty of the commission to hear the parties to the controversy in person or by counsel, or both, and such evidence as may be offered, oral or in writing, and may examine witnesses on oath, conforming to the mode of proceedings, as nearly as may be convenient, to that required of arbitrators, giving such time and latitude to each side and regulating the opening and conclusion of any argument as the commission may consider best adapted to arrive at the truth; and when the hearing is concluded the commission shall give notice of any change deemed proper by them to be made to the person or corporation operating the railroad: *Provided*, In no instance shall any corporation, railroad, or person be criminally or civilly liable for the making of any charge or discrimination whatever, if the same is not in violation of the tariff of charges or rules and regulations prescribed by the commission."

Sections 10 and 11 were unimportant in this case.

The remainder of the statute was as follows:

"SEC. 12. Be it further enacted, That every person or corporation operating a railroad in the State shall furnish the said commission with all the information required relative to the management of their respective lines, and particularly with

copies of all leases, contracts, and agreements for transportation with express, sleeping-car, or other companies to which they are parties.

"SEC. 13. Be it further enacted, That every railroad company shall, within twenty-four hours after the occurrence of any accident to a train, attended with serious personal injury, on any portion of its line within the limits of this State, give notice of the same to the railroad commissioners, who, upon information of such accident, may repair or dispatch one or more of their number to the scene of said accident and inquire into the facts and circumstances thereof, which shall be recorded in the minutes of their proceedings, and embraced in their annual report.

"SEC. 14. Be it further enacted, That the commission shall make annual reports to the governor on or before the first day of January in each year, for transmission to the legislature, of their doings for the year ending on the 30th day of September next preceding, containing such facts as will disclose the actual working of the railway system in this State, and such suggestions as to the general railroad policy of the State as may seem to them appropriate.

"SEC. 15. Be it further enacted, That it shall be the duty of every railroad company or person operating a railroad in this State to make quarterly returns of the business of said railroad to the railroad commission of Mississippi, which returns shall embrace all the receipts and expenditures of said railroad, and to be made according to forms furnished by the said railroad commissioners for that purpose.

"SEC. 16. Be it further enacted, That the quarterly returns herein provided shall be made as aforesaid within thirty days after the end of each quarter to which they relate, and any railroad company, or persons operating any railroad in this State, which shall fail or refuse to make the quarterly returns, as provided for in this act, shall forfeit to the State of Mississippi fifty dollars for every day of such refusal or neglect.

"SEC. 17. Be it further enacted, That the said quarterly returns shall be sworn to by one or more officers of said company, or of the persons operating the said railroad, who has

knowledge of their truth, and any person knowingly swearing falsely to any statement in any of said quarterly reports shall be guilty of perjury.

"SEC. 18. Be it further enacted, That it shall be the duty of the commissioners to inspect the depots of the railroads operated in this State, and see that at least one comfortable and suitable reception-room is provided at each depot for the use and accommodation of persons desiring and awaiting transportation over their line, and any railroad company failing or refusing to provide such room, after sixty days' notice from the commissioners to provide the same, shall be liable to a penalty of not less than fifty dollars for each day they so fail or refuse to provide such room, and said railroad company shall keep at all times in such reception rooms a bulletin board, which shall show the time of the arrival and departure of trains, and when any passenger train or other train for transporting passengers is delayed, notice of same shall be made on said bulletin board for the information of passengers, stating as nearly as can be ascertained the extent of the delay and probable time of arrival.

"SEC. 19. Be it further enacted, That the determination of every matter of said commission shall be in writing, and proof thereof shall be made by a copy of the same, duly certified to by the clerk of said commission; and whenever any matter has been determined by said commission, in the course of any proceeding before it relating to the regulation or supervision of any railroad in this State, and coming within the jurisdiction of such commission, proof of the fact of such determination, duly certified as aforesaid, shall be received in all the courts of this State, or before any officers thereof, in all civil cases, as *prima facie* evidence that such determination was right and proper, and the record of the proceedings of said commission shall be deemed a public record, and shall at all reasonable times be subject to the inspection of the public.

"SEC. 20. Be it further enacted, That said commission, or any one of said commissioners, may, in the discharge of any of the duties imposed upon them by this act, administer oaths, take affidavits, and summon and examine witnesses under oath, in all matters coming before them, and if any person shall tes-

tify, or make any false affidavit or oath, before said commission, or before any of said commissioners, or before any officers, to any matter coming before said commission, he shall be deemed guilty of perjury, and, upon conviction thereof, shall be punished according to law.

"SEC. 21. Be it further enacted, That all summons for witnesses to appear before said commission, or before any one or more of said commissioners, and notice to persons or corporations, shall be issued by one of said commissioners, and be directed to any sheriff, constable, or marshal, of any city or town, who shall execute the same in his bailiwick, and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court; and if any person, duly summoned to appear and testify before said commission, or before any one or more of said commissioners, shall fail or refuse to appear and testify without a lawful excuse, or shall refuse to answer any proper question propounded to him by said commission, or any of said commissioners, or if any person shall obstruct said commission, or one or more of said commissioners, in the discharge of duty, or shall conduct himself in a rude, disrespectful, or disorderly manner before said commission, or any of them deliberating in the discharge of duty, such person shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one thousand dollars.

"SEC. 22. Be it further enacted, That witnesses summoned to appear before said commission shall be entitled to the same per diem and mileage as witnesses attending Circuit Court; and witnesses summoned by said commission on its behalf shall be paid out of the State treasury on warrants, to be drawn by the auditor upon the certificate of the commission, showing the amount and items thereof, to which such witness may be entitled; and witnesses summoned for any railroad shall be paid by such railroad.

"SEC. 23. Be it further enacted, That if any railroad company, or person, or corporation operating any railroad in this State, shall violate any of the provisions of this act, or the tariff of charges, as fixed by such commission, such company,

person, or corporation, shall be liable to a penalty of five hundred dollars for each violation not otherwise provided for; and such penalty may be recovered by an action to be brought in the name of the State of Mississippi in any county where such violation may occur, or injury or wrong be done. The commission shall institute such action through the district attorney of the proper district, and no such suit shall be dismissed without the consent of the court and of said commission; and if any district attorney shall neglect for thirty days, after notice to bring any such suit, the commission may direct some attorney-at-law to bring the same, and his fee therefor shall be fixed by the court, and shall not exceed fifty per cent. of the amount collected; and the district attorney shall not interfere in such suit, and the same shall not be dismissed without consent as aforesaid: *Provided*, That in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shewn in defence that such tariff so fixed was unjust.

"Sec. 24. Be it further enacted, That the remedies hereby given shall be regarded as cumulative to the remedies now given by law against railroad corporations, and this act shall not be construed as repealing any statute giving such remedies.

"Sec. 25. Be it further enacted, That the provisions of this act shall apply to and include all persons, firms, and companies, and to all associations of persons, whether incorporated or otherwise, that shall operate a railroad in this State (street railways excepted).

"Sec. 26. Be it further enacted, That hereafter the election of railroad commissioners shall be at such time, in such manner, and for such term as may be determined by the legislature.

"Sec. 27. Be it further enacted, That the schedules adopted by the commission for charges for transportation of persons and freight shall not be enforced against any railroad in this State before the first day of May, A.D. 1884.

"Sec. 28. Be it further enacted, That this act shall take effect and be in force from and after its passage."

On the 15th of March, 1884, the following supplemental act was passed:

"SEC. 1. Be it enacted by the Legislature of the State of Mississippi, That the act entitled 'An act to provide for the regulation of freight and passenger rates on railroads in this State, and to create a commission to supervise the same, and for other purposes,' approved March 11, 1884, shall not be so construed as to authorize said commissioners to require bulletin boards to denote the delay of trains noted thereon, or to require the erection of station-houses in any case where in their judgment the public travel does not make it necessary, nor shall said act be so construed as to require said commission to investigate or call upon any railroad company for rates of charges in transportation or travel from any point outside of this State to points outside of this State, or in any way interfere with such rates of charges."

On the third of February, 1848, the legislature of Alabama passed an act to incorporate the Mobile and Ohio Railroad Company, with power "to locate, construct, and finally complete a single, double, or treble railroad or way from some suitable point in the city of Mobile, in a westerly or northwesterly direction, to the west line of this State, towards the mouth of the Ohio River, on such route as shall be deemed most expedient; and to transport, take, and carry property and persons upon said railroad or way by the power and force of steam, of animals, or of any other mechanical or other power, or any combination of them which said company may choose to apply;" and "with permission to make any lawful contract with any other railroad corporation in relation to the business of said company, and also to make joint stock with any other railroad corporation."

The immediate government and direction of the affairs of the company were vested in a board of directors to be chosen by the stockholders, and by § 7 it was provided: "That the directors shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate, and effects of said company, not contrary to this charter or the laws of this State or of the United States; the transfer of shares, the duties and conduct of their officers

and servants, touching the election of and meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company."

Section 12 was as follows:

"SEC. 12. And be it further enacted, That it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad, or way aforesaid, hereby authorized to be constructed, erected, built, or used, or upon any part thereof."

On the 17th of February, 1848, the legislature of Mississippi passed "An Act to incorporate the Mobile and Ohio Railroad Company." This act, after reciting the incorporation of the company in Alabama, and setting out that act of incorporation in full, "the same as printed in Alabama," and also reciting that Mississippi was "desirous to aid in accomplishing the object of the said act," proceeded as follows:

"SEC. 1. Be it enacted by the Legislature of the State of Mississippi, That the railroad described in the above-recited act be extended in the State of Mississippi, from the Alabama line to the State of Tennessee, in such direction and on such a route as shall be deemed most expedient; and that as to said extension there is granted to the said Mobile and Ohio Railroad Company, when organized, the same rights, powers, and privileges as are granted to it within the State of Alabama by the same act, subject, however, to the same and similar conditions, restrictions, modifications, and provisions as are in said act above recited, contained, and set forth, excepting the provision contained in section 15 of said act; and the said act is hereby concurred in and adopted within the State of Mississippi in reference to the said railroad as extended, and in reference to the said Mobile and Ohio Railroad Company, with the exception of that portion contained in section 15, as before stated: *Provided*, That in case of persons absent or unknown, whose lands may be condemned pursuant to sections 7, 8, and 9 of said recited act, the placing of the amount of the damages assessed to the credit of the owner, in the hands of the State treasurer, shall be taken as payment; and on such owner ap-

pearing or tendering satisfactory evidence of his claims thereto, such damages shall be paid him by the treasurer on the warrant of the auditor of public accounts."

The excepted section related to taxation, and as to this a different provision was made in Mississippi from that in the Alabama charter. Power was also given the company to cross the tracks of other railroads in Mississippi, and some slight changes were made in the provision for depositing the amount of damages assessed upon the condemnation of property for the use of the company. Otherwise the charters of the company in these two States were substantially identical.

On the same day, February 28, 1848, the legislature of Tennessee passed "An Act to incorporate the Mobile and Ohio Railroad Company and the Tennessee Central Raiload Company." This act began as follows:

"Whereas it appears to this general assembly, from the memorial of Jonathan Emanuel, president, and George N. Stewart, Sidney Smith, Moses Waring, Charles Le Baron, and S. Griffith Fisher, directors of the Mobile and Ohio Railroad Association, that a company has been organized at Mobile, in the State of Alabama, for the purpose of constructing a railroad from Mobile to the Tennessee River, and from thence to a suitable point near the mouth of the Ohio River, for which purpose said board of president and directors have applied to this general assembly for the passage of such a law as may be necessary to authorize the construction of said road through the State of Tennessee:

"And whereas it is deemed a matter of vital importance to this State that a direct communication by railroad to the Gulf of Mexico be established: Therefore,

"Sec. 1. Be it enacted by the General Assembly of the State of Tennessee, That the said Jonathan Emanuel, president, and the said George N. Stewart, Sidney Smith, Moses Waring, Charles Le Baron, and S. Griffith Fisher, directors, and their associates, who shall be the stockholders of said company, and their successors, under the name and style of 'The Mobile and Ohio Railroad Company,' are hereby declared to be a body corporate and politic under the laws of Tennessee,

with succession for five hundred years, and a common seal, with capacity to have, receive, and enjoy, to them and their successors, property and estate of whatsoever nature and quality, and the same to alienate, transfer, and dispose of, so far as may be necessary to carry into effect the main object of this charter, which is hereby declared to be the construction, use, and maintenance of a railroad from Mobile, in the State of Alabama, to some point on the Mississippi or Ohio River, near the mouth of the Ohio, passing through the State of Tennessee."

The remainder of the act related to the powers and privileges of the company in Tennessee.

On the 26th of February, 1848, the General Assembly of Kentucky passed an act "to authorize the Mobile and Ohio Railroad Company to extend their railroad from the south boundary line of the State of Kentucky to the Mississippi or Ohio Rivers," as follows:

"SEC. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the Mobile and Ohio Railroad Company, when formed under the act of the General Assembly of the State of Alabama, approved February 3, 1848, entitled 'An Act to incorporate the Mobile and Ohio Railroad Company,' shall be allowed the privilege of making any necessary reconnoissance and survey for the purpose of ascertaining the most eligible route for extending the Mobile and Ohio Railroad to any point upon the Mississippi or Ohio Rivers in this State.

"SEC. 2. Be it further enacted, That as soon as said route and point shall be ascertained the said Mobile and Ohio Railroad Company shall be allowed the right of way for the extension and construction of their said railroad from the Tennessee line to the Mississippi or Ohio Rivers, and that they shall be entitled to all the privileges, rights, and immunities, and subject to all such restrictions, as are granted, made, and prescribed for the benefit, government, and direction of said Mobile and Ohio Railroad Company within the State of Alabama by the act above described."

On the 20th of September, 1850, Congress passed "An Act

granting the right of way and making a grant of land to the States of Illinois, Mississippi, and Alabama in aid of the construction of a railroad from Chicago to Mobile."

This act provided "that the said railroad and branches shall be and remain a public highway for the use of the government of the United States free from toll or other charges," and "that the United States mail shall at all times be transported on the said railroad, under the direction of the Post Office Department, at such price as the Congress may by law direct."

These lands were transferred by Alabama and Mississippi to the Mobile and Ohio Railroad Company in 1850 and 1851, and in 1859 Congress ratified and confirmed the grants and extended the time for building the road.

The case was heard on demurrer to the bill. The Circuit Court rendered a decree allowing the injunction, and from that decree this appeal was taken.

Mr. John W. C. Watson for appellants.

Mr. John A. Campbell and *Mr. E. L. Russell* for appellee.—The railroad of the Mobile & Ohio Railroad Co. was completed in 1848 conformably to charters granted by Alabama, Mississippi, Tennessee, and Kentucky. Among the franchises granted to it was the power to fix, regulate, and collect tolls and charges for the transportation of persons and property on its road. The grant of this franchise vested it as a legal right, not subject to legislative repeal or regulation. *London* v. *Hierons*, 2 Moore P. C. 102, 113; *Gard* v. *Callord*, 6 M. & S. 70; *Attorney General* v. *Railroad Co*, 35 Wisc. 586; 1 Savigny des Obligations, 427; *Stamford* v. *Salisbury*, 1 Cromp. & Jerv. 400; *Jenkyns* v. *Harney*, 5 Tyrwh. 871. The inability of Mississippi to impair contracts or obligations by legislative enactment or judicial decision, and its inability to diminish privileges contained in charters granted by it have already been declared by this court. *Planters' Bank* v. *Sharp*, 6 How. 301; *Bacon* v. *Robertson*, 18 How. 480; *Groves* v. *Slaughter*, 15 Pet. 449. See also *Dodge* v. *Woolsey*, 18 How. 341, 347. The nature of the legislative contract made with the corporation is described

by the Supreme Court of Massachusetts in *Commissioners* v. *Farmers' Bank*, 21 Pick. 542. Shaw, C. J., says: "It is clearly a stipulation on the part of the government that the corporation shall be and continue a corporation for an indefinite time, or for a time limited by the act unless sooner forfeited for some cause recognized by existing laws as a cause for forfeiture: that their constitution, organization, and mode of action, as prescribed by the charter, shall not be annulled or changed by the legislature; that members shall not be added or removed; that modes of election, expulsion or suspension of members shall not be altered; and that whatever belongs to their organic constitution and action as bodies politic shall continue and be determined by the terms of the charter. In addition to which the powers specially granted to them are not to be withdrawn or diminished."

The statute passed by the legislature changes fundamentally the mode prescribed by the charter for fixing rates of transportation. The extract from Chief Justice Shaw shows clearly that this is an offence against the Constitution. See also *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 94 U. S. 155; *Railroad Co.* v. *Maryland*, 21 Wall. 456, 470; *Mobile & Ohio Railroad Co.* v. *Moseley*, 52 Mississippi, 127; *Sloan* v. *Pacific Railroad Co.*, 61 Missouri, 22; *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 184; *Maryland* v. *Baltimore & Ohio Railroad Co.*, 3 How. 534; *Olcott* v. *Supervisors*, 16 Wall. 678, 694; *Wilmington Railroad* v. *Reid*, 13 Wall. 264.

If it be said that the charter conferred upon the company only a permissory and revocable license, we reply that the charter was given as determining the conditions of a contract for long and continuous service of public utility, and that the power to fix and collect rates was essential to its performance. The grant to do so was a commission to the company, for a valuable consideration, to fix, regulate, and collect the tolls and charges. The existence of the company, its mode of organization and proceeding, and its franchises and modes of exercising them, all spring from this legislative act. It describes an agreement on the part of the company to construct

the road within the time designated, sufficient for the transportation of persons and property. To enable it to perform this, the power to lay tolls and collect charges was indispensable, and inevitably followed. The twelfth section specifies distinctly, what would have been inferred from the incorporation of the company, the disclosure of the objects and purposes of the act, and the concession of all of the powers, privileges, and immunities necessary and which shall become thereafter necessary for the purpose.

The adoption of this charter resulted from the concurrent act of four States of this Union. The object of the act and purposes to be accomplished by it were common to those States, and the instrument for them was selected and commissioned by all. The statute of Mississippi is designed to alter, and to disturb and derange the plan adopted by the four States for the administration of the affairs of the company, and to enable Mississippi to dictate the mode of operation of the company. The result of the co-operative adoption of the company in these four States, with the same powers of administration for transportation through each and all of the States, is to establish a community of right and interest which neither of them can separately and partially derange or transform. *Brocket* v. *O. & P. Railroad Co.*, 14 Penn. St. 244; *Cleveland R. Co.* v. *Speer*, 56 Penn. St. 325; *County* v. *Railroad Co.*, 51 Penn. St. 228; *P. & W. R. Co.* v. *Maryland*, 10 How. 376; *Sprague* v. *Hartford*, 5 R. I. 233; *The State* v. *Railroad Co.*, 18 Maryland, 193; *Merrick* v. *Van Santvoord*, 34 N. Y. 213; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622.

The franchises thus conferred upon the company were property, and as such protected by the Constitution of the United States against legislative spoliation. The constitutions of all the States in which the franchises are to be executed also recognize the principle of property, and the existence of the right of private ownership, and that this principle and right are not to be invaded by the State legislature. It is notorious that organizations exist to subvert this ancient and stable principle. The legislature of Mississippi by its legislation lends itself to

these attacks upon the social structure. The manifest intent of the statute is to obtain control over railroad transportation through the power of fixing rates.

In the new schemes for readjusting the relations of society, the importance of railroads is acknowledged by socialist writers, and their appropriation provided for. Not only land but all instruments of production are to be made the collective property of all, to be worked by associated labor, for the common benefit. This can never be attained. Individual effort is necessary for the creation of property. The right of free competition to buy, to sell, to dispose of property, is essential to our civilization and habits of social life. The law imposes few limits on it except those required for the protection of good morals. Out of this freedom spring contracts and the security afforded to property and personal liberty. We may conceive of a state of society where it may be proper to endow a government with power to dispose of persons and property at its will. But no such state of society exists in the United States.

We object to this legislation, because of the violation of a contract made by the State, in changing the conditions of a charter conferred by herself to secure the employment of capital and industry in the completion of a work which the State had decided to be of public utility. Also because of a want of power of the State to alter a contract where other parties jointly concerned were interested and concerned, and because of the invasion of rights of property. The documentary evidence of title shown by this company, and the confessions of the demurrer show a possession for twenty-five years of property in land, erections and buildings on the land, and employment of both, with incontestable authority to do the work the company was appointed to do in the manner in which it has been done.

The statute of Mississippi affirms an authority to direct the company in the matter of its tolls and charges, and to fix and to regulate them in respect to every item and detail of its business, and prescribes not only that the items of charge shall be determined, but also that the value of the property as assessed or determined by the commissioners shall be the basis on which

the apportionment of the freights and fares shall be estimated: all of which violates the contract between the company and the State, and deprives the company of a property which it has earned by constructing the road.

We further contend that the Mississippi act is void for want of sufficient certainty. [Counsel analyzed the act in order to show that such would be the result.]

And it is further insisted that this act is in direct conflict with, and violates the Constitution of Mississippi.

Article 1, section 12, of the Constitution of the State of Mississippi, provides, that "the right of trial by jury shall remain inviolate," article 3, sections 1 and 2, of that Constitution provides: "That the powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit: those which are legislative, to one; those which are judicial, to another; and those which are executive, to another." "No person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except in instances hereinafter expressly directed or permitted." And section 2 of article 1, which provides that "No person shall be deprived of life, liberty or property, without due process of law."

The provision of section 19 of the act, which says, that the determination of the commission "shall be received by all the courts of this State as *prima facie* evidence in any suit brought under the authority of the act," is a direct violation of this Constitution.

Mr. P. Hamilton also filed a brief for appellee, further contending that inasmuch as the road was one continuous property running through four States, it was a highway for commerce within the jurisdiction of Congress; and inasmuch as the act of Mississippi assumed to regulate the rates upon commerce external to the State and passing through it, as well as upon domestic commerce within the State, it infringed that clause of the Constitution which confers upon Congress the power to regulate commerce among the several States: citing *Pensacola*

Telegraph Co. v. *Western Union Telegraph Co.*, 96 U. S. 1; *The Clinton Bridge*, 1 Woolworth, 150; *Miller* v. *New York*, 109 U. S. 385; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 430; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Mobile* v. *Kimball*, 102 U. S. 691; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Railroad Co.* v. *Husen*, 95 U. S. 465, 470; *State Freight Tax Cases*, 15 Wall. 232; *Brown* v. *Maryland*, 12 Wheat. 419, 448; *Cooley* v. *Wardens of Philadelphia*, 12 How. 299; *Walton* v. *Missouri*, 91 U. S. 275; *Keiser* v. *Illinois Central Railroad Co.*, 18 Fed. Rep. 151; *Pacific Steamship Co.* v. *Railroad Commissioners*, 18 Fed. Rep. 10; *Sinnot* v. *Davenport*, 227, 242; *Peik* v. *Chicago & Northwestern Railway Co.*, 94 U. S. 164, 177; *Head Money Cases*, 112 U. S. 580; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The argument in support of the decree below is:

1. That the statute under which the commissioners are to act impairs the obligation of the charter contract of the Mobile and Ohio Railroad Company;

2. That it is, so far as that company is concerned, a regulation of commerce among the States;

3. That it denies the company the equal protection of the laws; and deprives it of its property without due process of law;

4. That it confers both legislative and judicial powers on the commission, and is thus repugnant to the Constitution of Mississippi; and

5. That it is void on its face by reason of its inconsistencies and uncertainties.

These several positions will be considered in their order.

1. The provisions of the charter on which the claim of contract rests are found in §§ 1, 7, and 12, as follows:

"Sec. 1. And the said company is hereby authorized and empowered . . . to transport, take, and carry property

and persons upon said railroad or way by the power and force of steam, of animals, or of any other mechanical or other power, or any combination of them which the company may choose to apply."

"SEC. 7. That the directors shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of said company, not contrary to this charter or the laws of this State or of the United States; the transfer of shares, the duties and conduct of their officers and servants, touching the election of, and meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company."

"SEC. 12. That it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad, or way aforesaid, hereby authorized to be constructed, erected, built, or used, or upon any part thereof."

From this it is claimed that the State granted to the company, for the full term of its corporate existence, that is to say, forever, the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control.

It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or inter-state commerce. *Railroad Co.* v. *Maryland*, 21 Wall. 456; *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago and Northwestern Railway Co.*, 94 U. S. 164; *Winona and St. Peter Railroad Co.* v. *Blake*, 94 U. S. 180; *Ruggles* v. *Illinois*, 108 U. S. 526, 531. This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the

existence of the power. In the words of Chief Justice Marshall, in *Providence Bank* v. *Billings*, 4 Pet. 514, 561, "its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." This rule is elementary, and the cases in our reports where it has been considered and applied are numerous. Thus, in *Providence Bank* v. *Billings*, it was held that the incorporation of a bank without any special provision for taxation did not imply a contract on the part of a State not to tax at all. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 419, 548, the court said this rule of construction was not confined to the taxing power, and accordingly it held that the charter of a toll-bridge company did not imply a contract not to allow the building of another bridge in the immediate vicinity which would materially interfere with its revenues. In delivering the opinion of the court, Chief Justice Taney used this language: "This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge; and establishes certain rates of toll which the company are authorized to take; that is the whole grant. There is no exclusive privilege given to them over the waters of Charles River above or below their bridge; no right to erect another bridge themselves nor to prevent other persons from erecting one; no engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income." In *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad Co.*, known as the *Delaware Railroad Tax Case*, 18 Wall. 206, 226, it was held that a provision in the charter that the railroad company "should pay annually into the treasury of the State a tax of one-quarter of one per cent. on its capital stock of four hundred thousand dollars," without any words "indicating the intent of the legislature that no further or different tax should be subsequently levied," was not sufficient to show a contract binding the State not to make such a levy, the court remarking that "the surrender, when claimed, must be shown by clear, unam-

biguous language, which will admit of no reasonable construction consistent with the reservation of the power." So, in *Bailey* v. *Magwire*, 22 Wall. 215, 228, it was held that a clause in a charter which subjected a corporation "to taxation at the rate assessed by the State on other real or personal property of like value," did not relieve the company from taxation for other than State purposes. And here the court said: "Silence on such a subject," that is to say, taxation for other purposes, "cannot be construed as a waiver of the right of the State in this regard. There must be something said which is broad enough to show clearly that the legislature intended to relieve the corporation from a part of the burdens borne by other real and personal property." In *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, it appeared that a company had been incorporated with authority to establish and maintain, for fifty years, "chemical and other works at the place designated . . . for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, or into other chemical products, by means of chemical or other processes;" but this court held that the State was not thereby prevented from causing the works to be abated in case they should, within the time of the charter, become a public nuisance because of the growth of population in the neighborhood, and among the reasons assigned was the absence from the charter of any express exemption of the company from the operation of the powers of the State applicable to its existing condition for the time being. In *Newton* v. *Commissioners*, 100 U. S. 548, 562, the seat of justice of a county had been fixed at Canfield, but the statute by which this was done provided "that before the seat of justice shall be considered permanently established at Canfield," the citizens should donate a lot and make certain provisions for the erection of public buildings thereon. The citizens complied with all the requirements of the law, and the seat of justice remained undisturbed at the place where it had been "permanently established" until 1874, when a law was passed for its removal to another town. The citizens of Canfield then caused a bill to be filed for an injunction restraining the county commissioners from effecting the

removal, on the ground that the original act, and what was done under it, constituted an executed contract on the part of the State that the seat of justice should remain forever at Canfield, and the later act impaired the obligation of that contract; but this court held otherwise, saying, among other things, "If the legislature had intended to assume an obligation that it should be *kept there* in perpetuity, it is to be presumed it would have said so. We cannot—certainly not in this case—interpolate into the statute a thing so important which it does not contain."

The cases in which it has been held that a contract was entered into are equally instructive. Thus in *Gordon* v. *The Appeal Tax Court*, 3 How. 133, the statute was: "That upon any of the banks in this State complying with the conditions of this act, the faith of the State is hereby pledged not to impose any future tax or bonus on the said banks during the continuance of their charters under this act." In *State Bank of Ohio* v. *Knoop*, 16 How. 369, the provision was that each bank organized under the act should semi-annually, on the days designated for declaring dividends, set off to the State six per cent. on the profits deducting therefrom the expenses and ascertained losses for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject, and from the judgment that this was a contract of exemption from any further exercise of the power of taxation three justices dissented. In *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, the words of exclusion were, "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected [within certain specified limits], any other bridge or bridges over or across the said river." In *Home of the Friendless* v. *Rouse*, 8 Wall. 430, the provision was that all property of said corporation shall be exempt from taxation, and that a certain existing statute to the effect that every act of incorporation should be subject to alteration and repeal "shall not apply to this corporation."

Such being the rule, and such its practical operation, we return to the special provisions of the charter on which this case

depends, and find, first, the authority given the corporation to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be. That was decided in *Railroad Co.* v. *Maryland; Chicago, Burlington & Quincy Railroad Co.* v. *Iowa; Peik* v. *Chicago & Northwestern Railway Co.; Winona & St. Peter Railroad Co.* v. *Blake;* and *Ruggles* v. *Illinois;* all cited above.

Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the State. This we held in *Ruggles* v. *Illinois* included laws in force when the charter was granted, and those which came into operation afterwards as well. It is true that the clause which thus limits the power of the directors is found in the middle of the sentence which confers the power, but it clearly was intended to refer to everything that might be done in this way "touching . . . all matters whatsoever that may appertain to the concerns of said company." There is nothing here, therefore, which in any manner implies a contract on the part of the State to exempt the company from the operation of laws enacted within the scope of legislative power for the regulation of the business in which it is authorized to engage.

The case turns consequently on § 12, which is, "that it shall be lawful for the company . . . from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation," &c. This would have been implied from the rest of the charter if there had been no such provision, and it is argued that, unless it had been intended to surrender the power of control over fares and freights, this section would not have been inserted. The argument concedes that the power of

the company under this section is limited by the rule of the common law which requires all charges to be reasonable. In *Munn* v. *Illinois*, 94 U. S. 113, and *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, above cited, this court decided that, as to natural persons and corporations subject to legislative control, the State could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by § 12 the State has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the State had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention.

This is not in conflict with the judgment of the Supreme Court of Mississippi in *Railroad Commission* v. *Yazoo & Mississippi Railroad Co.*, in which it was decided that the power had been surrendered in favor of that company because in that charter a maximum of rates was fixed. In the opinion, a copy of which has been furnished us in advance of its publication in the regular series of reports, the court says distinctly that "a grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer

power to exact compensation, which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterwards to interfere can be denied." In *Railroad Commission* v. *Natchez, Jackson & Columbia Railroad Co.* it was held by the same court that the charter authority for the company "from time to time to fix, regulate, and receive tolls and charges by them to be received for transportation of persons and property," did not amount to a contract of exemption, and the commission was allowed to proceed under the law.

From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust."

It is also claimed that the charter contains a contract binding the State to allow the company, at all times and in all ways, to manage its own affairs through its own board of directors, and that the obligation of this contract will be impaired if the provisions of the statute are enforced by the commissioners. As has already been seen, the power of the directors is coupled with a condition that their management shall be in accordance with the laws of the State. This undoubtedly means with such laws as may be constitutionally enacted touching the administration of the affairs of the company. The present statute requires the company, 1, to furnish the commissioners with copies of its tariffs for all kinds of transportation; 2, to post in some conspicuous place at each of its depots the tariff approved by

the commissioners, with the certificate of approval attached; 3, to conform to the tariff as approved without discrimination in favor of or against persons or localities; 4, to furnish the commissioners with all the information they require relative to the management of its line, and particularly with copies of all leases, contracts, and agreements for transportation with express, sleeping-car, or other companies to which they are parties; 5, to report all accidents within the limits of the State attended with any serious personal injury; 6, to make quarterly returns of its business to the commissioners, which returns shall embrace all the receipts and expenditures of its railroad; 7, to provide at least one comfortable and suitable reception room at each depot for the use and accommodation of persons desiring or awaiting transportation over its road; and 8, to keep at all times in such reception rooms a bulletin board which shall show the time of the arrival and departure of trains, and when any passenger or other train transporting passengers is delayed, notice of the extent of the delay and the probable time of arrival as near as it can be ascertained.

The second and third of these requirements relate only to the duty of the company to keep its charges within the limit of the tariff approved by the commissioners without discrimination in favor of or against persons or localities. The first, fourth, and sixth are clearly intended as a means of furnishing the commissioners with the information necessary to enable them to act understandingly in fixing the tariff. Whether under these provisions the company can be required to make a report of or give information about its business outside of Mississippi is a question we do not now undertake to decide. The second, fifth, seventh, and eighth are nothing more than reasonable police regulations for the comfort, convenience, and safety of those travelling upon the road or doing business with the company in the State.

The commissioners have power, 1, to approve, and if need be to fix the tariff of charges for transportation, both of persons and property, by which the company must be governed, and to exercise a watchful and careful supervision over such tariff; 2, to notify the company of the times and places when and where

the propriety of a change in existing tariffs will be considered; 3, to entertain complaints made by any person against a tariff which has been approved, on the ground that the same is in any respect for more than a just compensation, or that the charges amount to or operate so as to effect unjust discrimination, and, after due notice to the company and proper inquiry had, to make any changes that may be deemed proper; 4, to repair to the scene of an accident within the State attended with serious personal injury, and inquire into the facts and circumstances thereof, to be recorded in the minutes of their proceedings and embraced in the annual report they are required to make to the governor for transmission to the legislature; 5, to inspect the depots of all railroads operated in the State and to see that comfortable and suitable reception rooms are provided; and 6, to institute all necessary suits for the recovery of the penalties prescribed by the statute for a violation of its provisions. The first three of these relate entirely to proceedings for fixing charges and supervising the tariff, and the rest, like the correlative requirements of the company, are mere police regulations which the commissioners are to enforce. All this comes clearly within the supervising power of the State in the administration of the affairs of its domestic corporations.

We conclude, therefore, that the charter of the company contains no contract the obligation of which is in any way impaired by the statute under which the commissioners are to act.

2. There can be no doubt that each of the States through which the Mobile and Ohio Railroad passes incorporated the company for the purpose of securing the construction of a railroad from Mobile, through Alabama, Mississippi, Tennessee, and Kentucky, to some point near the mouth of the Ohio River, where it would connect with another railroad to the lakes, and thus form a continuous line of inter-state communication between the Gulf of Mexico in the south, and the Great Lakes in the north. It is equally certain that Congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each State is for

all the purposes of local government a domestic corporation, and that its railroad within the State is a matter of domestic concern. Every person, every corporation, everything within the territorial limits of a State is while there subject to the constitutional authority of the State government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the State; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the State for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from State regulation or State control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress, that is to say, using the language of this court in *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 210, "when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States." Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the inter-state business of the company or impair the usefulness of its facilities for inter-state traffic. It is not enough to prevent the State from acting that the road in Mississippi is

used in aid of inter-state commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.

The commission is in express terms prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of persons or property taken up without the State and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the State over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress, and the general powers of the State in this particular, is not everywhere distinctly marked, and it is always easier to determine when a case arises whether it falls on one side or the other, than to settle in advance the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is, certainly, much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond.

3. General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws. *Munn* v. *Illinois*, 94 U. S. 113, 134, 135; *Railroad Co.* v. *Richmond*, 96 U. S. 521, 529; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354. The great purpose of the statute now under consideration is to fix a maximum of charges, and to regulate in some matters of a police

nature the use of railroads in the State. In its general scope it is constitutional, and it applies equally to all persons or corporations owning or operating railroads in the State. No preference is given to one over another, but all are treated alike. Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company.

4. The Supreme Court of Mississippi has decided in the cases of *Railroad Commission* v. *Yazoo & Mississippi Railroad Company*, and *Railroad Commission* v. *Natchez, Jackson & Columbia Railroad Company*, not yet officially reported, that the statute is not repugnant to the Constitution of the State "in that it creates a commission and charges it with the duty of supervising railroads." To this we agree, and that is all that need be decided in this case. As was said by the Supreme Court of Mississippi, in the case first referred to above: "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented."

5. It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. The statute of Tennessee which was under consideration in *Louisville & Nashville Railroad Company* v. *Railroad Commission of Tennessee*, 19 Fed. Rep. 679, is materially different from this in many respects. That case was decided before this statute was passed, and it is not at all unlikely that the legislature of Mississippi made use of the decision in framing their bill so as to avoid some, if not all, of the objections which, in the opinion of the court, were fatal to what had been done in Tennessee. The argument on this branch of the controversy contains much that might have been useful if addressed to the legislature while considering the bill before its final enactment, but we find nothing in it to show that the statute as it now stands is altogether void and inoperative. When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the vari-

ous provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid.

The decree of the Circuit Court is reversed and the cause remanded, with instructions to dismiss the bill.

MR. JUSTICE HARLAN, dissenting.*

This case and the case against the Illinois Central Railroad Company, argued with it, are unlike that of *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155, where the charter of the company was granted expressly subject to such rules and regulations as the legislature might, from time to time, enact and provide; or of *Peik* v. *Chicago & Northwestern Railway Co.*, 94 U. S. 164, 175, where, at the time the railroad charter was granted, the State Constitution provided that all charters of corporations "may be altered or repealed by the legislature at any time after their passage;" or of *Winona & St. Peter Railroad Co.* v. *Blake*, 94 U. S. 180, where the charter prescribed no limit upon the legislative power to fix rates for transportation, and conferred no express power upon the company to fix or establish such rates as it might deem proper. Different questions from any of these are now presented.

The Mobile and Ohio Railroad Company was chartered on the 3d of February, 1848, by the State of Alabama, with authority to construct and maintain a railroad from the City of Mobile to the west line of that State, towards the mouth of the Ohio River, and to transport and carry property and persons, under such regulations, as to time and manner, as its board of directors might establish. It was also invested by its charter with power, "from time to time, to *fix*, regulate, and *receive* the toll and charges by them to be received for the transportation of persons and property over the line of railroad hereby authorized to be constructed and completed, or any part thereof." § 12. The legislature of Mississippi, in the same month, approved of the Alabama charter—except in certain particulars not important to be here mentioned—and consented to the

* This dissent applies also to the judgment and opinion of the court in *Stone* v. *Illinois Central Railroad Co.*, *post*, 347.

extension of the road through that State to the Tennessee line; conferring upon the company, when organized, "the same rights, powers, and privileges" that were granted to it within the State of Alabama. Like consent was given, and similar action was taken, by the States of Tennessee and Kentucky, with reference to the proposed road within their respective limits.

The Illinois Central Railroad Company is the lessee of the Chicago, St. Louis and New Orleans Railroad Company. By an act of the legislature of Mississippi, of April 18, 1873, the New Orleans, Jackson and Great Northern Railroad Company, owning a line of railroad from New Orleans, Louisiana, to Canton, Mississippi, and the Mississippi Central Railroad Company, owning a line running from the latter place northward to Jackson, Tennessee, were authorized to consolidate into one corporation; the latter to have all the rights, powers, privileges, immunities, and franchises in perpetuity, then conferred upon the constituent companies, or upon either of them. Such consolidation took place under the name of the Chicago, St. Louis and New Orleans Railroad Company, and by an act of February 28, 1878, was ratified. But the same act provided that it should be of no force or effect until the debt due the State from the Mississippi Central Railroad Company was adjusted by the Chicago, St. Louis and New Orleans Railroad Company. Subsequently, by an act approved March 1, 1882, the payment of this debt by the latter company to the State was acknowledged, and the Chicago, St. Louis and New Orleans Railroad Company was declared to be a corporation of Mississippi, "with perpetual succession, and, as such, is invested with all the rights, powers, privileges, liberties, and franchises conferred by the act to which this is a supplement, and *especially* the rights and powers . . . of section 10 of an act entitled 'An Act to incorporate the Mississippi Railroad Company,' approved March 10, 1852."

The 10th section of the act last named, to the rights and powers conferred by which particular reference was made, is in these words: "That the president and directors be and they are hereby authorized to adopt and establish such a tariff of

charges for the transportation of persons and property *as they may think proper, and the same to alter and change at pleasure.*"

The amount paid to the State by the Chicago, St. Louis and New Orleans Railroad Company, on account of the debt due from the Mississippi Central Railroad Company was $158,978.82.

It is thus seen that the Mobile and Ohio Railroad Company, and the Chicago, St. Louis and New Orleans Railroad Company, were given by their charters the power to fix and regulate rates for transportation of persons and property upon their respective roads. This power was, of course, not without limit; for the general grant of the franchises, rights, and privileges enumerated in these charters was attended by the condition, which the law always implies in such cases, that the charges for transportation established by the companies shall be reasonable.

The Mississippi statute of 1884 provides for the appointment of three commissioners, and invests them with the power of establishing—upon the basis of "just compensation," and the protection of persons, localities, or corporations against "unjust discrimination"—a tariff of charges for the transportation of persons and property on any railroad owned or operated in that State. The commissioners, so appointed, are required, in ascertaining such compensation, "to take into consideration the character and nature of the service to be performed, and the entire business of such railroad, together with its earnings from the passenger and other traffic;" to so revise these tariffs "as to allow a fair and just return on the *value* of such railroad, its appurtenances and equipments;" and to increase or reduce the rates so established "as justice to the public and each of said railroad companies may require," and "as experience and business operations may show to be just." Any person, company or corporation, operating a railroad in Mississippi, who fails to conform to the tariff of charges established by the commission, is made liable to a penalty of $500 for each violation, recoverable in the name of the State.

I am of opinion that this statute impairs the obligation of the contract which the State made with these companies, in

this: That it takes from each of them the power conferred by its charter of fixing and regulating rates for transportation within the limit of reasonableness, and confers upon a commission authority to establish, from time to time, such rates as will give "a fair and just return on the *value* of such railroad, its appurtenances and equipments," and "as experience and business operations may show to be just." In short, the companies are placed by the statute in the same condition they would occupy if their charter had not conferred upon them the power to fix and regulate rates for transportation. The whole subject of transportation rates is thus remitted to the judgment of commissioners who have no pecuniary interest whatever in the management of these vast properties, and who, if they had any such interest, would be disqualified under the statute from serving; and who are required to fix rates, according to the value of the property, without any reference to what it originally cost, or what it had cost to maintain it in fit condition for public use.

It is hardly necessary to discuss the proposition that the right to fix and regulate rates for transportation within the limit of reasonableness was and is one of great practical value to these companies; for, the rates so fixed would have governed the conduct of parties interested in them, unless it was made to appear, affirmatively, and in some legal mode, that they were unreasonable. The object of the construction of the roads operated by these companies was, as the bill avers and the opinion of the court admits, to establish a continuous line of inter-state communication between the Gulf of Mexico and the Great Lakes of the North. In the accomplishment of that object the entire country took a deep interest; for Congress, by grants of land and otherwise, gave those enterprises every possible encouragement. Does any one believe that private capitalists would have supplied the money necessary to establish and maintain these lines of inter-state communication had they supposed that the States through which the roads were extended reserved the right, by commissioners, to take charge of the whole matter of rates, and abrogate, at their pleasure, such tariffs of charges as might be established by the companies

under the power, expressly conferred, of fixing and regulating rates? Would they have risked the immense sums invested in these enterprises had the charters of the companies contained a provision making rates to depend, not on the capabilities, wants, and interests of the territory to be supplied with railroad service, or on the amount expended in constructing and maintaining these roads, but on their "*value*" as estimated by commissioners, and on such basis as the latter, from time to time, might deem to be justified by "experience and business operations?" Their value, upon what basis, or at what period of their existence? When they were constructed? Or what they would bring at a sale under a decree of court? In the place of charter provisions, under which rates fixed by the companies would be deemed legal until the contrary was made to appear, the statute substitutes a system under which rates established by a commission, and by it increased or diminished from time to time, must be observed by the companies, unless it is made to appear, affirmatively, that such rates are "unjust,"—officers and agents of the companies, acting in conformity with express provisions of their charters, being made liable to heavy penalties, unless they prove that the commission have established an "unjust" tariff of charges.

The court concedes that the power which the State asserts, by the statute of 1884, of limiting and regulating rates, does involve the power to destroy or to confiscate the property of these companies; and, consequently, it is said, the State cannot compel them to carry persons or property without reward, nor do that which in law would amount to a taking of private property for public use without just compensation. And reference is made to that clause of the statute which provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust." But if I do not misapprehend the effect of the opinion, it means to declare that where the tariff of charges fixed by the commissioners does not certainly work the destruction or confiscation of these properties, or amount in law to taking them for public use without just compensation, the charges so established must be accepted by

the courts, as well as by the companies, as reasonable, and, therefore, not be held or treated as "unjust" in any prosecution under the act for disregarding such tariff. I cannot otherwise interpret the observation that the legislature may establish a maximum, any charge in excess of which must be deemed by the courts and the parties to be unreasonable.

In expressing the foregoing views I would not be understood as denying the power of the State to establish a railroad commission, or to enforce regulations—not inconsistent with the essential charter rights of the companies—in reference to the general conduct of their merely local business. My only purpose is to express the conviction that each of these companies has a contract with the State whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as it deems proper—such rates to be respected by the courts and by the public, unless they are shown affirmatively to be unreasonable.

The bill, in my judgment, makes a case that justifies a court of equity in interfering to prevent the commissioners from imposing upon the defendants any such tariff of charges as the statute in question authorizes them to establish in reference to their business exclusively within the State of Mississippi. As the court withholds any expression of opinion as to the validity of the statute when applied to inter-state commerce, that is, to the transportation of persons and property taken up out of the State and put down in the State, or taken up in the State and put down out of the State, I have no occasion to discuss that question. For the reasons stated, I dissent from the opinion and judgment of the court in these cases.

Mr. Justice Field, dissenting.*

I concur with Mr. Justice Harlan, that the act of Mississippi impairs the obligation of the contract contained in the charter originally granted to the Mobile and Ohio Railroad Company

* This dissent applies also to the opinion and judgment of the court in *Stone* v. *Illinois Central Railroad Co.*, *post*, 347.

by Alabama, and soon afterwards adopted by Mississippi. At that time it was a matter of great public interest to have railway communication between the Gulf of Mexico and the Ohio River, passing through Alabama, Mississippi, Tennessee, and Kentucky, and to secure it these States, by legislative acts passed in February, 1848, incorporated the company, to construct, equip, and operate a railroad from Mobile, in Alabama, to a point opposite Cairo, in Illinois, at the junction of the Mississippi and Ohio Rivers. The road was to run, as thus seen, many hundred miles, part of which was in a country sparsely settled and in some places covered by almost irreclaimable swamps. It would require several years and the expenditure of many millions for its construction. The return for the heavy investment was to be in the distant future when the country should become more densely populated, and its resources better developed. It was a difficult matter to secure the necessary capital for an enterprise so costly in its character, so remote in its completion, and so uncertain in its returns. To effect this the several acts of incorporation authorized the president and directors of the company to adopt and establish such a tariff of charges for the transportation of persons and property as they might think proper, and to alter and change the same at pleasure. The bill alleges—and the allegation must be taken as true on the demurrer—that it was also understood by all parties, that when the road was completed it should be managed by officers selected by the stockholders; and adds that this right of selecting its officers and of charging and receiving what it should fix as its tariff, was not only a material part of the contract, but was the sole inducement or consideration upon which it was entered into by the company.

Certainly no one will deny that the right to adopt a rate of charges, subject, as such rate always is, to the condition that they shall be reasonable, was of vital importance to the company. Without that concession no one acquainted with the difficulties, expenses, and hazards of the projected enterprise, can believe that it would have been undertaken. It was certainly the expectation of the constructors of the road that

they should be allowed to receive compensation having some relation to its cost. But the act of Mississippi allows only such compensation as parties appointed by the legislature, not interested in the property, nor required to possess any knowledge of the intricacies and difficulties of the business, shall determine to be a fair return on the *value* of the road and its appurtenances, though that may be much less than the original cost. Within the last few years, such have been the improvements in machinery, and such the decline in the cost of materials, that it is probably less expensive by one-third to build and equip the road now than it was when the constructors completed it. Does anybody believe that they would have undertaken the work or proceeded with it, had they been informed that, notwithstanding their vast outlays, they should only be allowed, when it was finished, to receive a fair return upon its value, however much less than cost that might be?

Under the charter the company could make such reasonable discriminations in its charges dependent upon the amount of business done, the character of the material transported, the existence of competitive lines or points, as its interest might suggest, and which, to some extent, are indispensable to the successful management of the business of every railway company. Differences in the bulk of property of the same weight, differences in value and in liability to breakage or decay, exact different degrees of care and speed in its transportation, and consequently require and justify different charges. And all experience shows that, where competition by water or otherwise exists, variations in charges must be made from time to time to secure any portion of the business. These considerations must have had their influence with the stockholders when they accepted the charter and undertook the construction of the road. The act of Mississippi, which the court says is the exercise of a lawful right to interfere with the affairs of the company, never relinquished nor qualified by any stipulation, declares that no discrimination shall be made in the charges of the company in any case. Its language is, that "any person or corporation engaged in transporting passengers or freight over any railroad in this State, . . . who for his or its

advantage, or for the advantage of any connecting line, or for any person or locality, shall make *any* discrimination against any individual, locality, or corporation, shall be guilty of extortion." And in such cases the injured party can recover double the amount of damages sustained by him, and the offending party is declared to be guilty of misdemeanor and subject to a fine from ten to five hundred dollars. The harshness and impolicy of such legislation are well shown by illustrations mentioned by counsel. If, for instance, where its road touches a navigable stream, the company charges less per pound per mile for transportation to a distant point which can be reached by water, than it does to an inland station, it makes a discrimination against the latter station, and is guilty of extortion, although the transportation would otherwise not be given to the company. If it charges more per pound per mile for local than through freights, it makes a discrimination and may be punished for extortion. If it charges more per pound per mile for silks than for cotton goods, or for gold bullion than for cast iron, or for tea than for coal, it is guilty of a like discrimination and extortion. If it attempts to encourage the cultivation of fruits, or the manufacture of cotton, woolen, or silken fabrics, or any other industry along its line of road by a reduction of rates until the business is established, it makes a discrimination, and if higher rates are charged to others the exaction of the difference is to them extortion. As well said by counsel, it makes no difference whether the discrimination be founded on value, volume, distance carried, return haul, competition, regularity of shipment, or whether the article transported is perishable or not, it is prohibited, and if made is extortion; and thus, as he well observes, the act of Mississippi pays no attention to the common sense of the world, to the laws of commerce, or to universal custom. Reductions of rates made in the interests of charity and benevolence, for the poor, sick, or infirm, if not also extended to others, would under it be criminal. Indeed, under the law no cause can exist which would justify *any* discrimination.

I am aware that this court has held that, unless restrained by express contract, the legislature of a State has the right to

prescribe a maximum for charges for transportation of persons and freight over railways within her limits; but it has not been generally supposed that different rates, under certain circumstances, may not be made within the maximum in the interest both of the company and of the public. And the right itself must necessarily be subject to the qualification, that the prescribed maximum shall at least equal the cost of the service required.

Again, the right of the company to appoint all necessary officers, agents, or servants would seem to be essential to secure competent and efficient men for the successful management of its business. Few individuals or companies would undertake an enterprise requiring skill, experience, and large expenditures, if those who were to conduct it were not to be selected and controlled by them, but by parties appointed, perhaps, under political influences, and possibly without the requisite knowledge and experience. The efficiency and fidelity of employees would be better assured by leaving their appointment to those interested in the judicious management of the business of the company. Indeed, their usefulness and fidelity would seldom be secured in any other way. No one, therefore, can believe that the original stockholders would have accepted the charter and undertaken the work, if this right of appointing those who were to carry out and manage it when completed was to be withdrawn from them. The act of Mississippi is so plain an impairment of this essential right, that I should not have supposed there could be any question on the point, did I not find that a majority of my associates are of opinion that it is an entirely constitutional proceeding on the part of the legislature, in no wise interfering with the contract of the company.

I have no doubt that commissioners may, for many purposes, be appointed by the legislature; but I am not prepared to say that the direction and control of the business of the company can, unless a cause of forfeiture or repeal of its charter exists, be taken from it and confided to them, any more than its business can be changed from transportation to manufacturing or banking. The right to elect officers to direct and control its affairs, and to pursue the same kind of business for which it was

formed, must be maintained in any regulations prescribed for its government, or we must admit that the power of the legislature over the corporation is, in spite of constitutional limitations, as absolute as that of the Parliament of Great Britain. Indeed, the argument which supports the statute of Mississippi seems to proceed upon the ground that such is the legitimate outcome of the decisions of this court with respect to the control which the legislature may exercise over such corporations, irrespective of any stipulation in their charters. If such be the result of the decisions, it is important that it should be known, in order that parties interested in railway property may see that their protection against unreasonable and vindictive measures is not by appeal to the courts, but by efforts to secure wise and intelligent action from the legislature.

Mr. Justice Blatchford did not sit in this case or take any part in its decision.

STONE & Others *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

An act of incorporation of a railway company which provides that the president and directors may "adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper," and the same "alter and change at pleasure," does not deprive the State of its power, within the limits of its general authority as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so adopted and established.

A corporation of one State leasing and operating a railroad in another State is, as to the leased road, subject to local legislation to the extent to which the lessor would have been subject had there been no lease.

This was a bill in equity praying for an injunction to restrain the railroad commissioners in Mississippi from enforcing

the act referred to in *Stone* v. *Farmers' Loan & Trust Co.*, *ante*, 307, against the Illinois Central Railroad Company as the lessee of the Chicago, St. Louis and New Orleans Railroad, in the State of Mississippi. The bill was demurred to. After the demurrer was overruled, the bill was taken as confessed, and an injunction was granted. The defendant appealed to this court. The facts which make the case are stated in the opinion of the court. The case was argued with *Stone* v. *Farmers' Loan & Trust Co.*, *ante*, 307, and *Stone* v. *New Orleans & Northeastern Railroad Co.*, *post*, 352, substantially the same questions being involved in the three cases.

Mr. John W. C. Watson for appellants.

Mr. James Fentress for appellee, in addition to the general line of argument in the previous case, presented the following facts as specially applicable to the lines of railway for which he appeared.

The subject of a continuous railway connection from Lake Michigan to the Gulf early occupied the attention of Congress. On May 3, 1848, a bill passed the Senate to connect the upper and lower Mississippi with the great lakes at Chicago. In 1850 the subject was again before Congress, and on the 20th September of that year an act was passed "granting the right of way and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile." 9 Stat. 466. This act was advocated by Mr. Clay, Mr. Cass, Mr. Seward, Mr. King, Mr. Crittenden, and Mr. Benton. The several States legislated in aid of this as an inter-state railroad, to be dedicated to commerce among the States.

In 1853 Louisiana incorporated the New Orleans, Jackson and Great Northern Railroad Company for the purpose of making "a continuous line of communication between New Orleans and the northern and western portions of the Confederacy."

On the 11th March, 1852, the legislature of Mississippi enacted that the construction of the same railroad "from the city of New Orleans, running through the State of Mississippi,

. . . is deemed a work of great public importance . . . and should be encouraged by legislative sanction," and required the governor, on learning of the incorporation of the company in New Orleans, to issue a proclamation "declaring said company capable of entering on the territory of Mississippi," "for the purpose of constructing and extending their works."

The legislature of Tennessee, on the 25th February, 1852, granted the company the right of way through that State. The preamble to the act recited as follows: "Whereas, by resolutions adopted by a railroad convention begun and held on the 6th of April, A. D. 1851, at the city of New Orleans, in the State of Louisiana, it appears to this General Assembly that the rights of way and charter for a railroad to extend northward from said city of New Orleans through a part of the States of Louisiana, Mississippi, Tennessee and Kentucky to the Ohio River, having in view to connect the same with the proposed great North and South Central Railroad of Illinois, are earnestly solicited from the legislatures of the various States through which it is to pass; and also in which said resolutions the city of New Orleans did therein, through its representatives, pledge itself for a very liberal aid in the construction of said railroad, and whereas, it is deemed a matter of vital importance to this State that a direct communication by railroad to the Gulf of Mexico and the Great Northern Lakes be established, Be it enacted," etc.

Kentucky took similar action, and Illinois authorized the building of a railroad from the lakes to a junction on the Ohio River, and the connecting of this road when built with the line south of the river as a through line.

In order to hasten the completion of this inter-state railroad, Mississippi incorporated the Mississippi Central Railroad Company, to construct that part of the through line in that State which ran from Canton northwardly; and Tennessee created the Mississippi Central and Tennessee Railroad Company to continue the extension. The companies thus created were authorized by their respective charters to consolidate into one company. The legislature of Kentucky authorized the extension through that State by an act reciting that it was a "cor-

poration chartered by the joint legislatures of Mississippi and Tennessee." Mississippi recognized and legalized the consolidation after it had taken place, by an act reciting that "it was contemplated when said contract was made, in order to fully secure the advantages of said continuous line of railroad, and facilitate the operations thereof, that said New Orleans, Jackson and Great Northern Railroad Company and said Mississippi Central Railroad Company might be consolidated into one corporation."

And Louisiana passed an act reciting the last named act of Mississippi, also authorizing them "to amalgamate and be consolidated," and it was provided that such consolidated company "shall have, possess and enjoy in perpetuity all the rights, powers, franchises, privileges and immunities originally conferred by law on either of said companies in their several acts of incorporation or the amendments thereto."

That part of this inter-state railroad from New Orleans, Louisiana, to Canton, Mississippi, was built by the New Orleans, Jackson and Great Northern Railroad Company; and that part from Canton, Mississippi, to the Ohio River was built by the Mississippi Central Railroad Company. Becoming insolvent, both roads were sold by decrees of the United States courts of Louisiana, Mississippi, Tennessee and Kentucky. The purchasers were organized into corporations and consolidated the two companies, under the name of the Chicago, St. Louis and New Orleans Railroad Company, which was by name chartered by each of said States, and granted all the rights, powers, privileges, liberties and immunities of the New Orleans, Jackson and Great Northern Railroad Company and the Mississippi Central Railroad Company.

The Chicago, St. Louis and New Orleans Railroad Company leased their lines, thus acquired, to the appellee, which now operates over 2000 miles of railroad, extending into six different States, and is operating part of that railroad in Mississippi. The railroad commission act of that State, if enforced, would control the operation in Iowa, Wisconsin, Illinois, Kentucky, Tennessee and Louisiana, as well as in Mississippi. The language is plain and unambiguous. No matter where else it may

run, if the company is operating a railroad in Mississippi, the act covers it all.

Mr. W. P. Harris and *Mr. J. B. Harris* also for appellee.

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

This suit, like that of *Stone* v. *The Farmers' Loan and Trust Co.*, just decided, *ante*, 307, was brought to restrain the railroad commission from enforcing the railroad supervision act of Mississippi against a corporation operating a railroad in that State. The railroad in Mississippi forms part of a line from New Orleans through Louisiana, Mississippi, Tennessee, and Kentucky to a point on the Ohio River opposite Cairo, Illinois, where it connects with the Illinois Central Railroad, extending to Chicago. The entire line is now owned by the New Orleans, St. Louis and Chicago Railroad Company, a corporation formed by the consolidation of the several corporations created by the different States through which the road runs, for the purpose of securing its construction and operation for inter-state traffic, as well as for transportation within the limits of the several States.

The whole road from Cairo to New Orleans has been leased to the Illinois Central Railroad Company, an Illinois corporation, and is now operated by that company, much the largest part of its business being of an inter-state character.

The Mississippi charter, under which the road is now owned and operated in that State, provides:

"That the president and directors be, and they are hereby, authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure."

This is now part of the charter of the consolidated company in Mississippi. In all other respects the material facts in this case are the same as those in that just decided. Relief is also asked on the same grounds. The court below granted the injunction prayed for, and this appeal was taken for a review of a decree to that effect.

This case comes clearly within the rulings in the other. There is nothing here any more than there to show an intention

by Mississippi to exempt the corporation in that State from proper legislative control, and the Illinois corporation, by going into Mississippi to operate a railroad there, subjected itself to such local legislation as would have been applicable to the corporation owning the road, if no lease had been made. As a corporation of another State, it has no other privileges in Mississippi than such as belong to the corporation whose road it runs.

The decree of the Circuit Court is reversed on the authority of Stone v. *Farmers' Loan and Trust Co., and the cause is remanded, with directions to dismiss the bill.*

Mr. Justice Field dissented from the opinion of the court and the judgment in this case for the reasons expressed in his dissent in *Stone* v. *Farmers' Loan and Trust Co., ante*, 342.

Mr. Justice Harlan also dissented for the reasons expressed in his dissent in the same case, *ante*, 337.

Mr. Justice Blatchford did not sit in this case or take any part in its decision.

STONE & Others *v.* NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

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

A State statute providing that a railroad company may receive for transporting, carrying and telegraphing, such tolls and charges as might from time to time be established, fixed and regulated by the directors, and that the act should be construed liberally so as to favor its purposes and objects, *provided*, that nothing in it should be construed as preventing the legislature from regulating the rates of transportation for passengers and freight over the road, and *provided further*, that there should be no discrimination in favor of any road, does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so established, fixed and regulated. Subsequent legislation by the State fixing a maximum rate for other railroads does not apply to this road by virtue of the proviso as to discrimination.

Argument for Appellee in Stone *v.* N. O. & N. E. Railroad Co.

Like the last two cases, this was a suit in equity to enjoin the Railroad Commissioners, and was heard with those cases. The facts which make the case are stated in the opinion of the court. The case was argued with *Stone* v. *Farmers' Loan & Trust Co.*, *ante*, 307, and *Stone* v. *Illinois Central Railroad Co.*, *ante*, 347, substantially the same questions being involved in the three cases.

Mr. John W. C. Watson for appellants.

Mr. George Hoadly, *Mr. Edgar M. Johnson*, *Mr. Edward Colston*, and *Mr. W. L. Nugent* for appellee. In addition to the general line of argument in *Stone* v. *Farmers' Loan and Trust Co.*, they presented the following facts as specially applicable to the railroad for which they appeared.

The appellee, the New Orleans and Northeastern Railroad Company, is a corporation chartered by the State of Louisiana by various acts of the legislature of said State, to build and construct a railroad; and the appellee was, by an act of the legislature of Mississippi of March 30, 1871, empowered to construct a railroad from New Orleans, Louisiana, to Meridian, Mississippi, which it has since constructed as empowered in this act. By said act it was further empowered to fix its own rates of fares and freight subject to the following proviso:

"Provided that nothing contained in the charters shall be so construed as to prevent the legislature from regulating the rate of transportation for passage and freight over the same in the State; provided, further, that there shall be no discrimination in favor of any road."

This act containing no power to amend, alter, or repeal, and subject to no such power, was accepted by the company and acted upon; and, until the passage of the act complained of, the appellee had at all times exercised the power to fix its own charges.

The appellee is engaged in the transportation of persons and property as part of a through line between the States of Louisiana, Mississippi, Alabama, Georgia, Tennessee, Kentucky, Ohio, and many others, and is engaged in commerce among the several States.

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

This is a suit brought by the New Orleans and Northeastern Railroad Company to enjoin the railroad commission from enforcing the railroad supervision law of Mississippi against that company. It differs from the cases of *Stone* v. *Farmers' Loan and Trust Company*, *ante*, 307, and *Stone* v. *Illinois Central Railroad Company*, *ante*, 347, already decided, only in the charter provisions on which the claim of a contract exemption from legislative control as to fares and freights is made. These are as follows:

"SEC. 4. Be it further enacted, That said company is hereby authorized and empowered to transport, carry, and convey persons and property on said railroad; to build and maintain a line of magnetic telegraph, and to operate the same along the line of said railroad, and to receive for such transportation, carrying, conveying, and telegraphing, such tolls and charges as shall be from time to time established, fixed, and regulated by the directors of said railroad company."

"SEC. 18. Be it further enacted, That whenever any number of stockholders, representing three-fourths of the stock now subscribed to said railroad company, shall accept the powers, privileges, and franchises contained in the preceding sections of this act, the said company shall avail themselves of the benefit thereof, and that this act shall be liberally and favorably construed, so as to favor all the purposes and objects of the same and the operation of the provisions thereof; *Provided*, That nothing contained in the charter shall be so construed as to prevent the legislature from regulating the rate of transportation for passage and freight over the same in this State; *Provided further*, That there shall be no discrimination in favor of any road."

On their face and under the rulings in the other cases these sections show no such contract. It is averred in the bill, however, and admitted by the demurrer, that in 1882 the State granted charters to six other railroad companies, in each of which a maximum of rates was fixed. After setting forth the special provisions of the charters in this particular, the bill proceeds as follows:

"And your orator is therefore advised, believes, and charges, that, as the said legislature, by the proviso to the 18th section of the said act of March 30th, 1871, reserved to itself the right 'to regulate the rate of transportation for passage and freight' on your orator's road in said State of Mississippi, but only upon condition and with the limitation that in and by such act of regulation there should be no discrimination in favor of any road in said State, and against your orator, the charter clause above referred to becomes and is integrated into, and forms part of, your orator's said charter, and the legislature having thus exercised and exhausted its power of regulating tariffs in respect to the several railroad companies above set out, is by the terms of your orator's charter precluded from making any other or different system for regulating your orator's tariff in said State, or devising any other tariff of charges for it, else your orator would be discriminated against contrary to the true intent and meaning of the last proviso to section 18th of said act of March 30th, 1871."

To this we cannot agree. The provision in the charter of the New Orleans and Northeastern Company, that in fixing rates there shall be no discrimination in favor of any other road, does not bring into that charter the rate clauses in the charters of the new companies. It will undoubtedly be the duty of the commissioners when fixing the tariff for this company to see that there is no such discrimination as is provided against. Whether in doing so it will be necessary to have regard to the rates allowed by the later charters, is not a question in this case.

The decree of the Circuit Court is reversed on the authority of Stone v. *The Farmers' Loan and Trust Co., and the cause remanded, with instructions to dismiss the bill.*

Mr. Justice Harlan, with whom concurred Mr. Justice Field, dissenting.

It seems clear that the power reserved to the legislature of regulating rates of transportation for passengers and freight over the road of the complainant is subject to the condition that there shall be no discrimination against it in favor of any

other company. In other words, the complainant has a contract with the State that protects it against such discrimination in the matter of rates. If this were not so, it could not well be the duty of the railroad commission, as the court declares, to see that the discrimination provided against by the company's charter did not exist.

Adhering to the general views expressed by me in the preceding cases, I dissent from the opinion and judgment in this case.

MR. JUSTICE FIELD concurs in this dissent.

MR. JUSTICE BLATCHFORD did not sit in this case or take any part in its decision.

ANDERSON *v.* SANTA ANNA.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Argued November 25, 1885.—Decided January 4, 1886.

When, at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a State, the highest court of a State has construed the law under which it purports to be issued, rights accruing under that construction will not be affected merely by subsequent decisions of the same court, varying or departing from it.

When negotiable evidences of indebtedness of a municipal corporation in a State are created and issued under laws which have not, at the time of issue, been construed by the highest court of the State, its subsequent construction of them is not conclusive on Federal courts, although they will lean to an agreement of views with the State court.

This was a suit at law to recover on municipal bonds issued in payment of a subscription to railroad stock. The facts which make the case are stated in the opinion of the court.

Mr. Lawrence Maxwell, Jr., for plaintiff in error. *Mr. William M. Ramsey* and *Mr. George W. Gere* also filed a brief for same.

No appearance for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This is an action to recover from the township of Santa Anna, established under the general township organization laws of Illinois, the amount of certain negotiable bonds, with interest coupons attached, signed by its supervisor and clerk, and purporting to have been issued by it, on the 1st day of October, 1867, "under and by virtue of a law of the State of Illinois, entitled 'An act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same,' approved February 28, 1867, and in accordance with the vote of the electors of said township, at the special election held July 21, 1866, in accordance with said act." Each bond, also, recites that the faith of the township is "pledged for the payment of said principal sum and interest."

The Circuit Court sustained a demurrer to the declaration and amended declaration, and gave judgment for the township.

The act of February 28, 1867, empowered the railroad company to locate and construct a railroad from Pekin, in Tazewell County, through, or as near to as practicable, certain named towns, to the eastern boundary of the State of Illinois. For the purpose of aiding in its construction, authority was given to incorporated towns or townships in counties acting under the township organization law, along the route of the road, to subscribe to the capital stock of the company in any sum not exceeding $250,000.

By the 13th section of the act it is provided:

"§ 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorporation, town, or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and tax-payers of such town or township for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or town-

ship; which notice shall be posted not less than thirty days before the day of holding such election, notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription: *Provided*, That where elections may have already been held, and the majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in this act provided. And such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof and all the provisions hereof had been complied with."

The pleadings allege that on the 21st of July, 1866, the township of Santa Anna, through which the road passed, "held a special election upon the question of subscribing the sum of $50,000 to the capital stock of said Danville, Urbana, Bloomington and Pekin Railroad Company, at which said election a majority of the legal voters of said township voted for and were in favor of a subscription to the capital stock of said railroad company, by the said township," of the said sum; that, on the 1st of October, 1867, in pursuance of said vote, and of said act of February 28, 1867, the then supervisor of the township subscribed, in its name, the sum of $50,000, receiving from the railroad company, for the township, proper certificates of stock, and, in connection with the township clerk, and in payment for such stock, executing and delivering to the company the bonds and coupons in suit; that the township, for nine consecutive years, regularly and annually assessed taxes to meet the interest on said bonds, and paid the same over without objection; that on the first day of December, 1868, the plaintiff purchased the bonds in suit at their par value from one Tiernan, to whom they had been sold by the company; that on the first Monday of September, 1869, and subsequently, the township, by its proper officers, participated, as a stockholder, in sundry meetings of the company's stockholders; that on the 28th of October, 1871, its then supervisor caused

the bonds to be registered in the office of the auditor of public accounts of Illinois, who endorsed on each bond his certificate to the effect that it had been registered in his office pursuant to the act of April 16, 1869, to fund and provide for paying the railroad debts of counties, townships, cities, and towns; and that on the 1st day of July, 1874, the township exchanged this stock for a like amount of stock in another corporation, the Indianapolis, Bloomington and Western Railroad Company, which latter stock, during the time the township has held and owned it, has been worth as much as fifty per cent. of its par value.

The record does not disclose the particular ground upon which the Circuit Court sustained the demurrer, and gave judgment for the township. But we cannot understand how that result was possible, except upon the hypothesis that the act of February 28, 1867, legalizing elections previously held, at which a majority of the legal voters of a township declared in favor of a subscription to the stock of this company, was unconstitutional. But the constitutionality of that very statute, in respect of the clause now before us, was directly sustained by this court in *St. Joseph Township* v. *Rogers*, 16 Wall. 644, 663. The question there was as to the validity of bonds issued by a township on the 1st of October, 1867, to the Danville, Urbana, Bloomington and Pekin Railroad Company, under the authority of the before-mentioned act of February 28, 1867, and in accordance with a popular vote at an election held in August, 1866. It was there contended that the act was unconstitutional and void, as creating a debt for a municipality, against its will expressed in a legal manner. There, as here, the election referred to in the bonds was held without authority of law. But the court, speaking by Mr. Justice Clifford, said, that, according to repeated decisions of the Supreme Court of Illinois and of this court, defective subscriptions of the kind there made "may, in all cases, be ratified where the legislature could have originally conferred the power,"—citing, among other cases, *Cowgill* v. *Long*, 15 Ill. 202, and *Keithsburg* v. *Frick*, 34 Ill. 405.

In *Cowgill* v. *Long*, 15 Ill. 202, 204, it appears that a statute

of Illinois authorized the legal voters of any school district to meet together at a certain time in any year and determine by vote whether a tax should be levied for the support of common schools, for building and repairing school-houses, or for other school purposes. The inhabitants of a district held an election and voted a tax for the purpose of erecting a school-house. The tax was assessed and steps were taken for its collection. But as the election was not held at the time directed by the statute, certain tax-payers, whose property was levied on and was about to be sold, instituted a suit to enjoin the sale. Pending that suit, the legislature passed an act declaring the vote and tax "to be good, valid, and effectual in law and in equity," and legalized what had been done by the local officers in reference to the assessment of the tax. The court held that although the tax was voted at a time not authorized by law, and was not so certified as to become a valid tax, "it was clearly competent for the legislature to remedy those defects, while the tax remained uncollected." "Laws of this character," said Chief Justice Treat, delivering the unanimous opinion of the court, "are often passed to secure the collection of taxes defectively levied, and there can be no serious objection to their validity."

In *Keithsburg* v. *Frick*, above cited, 34 Ill. 405, 421, one of the questions presented was as to the validity of an act of 1857, giving a special charter to the town of Keithsburg, and conferring upon it authority to subscribe stock to a certain railroad company, and at the same time legalizing and confirming a previous subscription to the stock of the same corporation by the town while acting under the general incorporation law for towns and cities. The court, speaking by Mr. Justice Breese, said: "If the subscription was made under the organization allowed by the general incorporation law of 1849, the 17th section of the act of 1857 legalizes and confirms it. The subscription, therefore, was good if made under the act of 1857, as an original subscription under the second section, or as a subscription made under the act of 1849, confirmed as it is by the 17th section of the act of 1857. The bonds may be regarded as issued by the old corporation, confirmed by the new act, or as a new issue under the second section of the act of 1857."

Opinion of the Court.

In *Schofield* v. *Watkins*, 22 Ill. 66, 73, one of the questions was as to the constitutionality of a statute which legalized the acts and proceedings of certain school district trustees in uniting districts and levying and collecting taxes for building houses, and for the support of schools therein, and provided that all proceedings may be had in the same manner as if those proceedings had been strictly regular and legal. The court said, by Walker, J., that there could be no doubt that "the legislature have the power to form a school district, or may legalize the acts of officers in attempting to form a district, so as to render such district legal. . . . And the power to cure irregularities in the manner of levying a tax is equally undoubted, and, so far as this tax was levied for the purposes specified in the act, there is no doubt that the levy is thereby made valid."

These cases were all determined before the bonds in suit were issued. While they are not analogous in every respect to the one before us, they seem to rest upon the principle that the legislature when not restricted by the Constitution, may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given. The decision in *St. Joseph Township* v. *Rogers*, only gave effect to principles announced by the State court prior to the issuing of the bonds. If, according to the law of Illinois, as declared by its highest court at the time the bonds in suit were issued, the act of February 28, 1867, was a valid exercise of legislative power, the rights of the purchasers or holders could not be affected merely by subsequent change of decision. For it is the long-established doctrine of this court—from which, as said recently in *Green County* v. *Conness*, 109 U. S. 105, we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the State courts at the time such securities were issued. In *Douglass* v. *County of Pike*, 101 U. S. 677, the Chief Justice said: "After a statute has been settled by judi-

cial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment." See also *County of Ralls* v. *Douglass*, 105 U. S. 728, 732; *Olcott* v. *Supervisors*, 16 Wall. 678; *City* v. *Lamson*, 9 Wall. 477, 485; *Boyd* v. *Alabama*, 94 U. S. 645; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71; *Thompson* v. *Lee County*, 3 Wall. 327, 330; *Brown* v. *Mayor*, 63 N. Y. 239, 244; Cooley's Const. Lim. 474, 477, 4th Edit.; Dillon's Mun. Corp. § 46.

If, however, we are in error in our interpretations of the decisions in *Cowgill* v. *Long*, *Schofield* v. *Watkins*, and *Keithsburg* v. *Frick*, it results that when the bonds were executed there was no decision of the State court in reference to the power of the legislature to enact the statute of February 28, 1867. In that case, the duty of this court is to determine, upon its independent judgment, what was the law of Illinois when the rights of the parties accrued. In *Burgess* v. *Seligman*, 107 U. S. 20, 33, the court had occasion to re-examine all its prior adjudications concerning the obligation of the Federal courts to follow the decisions of the State courts upon questions of local law. Mr. Justice Bradley, speaking for the whole court, after observing that the Federal courts had an independent jurisdiction in the administration of State laws, coördinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of these laws, said: "So, when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean to an agreement of views with the State courts if the question seems to be balanced with doubt." Any other rule, it was

further said, would defeat "the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States."

Assuming, then, for the purposes of this case, that the question of legislative power as here presented had not, when the bonds in suit were issued, been finally determined by the State court, we perceive no reason to doubt the correctness of the decision upon this point in *St. Joseph Township* v. *Rogers.* It is not claimed that the constitution of Illinois, in terms, forbade retrospective legislation. But the statute in question is supposed to be obnoxious to that clause which provides that "the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes." Numerous decisions of the State court, to which our attention was called in other cases, construe that provision as defining not simply the class of municipal officers upon whom the power of taxation, for local purposes, may be conferred, but the purposes for which that power may be exerted. Those decisions are to the effect, that, within the meaning of the constitution, the corporate authorities of a township, like Santa Anna, are the electors, and that while the construction of a railroad, through or near the township, would be a corporate purpose within the meaning of that instrument, a debt for that object could not be imposed upon it without the consent of its corporate authorities, that is, without the consent of the electors. These principles fall far short of sustaining the proposition that the curative clause of the act of February 28, 1867, was unconstitutional; for, the legislature did not, in any just sense, impose a debt upon Santa Anna Township against the will of its corporate authorities, the electors. The act embraces only townships which, by a majority of their legal voters, at an election previously held, had declared for a subscription. That such majority was given at an election held by the township in the customary form is averred in the declaration and is admitted by the demurrer. The curative act only gave effect to the declared will of the electors. As the constitution of the State did not provide any particular mode in which the corporate authorities of a township should manifest their

willingness or desire to incur a municipal debt for railroad purposes, we perceive no reason why the action of the majority of legal voters, at an election held in advance of legislative action, might not be recognized by the legislature and constitute the basis of its subsequent assent to the creation of such indebtedness, and its ratification of what had been done. In *Grenada County* v. *Brogden*, 112 U. S. 261, 271, where somewhat the same question was involved, we said: "Since what was done in this case by the constitutional majority of qualified electors and by the board of supervisors of the county would have been legal and binding upon the county had it been done under legislative authority previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority." See also *Thompson* v. *Perrine*, 103 U. S. 806, 815; *Ritchie* v. *Franklin*, 22 Wall. 67; *Thompson* v. *Lee County*, above cited; *City* v. *Lamson*, above cited; *Campbell* v. *City of Kenosha*, 5 Wall. 194; *Otoe Co.* v. *Baldwin*, 111 U. S. 1, 15. The same principle was announced by the Supreme Court of Illinois in a very recent case—*U. S. Mortgage Co.* v. *Gross*, 93 Ill. 483, 494—involving the constitutionality of a statute of Illinois which was retrospective in its operation. "Unless," said the court in that case, "there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance." It cannot be denied that the legislature could lawfully have authorized a subscription by Santa Anna Township to the stock of this road, upon the assent, in some proper form, of a majority of its legal voters. The act of 1867 interfered with no vested right of the township; for, as an organization entirely for public purposes, it had no privileges or powers which were not subject, under the Constitution, to legislative control. The statute did nothing more than to ratify and confirm acts which the legislature might lawfully have authorized in the first instance.

We infer from the arguments before us that the Circuit Court felt obliged by the decision in *Township of Elmwood* v. *Marcy*,

92 U. S. 289, to hold the act of February 28, 1867, to be unconstitutional. In that case, the main question was as to the liability of Elmwood Township upon bonds issued, in its name, by its supervisor and town clerk, under the authority, not of that act, but of one passed April 17, 1869, which legalized and confirmed, and declared to be binding upon the township, an additional subscription to the stock of the Dixon, Peoria and Hannibal Railroad Company, pursuant to the vote of a majority of legal voters of the township at an election held at a time when the town had exhausted its power to subscribe. The bonds then in suit were issued on the 27th of April, 1869. The majority of the court, in that case, held the act of April 17, 1869, to be unconstitutional, entirely upon the authority of *Harward* v. *St. Clair Drainage Co.*, 51 Ill. 130; *People* v. *Mayor*, 51 Ill. 17; *Hessler* v. *Drainage Commissioner*, 53 Ill. 105; *Lovingston* v. *Wider*, 53 Ill. 302; *Marshall* v. *Silliman*, 61 Ill. 218; and *Wiley* v. *Silliman*, 62 Ill. 170. We have already seen that *St. Joseph* v. *Rogers*, *ubi supra*, maintained the validity of the very act now before us, upon the authority, as well of the then existing law of the State as declared by its highest court, as of our own decisions upon the general question of the power of the legislature to legalize that which it might have originally authorized. Although the decision in that case was cited by counsel in *Elmwood* v. *Marcy*, the court, in the latter case, did not refer to it or overrule it, but applied to the Elmwood bonds the principles announced in the later decisions of the State court. While the courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decisions in the State court, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the State court; and where such rights have accrued, before the State court has announced its construction, the Federal courts, although leaning to an agreement with the State court, must determine the question upon their own independent judgment. If the decisions of the State court, commencing with *Harward* v. *St. Clair Drainage Co.*, would,

if applied here, require an affirmance, we cannot depart from the long-established doctrine which makes it our duty to determine the rights of parties, where those rights depend upon the local law, according to that law as judicially declared at the time such rights accrued, or, in the absence of any such declaration, according to the law as, in our judgment, it then was.

We are of opinion that the demurrer should have been overruled.

The judgment is reversed, with directions for further proceedings in conformity with this opinion.

Confarr *v.* The Township of Santa Anna. In error to the Circuit Court of the United States for the Southern District of Illinois. The judgment in this case is, upon the authority of Anderson *v.* The Township of Santa Anna, just decided,

Reversed and the cause remanded for further proceedings in conformity with the opinion in that case.

LITTLE, Receiver, *v.* HACKETT.

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

Submitted November 11, 1885.—Decided January 4, 1886.

A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver.

Thorogood v. *Bryan*, 8 C. B. 115, disapproved.

On the 28th of June, 1879, the plaintiff below, defendant in error here, was injured by the collision of a train of the Central Railroad Company of New Jersey with the carriage in which he was riding; and this action was brought to recover

damages for the injury. The railroad was at the time operated by a receiver of the company appointed by order of the court of chancery of New Jersey. In consequence of his death the defendant was appointed by the court his successor, and subjected to his liabilities; and this action was prosecuted by its permission.

It appears from the record that on the day mentioned the plaintiff went on an excursion from Germantown in Pennsylvania to Long Branch in New Jersey with an association of which he was a member. Whilst there he dined at the West End Hotel, and after dinner hired a public hackney-coach from a stand near the hotel, and taking a companion with him, was driven along the beach to the pier where a steamboat was landing its passengers, and thence to the railroad station at the West End. On arriving there he found he had time before the train left to take a further drive, and directed the driver to go through Hoey's Park, which was near by. The driver thereupon turned the horses to go to the park, and in crossing the railroad track near the station for that purpose, the carriage was struck by the engine of a passing train, and the plaintiff received the injury complained of. The carriage belonged to a livery-stable keeper and was driven by a person in his employ. It was an open carriage, with the seat of the driver about two feet above that of the persons riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defence was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged

imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver and controlled the manner of his driving, his negligence could not be imputed to the plaintiff.

"I charge you," said the presiding judge to them, "that where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time."—"The passenger in the carriage may direct the driver where to go—to such a park or to such a place that he wishes to see; so far the driver is under his direction; but my charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers or to anybody else, why, then, he might be liable, because it was by his own command and direction that it was done, but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference."

Argument for Plaintiff in Error.

The plaintiff recovered judgment, and this instruction was alleged as error, for which its reversal was sought.

Mr. R. W. De Forest and *Mr. F. L. Hall* for plaintiff in error.—If the driver of the carriage was the agent or servant of the defendant in error, his negligence would be attributable to the master. The leading English cases are *Thorogood* v. *Bryan*, 8 C. B. 115, and *Cattlin* v. *Hills*, 8 C. B. 123, both apparently considered together.

The former was an action against the owner of an omnibus for the negligence of his driver in running over and killing a passenger alighting in the street from another omnibus.

The court held that the negligence of the driver of the omnibus from which the passenger was alighting prevented a recovery, and placed the decision upon the ground of identity between the passenger and his driver, and said:

"The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants, that if any injury results from their negligence, he must be considered a party to it."

This rule has been followed in England. *Bridge* v. *Grand Junction Railway Co.*, 8 M. & W. 214; *Waite* v. *North Eastern Railway Co.*, 7 Weekly Reporter, 311; *Child* v. *Hearn*, 22 Weekly Reporter, 864; *Armstrong* v. *Lancashire & Yorkshire Railway Co.*, L. R. 10 Exch. 47. In this country it has been followed in its entirety in Pennsylvania. *Philadelphia & Reading Co.* v. *Boyer*, 97 Penn. St. 91. In other States there has been great diversity of opinion. *Bennett* v. *New Jersey Railroad Co.*, 36 N. J. L. (7 Vroom), 225; *Chapman* v. *New Haven Railroad Co.*, 19 N. Y. 341; *Brown* v. *New York Central Railroad Co.*, 32 N. Y. 597; *Webster* v. *Hudson River Railroad Co.*, 38 N. Y. 260; *Barrett* v. *Third Avenue Railroad Co.*, 45 N. Y. 628; *Robinson* v. *New York Central Railroad Co.*, 66 N. Y. 11; *Dyer* v. *Erie Railway Co.*, 71 N. Y.

228; *Masterson* v. *New York Central Railroad Co.*, 84 N. Y. 247; *Smith* v. *Smith*, 2 Pick. 621; *Transfer Co.* v. *Kelly*, 36 Ohio St. 86; *Albion* v. *Hetrick*, 90 Ind. 545; *Toledo, Wabash & Western Railway Co.* v. *Miller*, 76 Ill. 278; *Cuddy* v. *Horn*, 46 Mich. 596; *Payne* v. *Chicago & Rock Island Co.*, 39 Iowa, 523; *Stafford* v. *Oskaloosa*, 57 Iowa, 748; *Prideaux* v. *Mineral Point*, 43 Wisc. 513; *Otis* v. *Janesville*, 47 Wisc. 422; *Callahan* v. *Sharp*, 27 Hun (34 N. Y. Supreme Ct.), 85. In the latter, in which the facts were exactly similar to those in this case, the court said: "It may be stated for a general rule, that where the relation of superior and subordinate exists, the maxim *respondeat superior* has application coextensive with the relation. 'Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts, committed during such temporary employment by another.' Moak's Underhill on Torts, 42." The case was affirmed in the Court of Appeals without an opinion. An examination of the briefs of counsel shows that the points discussed in the opinion in Hun were the points discussed in the appellate court. See also *McGuire* v. *Grant*, 25 N. J. L. (1 Dutcher), 356; *Blake* v. *Ferris*, 5 N. Y. 48.

In view of these authorities and the arguments sustaining our position contained in them, we submit that the relationship of master and servant existed between them, and that the negligence of the driver Brown is to be imputed to the defendant in error Hackett. But if this court shall hold that the full relationship of master and servant did not exist between the defendant in error and the driver Brown, then we submit that there still remained the power to control the driver, which was inherent in the hiring, as well as to the manner of his driving as to the places where he should go; that, the power existing, it was the duty of the defendant in error to exercise that power, to prevent a negligent act on the part of the driver, where there was a known imminent danger being encountered, and that by a failure to exercise such power the negligence of the driver is properly imputable to him.

Mr. Robert H. Hinckley and *Mr. Peter L. Voorhees* for defendant in error.

Mr. Justice Field delivered the opinion of the court. After stating the facts in the language reported above, he continued:

That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound—that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

To determine, therefore, the correctness of the instruction of the court below—to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident he is not responsible for the driver's negligence, nor precluded thereby from recovering in the action—we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired out him with horse and carriage, and was responsible for his acts. Upon this point we have a decision of the Court of Exchequer in *Quarman* v. *Burnett*, 6 M. & W.

499, 507. In that case it appeared that the owners of a chariot were in the habit of hiring for a day, or a drive, horses and a coachman from a job-mistress, for which she charged and received a certain sum. She paid the driver by the week and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended and they ran off and against the chaise of the plaintiff, seriously injuring him and the chaise, and he brought an action against the owners of the chariot and obtained a verdict; but it was set aside on the ground that the coachman was the servant of the job-mistress, who was responsible for his negligence. In giving the opinion of the court, Baron Parke said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." As none of these circumstances existed it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist.

This doctrine was approved and applied by the Queen's Bench Division, in the recent case of *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890. The corporation owned a water-cart and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise than that its inspector directed him what streets or portions of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and, in an action against the corporation for the injury, he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation.

Opinion of the Court.

In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer.

The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrong doer when they who are in charge can recover. In other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they by reason of such negligence could not recover. The leading case to this effect is *Thorogood* v. *Bryan*, decided by the Court of Common Pleas in 1849, 8 C. B. 114. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury, that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by Mr. Justice Coltman, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the

owner, and her servants, that if any injury resulted from their negligence, he must be considered a party to it; "In other words," to quote his language, "the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury." Mr. Justice Maule, in the same case, said that the passenger "chose his own conveyance and must take the consequences of any default of the driver he thought fit to trust." Mr. Justice Cresswell said: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action, and I must confess I see no reason why a passenger, who employs the driver to carry him, stands in any different position." Mr. Justice Williams added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by."

What is meant by the passenger being "identified with the carriage," or "with the person having its management," is not very clear. In a recent case, in which the Court of Exchequer applied the same test to a passenger in a railway train, which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, Baron Pollock said that he understood it to mean "that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." *Armstrong* v. *Lancashire & Yorkshire Railroad Co.*, L. R. 10 Ex. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position with reference to the negligent act as the driver who committed it, or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the

passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration.

The truth is, the decision in *Thorogood* v. *Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.

Thorogood v. *Bryan* has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In *The Milan*, Dr. Lushington, the judge of the High Court of Admiralty, in speaking of that case, said: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against *Hay* v. *La Neve* and the ordinary practice of the court of admiralty." Lush. 388, 403.

In this country the doctrine of *Thorogood* v. *Bryan* has not been generally followed. In *Bennett* v. *New Jersey Railroad Co.*, 36 N. J. L. (7 Vroom) 225, and *New York, Lake Erie & Western Railroad Co.* v. *Steinbrenner*, 47 N. J. L. (18 Vroom) 161, it was elaborately examined by the Supreme Court and the Court of Errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first

case it was held that the driver of a horse-car was not the agent of the passenger so as to render the passenger chargeable for the driver's negligence. The car, in crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse-car, which was in part productive of the accident, and the presiding judge was requested to charge the jury, that if this was so, the plaintiff was not entitled to recover; but the court instructed them that the carelessness of the driver would not affect the action or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in *Thorogood* v. *Bryan*, the court, by the Chief Justice, said: "Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street-car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to

say that he is not to be affected by it for other purposes." 7 Vroom, 227, 228.

In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad, the coach was struck by a passing train and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, co-operating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

In New York a similar conclusion has been reached. In *Chapman* v. *New Haven Railroad Co.*, 19 N. Y. 341, it appeared that there was a collision between the trains of two railroad companies, by which the plaintiff, a passenger in one of them, was injured. The Court of Appeals of that State held that a passenger by railroad was not so identified with the proprietors of the train conveying him, or with their servants, as to be responsible for their negligence, and that he might recover against the proprietors of another train for injuries sustained from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision the court referred to *Thorogood* v. *Bryan*, and said that it could see no justice in the doctrine in connection with that case, and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law, but was framing a new exception based on fiction and inconsistent with justice. The case differed from *Thorogood* v. *Bryan* in that the vehicle carrying the plaintiff was a railway train instead of an omnibus, but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated, by the Court of Exchequer in the recent case of *Armstrong* v. *Lancashire & Yorkshire Railroad Co.*

In *Dyer* v. *Erie Railway Co.* 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he travelled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses.

A similar doctrine is maintained by the courts of Ohio. In *Transfer Company* v. *Kelly*, 36 Ohio State, 86, 91, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the Transfer Company. There was evidence tending to show that both companies were negligent, but the court held that the plaintiff, he not being in fault, could recover against the Transfer Company, and that the concurrent negligence of the company on whose cars he was a passenger could not be imputed to him, so as to charge him with contributory negligence. The Chief Justice, in delivering the opinion of the court, said: "It seems to us, therefore, that the negligence of the company, or of its servants, should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed, where the negligence of the company, or its servant, was the sole cause of the injury." "Indeed," the Chief Justice added, "it seems as incredibile to my mind that the right of a passenger to redress against a stranger for an injury caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to his injury, he being

without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In the Supreme Court of Illinois the same doctrine is maintained. In the recent cases of the *Wabash, St. Louis & Pacific Railway Co.* v. *Schacklet*, 105 Ill. 364, the doctrine of Thorogood's case was examined and rejected, the court holding that, where a passenger on a railway train is injured by the concurring negligence of servants of the company on whose train he is travelling, and of the servants of another company with whom he has not contracted, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the company on whose train he was travelling.

Similar decisions have been made in the courts of Kentucky, Michigan, and California. *Danville &c. Turnpike Co.* v. *Stewart*, 2 Met. (Ky.) 119; *Louisville & Cincinnati Railroad Co.* v. *Case*, 9 Bush, 728; *Cuddy* v. *Horn*, 46 Mich. 596; *Tompkins* v. *Clay Street Railroad Co.*, 4 West Coast Reporter, 537.

There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding

must in some way have co-operated in producing the injury complained of before he incurs any liability for it. "If the law were otherwise," as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, "not only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried." *New York, Lake Erie & Western Railroad* v. *Steinbrenner*, 47 N. J. L. (18 Vroom), 161, 171.

In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive. The instruction of the court below, that unless he did exercise such control and require the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, was therefore correct, and

The judgment must be affirmed.

MOWER *v.* FLETCHER.

SAME *v.* SAME & Another.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Argued December 17, 18, 1885.—Decided January 4, 1886.

If the proper officers of the United States approve a selection of school lands in disputed territory in California, outside the limits of an unsettled survey by the United States of a private claim, and issue proper certified lists,

and a purchaser under the title thus acquired by the State enters into possession, improves, and holds the land, no one, by forcibly or surreptitiously getting into possession can make a preëmption settlement which will defeat his title.

The nature of these two actions and the facts which make the issue are stated in the opinion of the court.

Mr. W. J. Johnston and *Mr. U. J. Baxter* for plaintiff in error.

Mr. M. D. Brainard and *Mr. James K. Redington* for defendants in error.

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

The Federal question in each of these cases is the same, and it arises on the following facts: By the act of March 3, 1853, 10 Stat. 244, ch. 145, "to provide for the survey of the public lands in California, the granting of Preëmption Rights therein, and for other purposes," sections 16 and 36 of the public lands in each township, surveyed or unsurveyed, were granted to the State "for the purposes of public schools." By § 7 it was provided that if section 16 or section 36 in any township should be taken by a private claim other lands might be selected in lieu by the proper authorities of the State. A plat of the survey of township 2 south, range 13 west, San Bernardino meridian, was filed in the United States land office at San Francisco, April 22, 1868, and on the same day the State's locating agent selected S. ½ N. W. ¼ and N. ½ S. W. ¼, sec. 32, in that township, in lieu of S. E. ¼ sec. 36, T. 4 S., R. 4 W., same meridian, "claimed to be within a Mexican or Spanish grant." In the case to which Fletcher alone is defendant in error it is found as a fact, "that at the time of making said application and selection the S. E. ¼ of sec. 36 . . . was and has been ever since and is now in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant." In the other case there is no finding on this subject, but it is found "that at the time of said selection and location the owners of the Rancho

Sausal Redondo claimed that said [selected] lands were within the limits of said Rancho." According to the findings in the last case the dispute between the United States and the claimants of the Rancho seems to have continued until about March 22, 1875, when a survey was finally approved that excluded the selected lands from the grant, and a patent was issued according to this survey. The lieu selection as made by the agent was duly certified by the Commissioner of the General Land Office and the Secretary of the Interior to the State, November 23, 1871, and the land selected was patented by the State to Elmore W. Squiers, October 20, 1875, who had bought from the State a long time before. The title thus acquired by Squiers afterwards passed to the defendant in error Fletcher, who, on the 20th December, 1875, entered into a contract with Mower, the plaintiff in error, for the sale of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, twenty acres, for $1,000, of which $500 was paid in hand, and for the balance Mower gave his note payable eighteen months after date, with interest at the rate of one per cent. per month, taking back from Fletcher an agreement for a conveyance of the land on payment of the note. Under this contract Mower took possession of the land he bought, and on the 12th of March, 1876, made and filed with the register of the proper land office a declaratory statement of his intention to claim under the preëmption laws the whole of the S. $\frac{1}{2}$ N. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of the section including the twenty acres he had bought from Fletcher. On the 12th of December, 1876, he tendered to the register and receiver of the proper land office proof of his settlement, improvements and general compliance with the requirements of the preëmption laws, and also tendered the price and all legal fees and commissions, and requested to be allowed to enter the lands as a preëmptioner. This was refused by the register and receiver, and he thereupon appealed to the Commissioner of the General Land Office, where the case is now pending undetermined. Mower moved upon the lands outside of the twenty acres in January, 1877. In doing so he took possession of a dwelling-house erected by Squiers. The lands had all been enclosed, and at the time Mower moved on to them the north eighty acres were enclosed on three sides,

and there were upon the tract a bearing orchard of about fifteen hundred trees, fifteen years old, and a dwelling-house, corrals and out-houses, all put there by Squiers.

On the first of March, 1877, Congress passed an act "relating to indemnity school selections in the State of California," 19 Stat. 267, ch. 81. Section 2 of that act is as follows:

"SEC. 2. That where indemnity school selections have been made and certified to said State, and said selection shall fail by reason of the land, in lieu of which they were taken, not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, that if there be no such sixteenth and thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, that if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States."

Section 3 declares that the confirmation shall not extend to lands settled upon under the homestead or preëmption laws, "provided that such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior."

Mower having neglected to pay his note when it fell due, Fletcher, on the 2d of August, 1877, after tendering a deed for the land, brought suit for the recovery of the money. Mower answered, setting up a failure of title to the land, and, therefore, a want of consideration for the note. The Supreme Court held that Fletcher had good title, and gave judgment for the amount of the note and interest. To reverse that judg-

ment the writ of error in the suit of *Mower* v. *Fletcher* was brought.

On the 24th of April, 1879, Fletcher and Bicknell, who held title under the patent to Squiers, brought suit to recover possession and quiet their title to the part of the lands upon which Mower had entered, not included in the twenty acres sold by Fletcher to him. To this Mower set up his preëmption claim as a defence, and insisted that the title under the selection by the State was invalid. The Supreme Court decided that Mower acquired no right to the possession by his attempt at a preëmption settlement, and gave judgment accordingly. To reverse that judgment the writ of error in *Mower* v. *Fletcher & Bicknell* was brought.

All questions of mere irregularity in the selection of lieu lands by the State, and in the grant by the State to Squiers, were conclusively settled, so far as the parties to this suit are concerned, by the issue to the State of the lists, certified by the Commissioner of the Land Office and the Secretary of the Interior, and by the patent from the State to Squiers. *Frasher* v. *O'Connor*, 115 U. S. 102. By an act of August 3, 1854, 10 Stat. 346, ch. 201, it was provided that where a law granting lands to the States or Territories does not convey the fee simple title, "lists of such lands . . . certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." This statute is now section 2449 of the Revised Statutes.

In the argument for the plaintiff in error it was contended that this S. E. $\frac{1}{4}$ of section 36 was not actually within the limits of any Mexican claim when the lieu selection was made, and that consequently the certified list conveyed no title.

It is found as a fact in the case of *Mower* v. *Fletcher* that when the selection was made the S. E. ¼ section 36, "was, and has been ever since, in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant." This is not inconsistent with the fact that when the selection was made the land was within the limits of an unconfirmed Mexican claim, the boundaries of which had not been fixed by a final survey. The finding that the S. E. ¼ of section 36 *is* the property of the State is not, under the circumstances, the equivalent of a finding that it *was* the undisputed property of the State when the lieu selection was made. Such being the case, we are at liberty to presume it was as represented within the claim of a Mexican grant when the selection was made and certified. As in the case of *Mower* v. *Fletcher & Bicknell* there is no finding on the subject, the same presumption arises there.

In *Frasher* v. *O'Connor* it was decided that the survey made in 1868 of the Sausal Rancho Redondo was sufficient to authorize the State to select, under its various grants, lands outside of the then surveyed boundaries, subject, of course, to a defeat of title if in the end the survey as made should be set aside and the boundaries of the grant finally extended so as to include the selections. This was because by § 8 of the act of July 23, 1866, 14 Stat. 220, ch. 229, it was provided that "all land not included in such grant as so set off shall be subject to the general laws of the United States." As the survey finally made fixed the boundaries so as to exclude the selected lands, the title of the State related back to the selection, and this enured to the benefit of Squiers under his patent from the State.

The question still remains, however, whether, if school selections are found in disputed territory outside the limits of an unsettled survey by the United States of a private claim, the State must wait until the boundaries are finally fixed before it can get its lieu lands. Without determining whether, if lieu lands are selected and certified under such circumstances, the United States can reassert title when it is finally ascertained that the school sections were not covered by the claim, we have no hesitation in saying that if the proper officers of the United

States approve such a selection and issue the proper certified lists, and a purchaser under such a title enters into the possession of the land and improves, cultivates, and holds it, no one by forcibly or surreptitiously getting into possession can make a preëmption settlement which will defeat his title. *Atherton* v. *Fowler*, 96 U. S. 513, 519. As was said in that case, "The generosity by which Congress gave the settler the right of preëmption was not intended to give him the benefit of another man's labor, and authorize him to turn that man or his family out of his home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling."

This disposes of the claim of preëmption, and that being out of the way it is clear that the act of March 1, 1877, confirmed the State's title and made that of Fletcher good when the note of Mower to him fell due, and when he was bound to convey under his contract.

The judgment in each of the cases is affirmed.

STEBBINS & Others *v.* ST. ANNE & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted December 18, 1885.—Decided January 11, 1886.

Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity.

This was a bill in equity, filed June 25, 1884, by John H. Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney, and by William D. Judson and Amos

Statement of Facts.

Tenney, lately partners with Joseph E. Young, under the name of Joseph E. Young & Co., against the Town of St. Anne, the Chicago, Danville and Vincennes Railroad Company, and the receiver of that company, to obtain payment of bonds to the amount of $30,000, issued by the town, under statutes of the State of Illinois, to aid in the construction of the railroad of that company. The facts alleged in the bill, so far as necessary to the understanding of the decision, were as follows:

In February, 1869, the railroad company entered into a contract with Joseph E. Young & Co. to construct its railroad from Danville through St. Anne and other towns to Chicago, and thereby agreed to assign and did assign to the contractors all donations, bonds or aids which might be contributed by municipalities along the line of the railroad. The contractors fulfilled their contract and completed the construction of the road before December 1, 1871.

In June, 1869, the town voted to raise by tax a subscription of $30,000, to aid in the construction of the railroad, to be paid in bonds of from $1000 to $5000 each, payable to bearer in from one to five years, with interest at the rate of ten per cent. In December, 1870, the bonds were signed by the supervisor of the town in its behalf, and, by direction of the town authorities, delivered by him to Joseph E. Young & Co., as entitled to the bonds under their contract with the railroad company; and were afterwards redelivered by the contractors to him for the purpose of being registered in the office of the auditor of accounts at Springfield in the State of Illinois.

The supervisor, on his way to Springfield for that purpose, stopped at his home in St. Anne, and while there, on January 5, 1871, certain citizens of the town filed a bill in equity in the Circuit Court of Kankakee County against him and other officers of the town, upon which an injunction was granted against the delivery of the bonds, and the bonds were placed by order of the court in the custody of its clerk for safe keeping, and the suit remained in court until April 4, 1876, when the bill was dismissed and the injunction dissolved, after the case had been taken to the Supreme Court of Illinois, and the bonds

declared valid by the opinion of that court, reported in *Chicago, Danville & Vincennes Railroad* v. *Coyer*, 79 Ill. 373.

On April 7, 1876, all the bonds, except one, were taken from the clerk of the court upon a writ of replevin obtained by the then supervisor of the town from a justice of the peace, who had no jurisdiction of the matter; and on the next day were fraudulently and unlawfully burned and wholly destroyed by the town authorities, without the knowledge or consent of the contractors or of the railroad company.

The bill further alleged that Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney "are the real equitable owners of all and singular the interests, claims and demands of said Joseph E. Young and Company, or said railroad company, or its receiver, against the said town of St. Anne, and in and to the bonds herein set forth; and said John H. Stebbins is equitably entitled to one third of the claim of said Joseph E. Young and Company against said railroad company, or the judgment against said railroad company, as herein set forth;" and that Stebbins obtained his interest as follows: In January, 1875, Young being insolvent, the Circuit Court of Cook County, upon a bill filed by Stebbins as one of his creditors, appointed one Luther Pierce receiver of Young's estate, and Young by its order conveyed to Pierce all his property for the benefit of his creditors. In September, 1876, that court, on the application of Pierce, granted an order for the sale of said property, among which were two claims against the railroad company, one for $600,000, and the other for $300,000. Pursuant to that order, said receiver advertised said claims, and in November, 1876, they were sold by him and bought by Stebbins, and a certificate therefor issued to the latter, and the sale reported to and confirmed by the court. The report showed that Young owned one third of said claims against the railroad company. In April, 1876, in the District Court of the United States for the Northern District of Illinois, Young was adjudged a bankrupt, and Pierce appointed assignee of his estate, and in March, 1877, Young was discharged. The bill alleged that "therefore all the right and claim said Young has to any of said claims against said railroad company or said

town of St. Anne has become vested in said John H. Stebbins."

The bill then alleged that Edward G. Judson was the equitable owner of all the interest of William D. Judson in all claims of Joseph E. Young & Co., against the town, by virtue of a written assignment, made by him in February, 1876, to secure the payment of a debt of $14,000, of all his interest, including his interest as a member of the firm of Joseph E. Young & Co., in all claims against the town; that William A. Tenney and Sutherland Tenney obtained their interests in the share of Amos Tenney in the assets of Joseph E. Young & Co., and the demand of that firm against the town, by virtue of a like assignment made by him to them in March, 1876, to secure the payment of a debt from him to them upon a guardianship account; and that therefore Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney were now entitled to all the interest of Joseph E. Young & Co. in the claim against the town.

The bill further alleged that in November, 1877, the firm of Joseph E. Young & Co., in an action at law upon claims growing out of the construction of the railroad, recovered judgment against the railroad company for the sum of $588,556, and costs; that one third of that judgment equitably belonged to Stebbins, and the other two thirds belonged to William D. Judson and Amos Tenney; that in December, 1877, an execution was issued on that judgment and placed in the hands of a sheriff, and by him returned in no part satisfied; that the railroad company was in the hands of a receiver and was wholly insolvent, and had no property out of which to satisfy that judgment, or any part of it; and that no part of that judgment, or of the claim of Joseph E. Young & Co. against the railroad company, had been paid.

The bill finally alleged that the town was indebted as aforesaid to the railroad company, or to Joseph E. Young & Co. under their contract, in the sum of $30,000, and interest from the time of the delivery of the bonds in December, 1870.

The bill prayed for process and discovery; and that Stebbins, Edward G. Judson, William A. Tenney and Sutherland

Tenney be decreed to be the legal and equitable owners of the claim of Joseph E. Young & Co. against the town, and Stebbins be decreed to own one third of the judgment recovered as aforesaid against the railroad company, and William D. Judson and Amos Tenney the other two thirds of that judgment; that Stebbins be subrogated to the rights of Young in all his claims against the railroad company, and Stebbins and Edward G. Judson, William A. Tenney and Sutherland Tenney also be subrogated to all the rights and claims of the railroad company and of Joseph E. Young & Co. against the town; and that, inasmuch as all the bonds would have been due, and the rights of the plaintiffs and the obligations of the town were fixed, before the commencement of this suit, and inasmuch as the town, in equity, was now justly indebted upon its contract to pay the sum of $30,000, with interest, as above set forth, a decree for the amount so due be entered against the town, to be paid to Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney, as the equitable assignees of Joseph E. Young & Co.; and for further relief.

A demurrer to the bill, for want of equity, for misjoinder of parties, and for multifariousness, was filed by the defendants, and was sustained for want of equity and the bill dismissed. The plaintiffs appealed to this court.

Mr. Thomas S. McClelland and *Mr. Robert Doyle* for appellants.

Mr. L. E. Payson for appellees.

Mr. Justice Gray delivered the opinion of the court.

After stating the facts as above reported, he continued:

The object of this bill is to compel the town of St. Anne to pay the amount of the bonds which the town issued to aid in the construction of the railroad, and delivered to Joseph E. Young & Co., the contractors for building the road, in accordance with the agreement between those contractors and the railroad company.

Assuming, without deciding, that the bonds were valid

obligations of the town, and that there is such a want of adequate remedy at law as to justify a resort to equity, nevertheless this bill cannot be maintained.

The bill, after many specific allegations, mostly of fact, but including some inferences of law not supported by the facts alleged, contains a general allegation that the town is indebted either to Joseph E. Young & Co. or to the railroad company in the amount of the bonds.

If, as would appear to be the result of all the allegations of the bill, the debt of the town upon the bonds was to Joseph E. Young & Co., the bill cannot be maintained without bringing before the court the owners of the interests of all the members of that partnership in the debt. This has not been done. The three partners were Joseph E. Young, William D. Judson and Amos Tenney. Said Judson and Tenney, as well as Edward G. Judson, William A. Tenney and Sutherland Tenney, the pledgees of their interests in the claim of their partnership against the town, are joined as plaintiffs. But the interest of Young in that claim is not represented. The sale and conveyance to Stebbins (the only other plaintiff) from Pierce, as the receiver of Young's estate under insolvency proceedings in the State court, included only Young's interest in claims against the railroad company. The interest of Young in the claim of the partnership against the town remained in Pierce, either as such receiver, or as assignee under the subsequent proceedings against Young under the bankrupt act of the United States; and neither Young nor Pierce is a party to the bill.

If the alternative view is taken, and it is assumed that there is a debt of the town to the railroad company, and that Stebbins, by his purchase of Young's interest in the claim of the partnership against that company, and by the judgment subsequently recovered by the partnership upon that claim, acquired the right, jointly with the two other partners, to compel the application of the sum due from the town to the railroad company in satisfaction of that judgment, another difficulty arises, namely, that Edward G. Judson, William A. Tenney and Sutherland Tenney, the pledgees of William D. Judson's

and Amos Tenney's interests in the claim of the partnership against the town, acquired no interest in the claim of the partnership against the railroad company, or in the judgment recovered upon that claim, and should not therefore be parties to this bill.

In fine, the whole interest in any claim of the partnership against the town was in Pierce, either as the receiver of Young's estate in insolvency, or as the assignee of his estate in bankruptcy, and in William D. Judson and his pledgee Edward G. Judson, and in Amos Tenney and his pledgees William A. Tenney and Sutherland Tenney; and no part of that interest was in the plaintiff Stebbins. The whole interest in any claim of the partnership against the railroad company was in Stebbins, as assignee of Young's interest in this claim, and in William D. Judson and Amos Tenney; and no part of this interest was in the plaintiffs Edward G. Judson, William A. Tenney and Sutherland Tenney. Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity.

Decree affirmed.

JOHNSON & Another *v.* WILKINS.

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

Submitted January 4, 1886.—Decided January 11, 1886.

The plaintiff in error having failed to show, either from the record, or by affidavits, that the matter in dispute exceeds five thousand dollars, the Court dismisses the writ for want of jurisdiction.

The facts are stated in the opinion of the court.

Mr. J. D. Thompson for plaintiffs in error.

Mr. C. C. Yonge, Sen'r, for defendant in error.

Opinion of the Court.

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

There is nothing in this record from which it can fairly be inferred that the value of the matter in dispute exceeds five thousand dollars. The suit was ejectment, begun in a State court and removed to the Circuit Court of the United States, for a lot in Pensacola and the profits thereof since January 1, 1880, of the yearly value of five hundred dollars. The value of the lot is not stated in any of the pleadings, but in the petition for the removal of the suit it is put at "more than five hundred dollars." The recovery was of the lot and rent at fifteen dollars per month from January 1, 1880, until March 1, 1883, or five hundred and seventy dollars in all. If this rental is to be taken as an indication of the value of the property, it certainly must be less than our jurisdictional limit. As it rests on the plaintiffs in error to show our jurisdiction either from the record or by affidavits, and this has not been done,

The writ of error is dismissed for want of jurisdiction.

WELLS & Others *v.* WILKINS.

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

Submitted January 4, 1886.—Decided January 11, 1886.

The court receives affidavits from plaintiffs in error, and counter affidavits from defendants in error, to determine the value of tracts of land sued for in ejectment (neither pleadings nor evidence in the record showing it), and dismisses the case.

The facts are stated in the opinion of the court.

Mr. J. D. Thompson for plaintiffs in error.

Mr. C. C. Yonge, Sen'r, for defendant in error.

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

These are suits in ejectment, each for a separate and distinct

Statement of Facts.

part of a lot in Pensacola. A judgment was rendered in each case for the recovery of the premises sued for in that case. Neither the pleadings nor the evidence found in the records show the value of the property, but on suing out the writs of error the plaintiffs in error in each case filed two affidavits to the effect that the value was more than $5000. Since the cases were docketed here, however, the defendant in error has filed counter affidavits which prove beyond all doubt that this is a mistake, and that the value in every one of the cases is very much less than our jurisdictional limit.

The writs of error are consequently all dismissed for want of jurisdiction.

Goldstucker & Another *v.* Wilkins. Wells & Others *v.* Wilkins. Wells & Others *v.* Wilkins. Wells & Others *v.* Wilkins. Wells & Another *v.* Wilkins. All in error to the Circuit Court of the United States for the Northern District of Florida. These cases were all submitted at the same time, and by the same counsel, with Wells *v.* Wilkins reported above, and are, for the reasons given in the above opinion, all

Dismissed for want of jurisdiction.

HUNT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 4, 1886.—Decided January 18, 1886.

Under the provisions of the act of July 16, 1862, 12 Stat. 586, ch. 183, § 16, an officer of the navy of a class subject by law or regulaiton to examination before promotion to a higher grade, was not entitled to be examined until his turn for promotion had arrived, or was near at hand.

If a naval officer was delayed in promotion for want of examination, and the examination was delayed by reason of absence on duty when entitled to promotion, the act of July 16, 1862, gave him the right to have the increased pay of the new grade begin when the examination should have taken place.

George P. Hunt, the appellant, a chief engineer in the navy, brought this suit in the Court of Claims to recover a balance of pay due him, as he alleged, from the United States.

The facts were as follows: On October 25, 1868, the appellant was a first assistant engineer in the United States Navy, and had served in that grade two years at sea on board a naval steamer. At the date mentioned there was no vacancy in the grade of chief engineer to which the appellant could be promoted, nor did any such vacancy occur until July 4, 1880. On October 11, 1880, he was ordered to report for examination for promotion to the grade of chief engineer, and, upon examination, was found qualified, and on December 29, 1880, was promoted to the grade of chief engineer and received the pay of that grade from July 4, 1880. From October 25, 1868, to July 4, 1880, the appellant received the pay and emoluments of a first assistant engineer only. He claimed that for the period between the two dates just named he was entitled to the pay of chief engineer, and brought his suit to recover for that period the difference between the pay and emoluments of a first assistant engineer and of a chief engineer. The Court of Claims dismissed his petition, and he appealed.

Mr. Charles F. Benjamin for appellant.

Mr. Solicitor-General for appellee.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language above reported, he continued.

It appears from the findings of the Court of Claims that from October 25, 1868, to July 4, 1880, there was no vacancy in the grade of chief engineer to which the appellant could have been promoted even had he been examined and found qualified. His position in this suit is, therefore, that he is entitled to the pay of an office for a period during which he did not hold, and was not entitled to hold it, and did not perform its duties. He insists that as soon as he had performed two years' service at sea he had a right to be examined for promotion, and, when examined and promoted nearly eleven years afterwards, was entitled to the pay of the grade to which he was promoted from the time when his two years' service at sea was completed. The law to support such a claim should be clear.

If the appellant is entitled to any of the increased pay claimed, the time for which it should be computed is cut short by the act of June 22, 1874, the first section of which is as follows: "That on and after the passage of this act any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade, shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill." This section clearly cuts off by implication any increase of pay until promotion. So that, if it be conceded that the section could not have any retroactive effect, it, at least, limits the right of the appellant to any increase of pay to the period between October 25, 1868, when his two years' service at sea was completed, and the passage of the act.

The claim of the appellant to the increased pay is based on section sixteen of the act of July 16, 1862, entitled "An Act to establish and equalize the grade of line officers of the United States Navy," ch. 183, 12 Stat. 586, which provides: "That whenever any officer of the Navy of a class subject by law or regulation to examination before promotion to a higher grade, shall have been absent on duty at the time when he should have been examined, and shall have been found qualified at a subsequent examination, the increased rate of pay to which he may be entitled shall be allowed to him from the date when he would have received it had he been found qualified at the time his examination should have taken place."

The Navy Regulations in force in 1867 provided as follows:

"Section 264. Candidates for promotion to the grade of chief engineer must have served at least two years at sea as first assistant engineers on board a naval steamer."

It is clear, upon the face of this statute and regulation, that the appellant has not maintained his suit. He does not aver in his petition, and it is not found by the Court of Claims, "that he was absent on duty at the time when he should have been examined." Neither does it appear that at any time after the expiration of his two years' service at sea, on October 25, 1868, down to the time of his examination on October 11, 1880, he was absent on duty. Even, therefore, upon his own construc-

tion of the statute, he does not bring himself within its terms as one entitled to the pay which he sues to recover.

But we are of opinion that it is an unwarranted construction of the statute and regulation to hold that, as soon as a first assistant engineer has served two years at sea on board a naval steamer, he is entitled, as a matter of right, to an immediate examination, whether there is a vacancy in the next higher grade to which he could be promoted or not; and if his examination is delayed by his absence on duty he can, when examined and promoted, demand the pay of a chief engineer from the time when he had completed his two years' service at sea. We think the law was properly construed by Mr. Welles, Secretary of the Navy, in his letter of May 12, 1864, to the Fourth Auditor, in which he said: "There may be some obscurity in the wording of the sixteenth section of the act of July 16, 1862, but the evident and sole purpose of the law is to prevent an officer from being deprived by absence on duty of the increased pay which promotion would have given him." In other words, the meaning of the law is, that if an officer is delayed in his promotion because he has not been examined, and his examination has been delayed by his absence on duty, he shall, when promoted, have the increased pay of the new grade, to begin from the time when his examination should have taken place.

Under the law and the regulations a first assistant engineer became eligible to examination for promotion when he had served two years at sea upon a naval steamer. But he was merely eligible. He was not entitled to be examined until his turn for promotion had arrived, or was near at hand. In no event, therefore, could he demand that the increased pay of his new grade should begin until he had a right to be examined for promotion.

It appears that under a misconstruction of the law a practice grew up in the Navy Department by which promoted officers were allowed the pay of their new grade from the time when they were eligible for examination. But this was corrected by the Secretary of the Navy in 1877, who recommended that the increased pay of a promoted officer should be allowed only from the time when a vacancy occurred to which he could have

been promoted if an opportunity for examination had been given him. In our opinion this recommendation was based on a correct construction of the statute.

We see no reason why a practice unwarranted either by law or the regulations of the navy, and which had been discontinued for eight years, should be revived and given effect in this case.

Judgment affirmed.

UNITED STATES *v.* WALLACE.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 4, 1886.—Decided January 18, 1886.

Under the provisions of Rev. Stat. §§ 847 and 828, a commissioner of a Circuit Court who, by direction of the court, keeps a docket with entries of each warrant issued and subsequent proceedings thereon made on the day of occurrence, is entitled to a fee like that allowed to the clerk of the court for dockets, indexes, &c., although his docket entries may differ from those made by the clerk.

The judgment appealed from in this case was rendered in favor of the appellee, who was plaintiff below, for the sum of $1032, upon the following finding of facts reported by the Court of Claims:

I. The claimant, John H. Wallace, was a commissioner of the Circuit Court of the United States for the Southern District of Alabama from January 16, 1882, to November 22, 1883.

II. October 4, 1881, the Circuit Court of the United States for said district, in compliance with a request by the Attorney-General, made an order requiring, among other things, that each of the commissioners of said court should keep a docket, in which he should enter on the day the transaction should occur the issuance of each warrant, the name of the person upon whose complaint and request the same was issued, the nature of the offence, and the name of the officer to whom the warrant was delivered for service, together with the proceedings had under said warrant; that there should also be entered

therein the names of the witnesses present and examined and their fees, the name of the guard, if any, and his fees, and also the marshal's and deputy marshal's fees, together with the mileage and expenses allowed by law, and the said order was continued of force.

III. From the said January 16, 1882, to November 22, 1883, petitioner, as such commissioner, issued warrants in three hundred and seventy-six cases, in three hundred and twenty-eight of which issue was joined and testimony taken, and in forty-eight of which issue was not joined, the defendant was discharged, and no testimony taken, and he duly made his docket entries in each and in all of said cases as required by said order.

IV. His accounts for fees for keeping said docket were duly verified by oath, and presented to the said court, in presence of the district attorney, and approved by the court, and an order approving the same as being in accordance to law and just duly entered upon the records of the said court. In said accounts, as approved by the court, he was allowed a fee of $3 in each case where issue was joined and testimony taken, and $1 where issue was not joined and the defendant was discharged.

V. His accounts therefor were duly presented for payment to the accounting officers of the Treasury, together with the order of court approving the same, and payment thereof was refused by them.

Mr. Solicitor-General for appellant.

Mr. Charles C. Lancaster and *Mr. Charles E. Mayer* for appellee.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the language reported above, he continued:

It is provided in § 847 Rev. Stat. regulating the fees of commissioners:

"For issuing any warrant or writ, and for any other service,

the same compensation as is allowed to clerks for like services."

§ 828 Rev. Stat. provides that the clerk be allowed:

"For making dockets and indexes, taxing costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, $3." And—"For making dockets and indexes, taxing costs and other services in a cause which is dismissed or discontinued, or where judgment or decree is made without issue, $1."

It was not disputed by the accounting officers of the Treasury Department, nor by the Solicitor-General in argument, that the commissioner was legally bound under the order of the Circuit Court to render the services charged for in keeping the dockets required, nor that he is entitled to compensation therefor. But it is insisted that he ought not to be allowed the compensation demanded, because the services rendered in keeping his docket are not in all particulars like services to those rendered by clerks in keeping dockets, and that, consequently, his compensation is fully covered by paragraph 8 of § 828, which allows for making entries "for each folio fifteen cents."

This view is met by the Court of Claims in the following extract from its opinion:

"The phrase 'like services' does not necessarily mean identical with, for by such a construction the compensation allowed to commissioner 'for any other service' would be defeated because of the subject-matter of the duties of the commissioner and the clerk being somewhat different; but the statute must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, then, under § 847, the commissioner would be entitled to the compensation allowed by law to the clerk, it being in legal substance a 'like service.'"

The compensation of fifteen cents for each folio, supposed to embrace this service, is given "for entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report." Clearly this service has no likeness to that of keep-

ing a docket, while the keeping of a docket by the commissioner is a like service to the keeping of a docket by the clerk, although the docket entries to be made by each may differ.

The judgment of the Court of Claims is

Affirmed.

EX PARTE BROWN & Another.

ORIGINAL.

Submitted January 13, 1886.—Decided January 18, 1886.

The dismissal of a cause by the Supreme Court of a Territory, because errors had not been assigned according to the rules of practice applicable to the form of action, is a judgment which can only be reviewed by writ of error or appeal, as the case may be.

This was a motion for leave to file a petition for a writ of mandamus. The petition, which accompanied the motion, showed that the petitioners commenced a suit in ejectment in the Territory of Washington on the 10th of July, 1884; that the defendant answered, denying the plaintiff's right to recover, and setting up various separate defences; that the plaintiffs demurred; that the court overruled the demurrer; that the plaintiffs having elected to stand upon the ruling of the court on the demurrer, the case was dismissed; that the plaintiffs thereupon appealed to the Supreme Court of the Territory; that transcripts of the record were duly filed in the Supreme Court and the causes removed and docketed there; that a motion was made by defendant to dismiss the appeal because the action was at law and could be reëxamined only on writ of error; that the motion was sustained and judgment entered accordingly; and that the amount in controversy was largely in excess of $5000. The prayer of the petition was for a writ of mandamus to the Supreme Court of the Territory, directing it to set aside the judgment, to reinstate the case, and to decide it on the merits.

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Mr. Leander Holmes and *Mr. John H. Mitchell* for the motion.

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

This motion is denied. According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary. *Ex parte Morgan*, 114 U. S. 174, and cases cited.

Motion denied.

UNION PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

ORIGINAL MOTION IN A CASE ON APPEAL FROM THE COURT OF CLAIMS.

Submitted January 11, 1886.—Decided January 18, 1886.

When a judgment of the Court of Claims is reversed and the case is remanded for new trial, the findings of fact on the first trial form no part of the record on appeal from the judgment in the second trial, unless embodied by that court in the second findings.

When a claimant in the Court of Claims amends his petition by filing a new one in the place of it, and the case is heard on the amended petition only, and on appeal that court sends up only the amended petition, this court will not issue a writ of certiorari to bring up the original petition.

This was a motion for a writ of *certiorari* to the Court of Claims. The motion set forth the following facts:

This cause was originally commenced in the Court of Claims

by three petitions. In one, numbered 12,515, judgment was given against the company. On appeal this court reversed that judgment. 104 U. S. 662. The three cases were then consolidated in the Court of Claims and an amended petition filed as a substitute for the previous petitions. The original petition in 12,515 set forth as exhibit B a certain letter to the Postmaster-General; and the findings of fact found that letter by referring to the petition. The letter was not attached as an exhibit to, or contained in the amended petition, and was not found as a fact by the Court of Claims. This motion set forth the importance of the letter to the issues in this case, and prayed as follows: "That the said findings of fact in No. 12,515, and, particularly, the said letter of September 1, 1876, be ordered to be made and considered a part of the record on this appeal; and to that end, if necessary, prays, under Rule 14 of this court, that a writ of *certiorari* issue to the Court of Claims requiring it to transmit to this court the record and the said findings of fact in No. 12,515, and the said letter of September 1, 1876, to which end it prays, under the 30th rule of this court, that the appellant's motion, heretofore filed at this term for a further finding of facts by the Court of Claims, and the order of this court entered thereon, may be reheard, if such rehearing shall be necessary, in order to get said letter of September 1, 1876, before this court as part of the record on this appeal."

Mr. J. F. Wilson and *Mr. John F. Dillon* for the motion.

Mr. Solicitor-General opposing.

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

This motion is denied. The findings of fact on the first trial in the Court of Claims have not under our rules any place in this record. Those findings were set aside when the judgment thereon was reversed, and the cause remanded for a new trial. On this appeal we consider only the findings at the second trial.

The original petition filed in the Court of Claims contained

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by reference the letter of September 1, 1876. In the amended petition, on which the last trial was had, this letter was omitted. It is not, therefore, any part of the record on this appeal. We decided on the former motion to send the case back for further findings, that it could not now be brought here as part of the evidence, and that it was not the proper subject of a special finding. We see no reason to reconsider that decision.

Motion denied.

GIBBONS *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 21, 1885.—Decided January 18, 1886.

If a church building is taken down, and a new church, with a sufficient space around it for air and light, is built on other land within the same enclosure, in order to enable a revenue to be derived from the sale or lease of the land on which the old church stood, and it is unnecessary for the enjoyment of the new church that this land should remain vacant, this land is not exempt from taxation for the support of the government of the District of Columbia under § 8 of the acts of March 3, 1875, ch. 162; July 12, 1876, ch. 180; and March 3, 1877, ch. 117.

It is within the constitutional power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates.

This is an appeal from a decree dismissing a bill in equity by the Roman Catholic Archbishop of the Diocese of Baltimore, of which the District of Columbia is a part, to clear the title of lots numbered 36 to 46 inclusive (being the lots formerly numbered 5, 6 and 7), in square 376 in the City of Washington, from a cloud created by the assessment and sale thereof for taxes amounting, with interest, to more than $5000.

The case was heard upon the bill, answer, a general replication, and the deposition of the pastor of St. Patrick's Church, from which the facts appeared to be as follows:

The lots in question front south on F Street about 170 feet,

and have a depth varying from about 93 feet to about 114 feet. They were conveyed by Anthony Caffray in 1804 to the Roman Catholic Bishop of Baltimore in fee "for the use of the Roman Catholic congregation worshipping in the place called St. Patrick's Church in the City of Washington;" and thenceforward until 1870 were occupied by the old St. Patrick's Church. During that period the church enclosure included about one half of square 376, bounded south by F Street, west by Tenth Street, and north by G Street. In 1870 the old church building was found to be unsafe, and in 1872 it was taken down. Since 1870, and pending the completion of a new church now in process of erection, the congregation has worshipped in Carroll Hall on G Street, within the same half square, and separated from the lots in question by a thirty foot passageway. The new church fronts on Tenth Street, with a strip of open ground about thirty-five feet wide on its south side and in the rear for light and ventilation, all to the north of the lots in question. The reason for so placing the church, instead of putting it in the middle of the inclosure, was to enable a revenue to be derived from the sale or lease of these lots to pay off the church debt incurred in building; and it was not necessary for the enjoyment of the church that these lots should remain vacant. In February, 1881, the plaintiff obtained a decree in equity, authorizing him to sell or otherwise dispose of these lots, and to apply the proceeds to the completion of the new church building; and about that time he made leases thereof for twenty-five years to private persons.

From 1804 until June 30, 1875, no taxes were assessed on these lots. Afterwards until June 30, 1880, they were annually assessed for taxes and sold for non-payment thereof. The annual taxes since that time have been paid.

Mr. M. F. Morris for appellant.

Mr. A. G. Riddle for appellee.

Mr. Justice Gray delivered the opinion of the court. After stating the facts as reported above, he continued:

The only matter in contest is the validity of the taxes assessed upon the lots on F Street for the five years between June 30, 1875, and June 30, 1880, under the annual acts of Congress of March 3, 1875, ch. 162, and July 12, 1876, ch. 180, and the permanent act of March 3, 1877, ch. 117, authorizing the levy of taxes for the support of the government of the District of Columbia, the material provisions of which are as follows:

The eighth section of each of these statutes exempts from taxation houses for the reformation of offenders, almshouses, buildings devoted to art or belonging to institutions of purely public charity, "church buildings, and grounds actually occupied by such buildings," houses to improve the condition of seamen or soldiers, free public library buildings, and cemeteries.

The act of 1875 adds: "The lands or grounds appurtenant to any said house or building, so far as reasonably needed and actually used for the convenient enjoyment of any said house or building for its legitimate purpose and no other; but if any portion of any said building, house, grounds, or cemetery, so in terms excepted, is used to secure a rent or income, or for any business purpose, such portion of the same, or a sum equal in value to such portion, shall be taxed against the owner of said building or grounds." 18 Stat. 503.

The acts of 1876 and 1877 substitute for this addition a provision to the same effect, though differing somewhat in form, as follows: "But if any portion of any such building, house, grounds or cemetery, so in terms excepted, is larger than is reasonably needed [in the act of 1876—"absolutely required," in the act of 1877] and actually used for its legitimate purpose and none other, or is used to secure a rent or income, or for any business purpose, such portion of the same, or a sum equal in value to such portion, shall be taxed against the owner of said building or grounds." 19 Stat. 85, 399.

Upon the construction most favorable to the appellant, these statutes exempt nothing from taxation beyond church buildings and grounds actually occupied for such buildings, and the lands or grounds appurtenant to any such building, so far as reasonably needed and actually used for its convenient enjoyment for its legitimate purpose. Even parts of the exempted buildings

and lands, if used to secure a rent or income, or for any business purpose, are taxable. But land which is neither actually occupied for a church building, nor reasonably needed and actually used for the convenient enjoyment of the building as a church, is not exempt from taxation, whether it is used for any other purpose or not.

We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also to add to its beauty and attractiveness, may, if not used or intended to be used for any other purpose, be exempt from taxation under these statutes.

But upon the uncontroverted facts of the present case it was not only unnecessary for the enjoyment of the church that the F Street lots should remain vacant, but the very reason for placing the church to the northward of these lots, instead of putting it in the middle of the whole land controlled by the ecclesiastical authorities, was to enable a revenue to be derived from the lease or sale of these lots. Under such circumstances, these lots were not exempt from taxation, even before they had been actually so leased.

The objection, taken in argument, that the act of March 3, 1877, is unconstitutional, because it provides that the tax upon all lands within the District of Columbia, outside of the cities of Washington and Georgetown, and held and used solely for agricultural purposes, shall be a dollar and a quarter on the hundred, and upon all other real and personal property in the District, not expressly exempted, a dollar and a half on the hundred, is founded on a misunderstanding of the case of *Loughborough* v. *Blake*, 5 Wheat. 317.

The point there decided was that an act of Congress, laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution, might comprehend the District of Columbia; and the power of Congress, legislating as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318; *Welch* v. *Cook*, 97 U. S. 541; *Mattingly* v. *District of*

Columbia, 97 U. S. 687. In the exercise of this power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.

Decree affirmed.

FLETCHER *v.* HAMLET.

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

Submitted December 21, 1885.—Decided January 18, 1886.

Cases advanced under Section 3 of Rule 32 are to be submitted on printed briefs and arguments after service of notice and brief or argument.

When one of several defendants in a suit on a joint cause of action in a State court loses his right to remove the action into a Circuit Court of the United States by failing to make the application in time, the right is lost as to all.

This was a motion to dismiss or affirm. The facts which make the case are stated in the opinion of the court.

Mr. B. R. Forman for the motion.

Mr. Edgar H. Farrar and *Mr. Ernest B. Kruttschnitt* opposing.

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

This is a writ of error brought under § 5 of the act of March 3, 1875, 18 Stat. 470, ch. 137, for the review of an order of the Circuit Court remanding a case which had been removed from a State court. It has been advanced under Rule 32, and is now for hearing on its merits. In submitting the case the defendants in error treat the rule as though it required a motion to dismiss or affirm. Such is not the proper practice. Cases advanced under section 3 of Rule 32 are to be submitted like

motions to dismiss under Rule 6, that is to say, on printed briefs or arguments after service of notice and brief or argument, as required by section 4, Rule 6.

The facts are these: Hamlet, Bliss & Elliott, citizens of Alabama, brought suit in the Civil District Court of the Parish of Orleans, on the 17th of March, 1883, against the commercial firm of Fletcher, Wesenberg & Co., doing business in New Orleans, Louisiana, and composed of John F. Fletcher, Thomas O'Conner, William Wesenberg, and George M. Fletcher. Service of citation was made on the firm and William Wesenberg through Wesenberg in person, April 6, 1883. This was good service on the firm, and according to the laws of Louisiana a judgment in the action would bind Wesenberg personally, and the assets of the firm and of the other members of the firm in Louisiana. On the 6th of April Wesenberg appeared and filed exceptions to the petition on his own behalf and on behalf of the firm. These exceptions, which involved the merits of the case, were sustained in the District Court April 17, 1883, but on appeal to the Supreme Court the judgment of the District Court was reversed, and the cause remanded for further proceedings. Wesenberg then filed an answer for himself and for the firm May 22, 1884. On the 4th of June, 1884, process was issued and served on John F. Fletcher. The effect of this was to bring Fletcher into the suit so as to bind him personally by a judgment in the action as well as his property in Louisiana. On the 17th of June Fletcher filed exceptions individually and on behalf of the firm. These exceptions were referred to the merits, November 28, 1884, and Fletcher then filed his answer. The case was set down for trial December 4, 1884, but not being reached was ordered to be continued until the next jury term.

A term of the court began on the first Monday in November, 1884, and it continued until the third Monday in July, 1885. For convenience, different weeks in the term were set apart for jury trials. These weeks, occurring at intervals during the term, were often referred to as jury terms.

On the 5th of February, 1885, Wesenberg and John F. Fletcher joined in a petition for the removal of the suit to the

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Circuit Court of the United States for the Eastern District of Louisiana, on the ground that they were citizens of Tennessee and the plaintiffs citizens of Alabama, and that the suit involved a controversy wholly between citizens of different States. When the case was entered in the Circuit Court it was remanded. To reverse that order this writ of error was brought.

It is conceded that the suit was not removable when the petition for removal was filed, unless the service of process on Fletcher on the 4th of June so changed the character of the litigation as to make it substantially a new suit, begun on that day. In our opinion such was not the effect of the new process. The suit was begun when process was served on Wesenberg and the firm. If judgment had been rendered against the defendants at any time after that it could have been enforced against Wesenberg personally and against all the property of the firm and of the individual partners in Louisiana. The cause of action is joint. There is no separable controversy in the case. There can be no removal by the defendants unless they all join and all are citizens of different States from the plaintiffs. Confessedly Wesenberg lost his right to a removal by failing to make the application in time, and as Fletcher cannot take the case from the State court unless Wesenberg joins with him, it follows that he is subjected to Wesenberg's disability.

The order to remand is

Affirmed.

EUREKA LAKE & YUBA CANAL COMPANY *v.* SUPERIOR COURT OF YUBA COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Submitted December 21, 1885.—Decided January 18, 1886.

When the court may reasonably infer from the record in a case brought here by writ of error from a State court that the Federal question raised here was necessarily involved in the decision there, the court will not dismiss the writ on motion to dismiss for want of jurisdiction, although it may not appear affirmatively on the record that the question was raised there.

Statement of Facts.

When a court, having acquired jurisdiction of a cause and the parties to it, issues an order upon one of the parties to show cause why he should not be punished for contempt in disobeying a temporary restraining order of injunction made in the cause, and he conceals himself to evade service of the process, the court may, on proper return of the facts, direct service of the order to show cause to be made on his attorney of record, and after due service thereof, may proceed to hear the order to show cause, and to adjudge the same.

This was a motion to dismiss the writ of error for want of jurisdiction, with which was united a motion to affirm.

The record in the case showed that the Eureka Lake and Yuba Canal Company, (Consolidated,) was a New York corporation doing business in California, and that in or about the month of March, 1880, the company filed in the office of the Secretary of State of California an instrument designating and appointing "David Cahn, of 205 Sansome Street, in the city of San Francisco, . . . as the person upon whom process issued by authority of or under any law of the State of California may be served, and all process served upon said David Cahn will be valid and binding upon said corporation." This was done in compliance with an act of the legislature of California, entitled "An Act in relation to foreign corporations," approved April 1, 1872. On the 3d of October, 1882, the county of Yuba brought suit against the corporation in the Superior Court of that county to enjoin the corporation from depositing or suffering to flow into the channel or bed of the Yuba River, or any of its tributaries, "the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones, or other material discharged from its said mines," and from selling to others any water to be used in hydraulic mining. Immediately upon the bringing of the suit an *ex parte* restraining order was entered by the court in accordance with the prayer of the complaint. Process in the suit and a copy of the restraining order were served on Cahn November 9, 1882. On the 5th of December a motion was made to set aside this service. This motion was denied December 23d, and on the 17th of January the corporation, by James K. Byrne and

W. C. Belcher, its attorneys, filed a demurrer to the complaint. On the 20th of January an order was entered requiring the corporation to show cause, February 2d, why it should not be punished for a contempt of court in disobeying the injunction. Service of this order was directed to be made on Bigelow, the managing agent of the company, or on Cahn, the designated agent for the service of process. This service was not made on account of the absence of Cahn in the city of New York, where the company had its principal place of business. Thereupon, the time for showing cause was changed to March 24th, and service of an order to this effect was made on Cahn March 5th. After this service, the corporation appeared by its attorneys and moved to set aside the order to show cause, on the ground, among others, that Cahn was not on the 5th of March, "and had not been for more than one month prior thereto," the person designated by the corporation as its agent for the service of process. Upon the hearing of this motion, it appeared that the appointment of Cahn as process agent had been revoked and Bigelow put in his place. Such being the case, a further order was entered requiring like cause to be shown April 23d, and efforts were made to serve this order on Bigelow, who was the only person in the State on whom process against the corporation could be served. Bigelow resided at the mines, and the record shows clearly that he purposely kept himself out of the way of the officer to avoid service. No service was, therefore, made on him, and upon the return of the facts, supported by affidavits, May 14th was fixed by the court as the time for the hearing, and an order was entered that service be made upon "the attorneys of record herein of said defendant." This service was effected. At the return day the attorneys of the defendant, appearing specially for that purpose, moved to set aside the order to show cause, 1, because the restraining order was void, the court having "no jurisdiction of the person of the defendant at the time the said order was made and issued;" 2, because the "judge who made the same was, at the time the same was made, disqualified by law to make the said order;" 3, be-

cause the order "was granted without due notice, or any notice whatever, to the proper officer, or any officer or officers, or to the managing agent, or any agent of said corporation, of the application therefor;" 4, because the restraining order was "never served on the defendant;" and, 5, because the order to show cause was "never served upon the defendant." This motion was overruled, and thereupon, the corporation not appearing, "by attorney, or otherwise, to show cause . . . in relation to said contempt," but making default "in said matter of contempt," a hearing was had "upon said order to show cause, and said affidavits and the records and papers in said court and action," and the corporation was adjudged to be guilty of contempt, and to "pay a fine to the people of the State of California in the sum of two hundred and fifty dollars as a punishment for such contempt, and that execution issue in the name of the people of the State of California against said defendant therefor."

On the 26th of July, 1883, the corporation filed in the Supreme Court of the State a petition for review, on the ground that "in entering said order of injunction, and in assuming thereafter to adjudge the petitioner guilty of contempt for its alleged violation of said order, the said Superior Court of said County of Yuba, and the said judge thereof, exceeded the jurisdiction thereof." Upon this petition the orders of the Superior Court were affirmed, and to reverse that judgment this writ of error was brought.

Mr. A. L. Rhodes for the motions.

Mr. W. W. Cope opposing.—In affirming the judgments the Supreme Court of California necessarily decided that service upon the attorney of the corporation of the order to show cause why it should not be punished for contempt, gave the court jurisdiction, and warranted judgments, the execution of which would result in the loss of its property. Such service was not "due process of law" within the meaning of the Constitution of the United States, and the judgment violates the prohibition of section 1 of the Fourteenth Amendment. The

Supreme Court in giving judgment referred to its decision in *Golden Gate Mining Co.* v. *Superior Court of Yuba County*, 65 Cal. 187, 192, where it said: "The defendant in the action had entrusted its attorneys with the protection of its interests and the defence of its rights. We can see no abuse of authority on the part of the court in directing that the order to show cause should be served on an attorney, since it was made to appear that the defendant, by reason of its own acts, could not be served personally. The process was suitable, and the mode adopted by the court conformable to the spirit of the code."

This doctrine we respectfully contend is in violation of the Constitution of the United States. It confounds the distinction between criminal and civil contempts, and the different methods of obtaining jurisdiction of the persons of the perpetrators of such offences. It assumes that because an attorney is employed to protect the civil rights of a party, he represents him in criminal proceedings growing out of the conduct of those civil rights. This court held in *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392, that "contempt of court is a specific criminal offence;" that the imposition of a fine for it is a judgment in a criminal case; and that "that part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing." The same doctrine is held in Virginia, *Baltimore & Ohio Railroad Co.* v. *Wheeling*, 13 Grattan, 40, 57; and in New York, *Pitt* v. *Davison*, 37 Barb. 97, 109, 110. It is true this case was reversed by the Court of Appeals, but not upon this point, as the syllabus shows. And this is the construction put upon the case in Wells on Jurisdiction of Courts, § 193; and in Rapalje on Contempts, § 21, where it is said: "Civil contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court, or of its process, or which obstruct the administration of justice, or tend to bring the court into disrepute; such as disorderly conduct, insulting behavior in the presence or immediate vicinity of the court, or acts of violence

which interrupt its proceeding; also, disobedience to or resistance of the process of the court; interference with property in the custody of the law; misconduct of officers, etc." *Ex parte Edwards*, 11 Florida, 174, 184; *Matter of Watson*, 3 Lansing, 408; *People* v. *Cowles*, 4 Keyes, 38, 46; *Hawley* v. *Bennett*, 4 Paige, 163; *People* v. *Spalding*, 10 Paige, 284. See also *Phillips* v. *Welch*, 11 Nevada, 187.

Speaking of the principle for which we are here contending, the Supreme Court of New York, in *Stuart* v. *Palmer*, 74 N. Y. 183, 190, says: "It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defence of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and it is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the Legislature cannot do nor authorize to be done. Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer* v. *Bunbury*, 30 Mich. 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

We think the court will hardly consider the question a frivolous one; and there being no color of right to a dismissal, the motion to affirm must be denied under the rule laid down in *Whitney* v. *Cook*, 99 U. S. 607.

Mr. Chief-Justice Waite delivered the opinion of the court. After stating the facts in the language reported above, he continued:

It does not appear affirmatively on the face of the record that the orders of the Superior Court were objected to in the Supreme Court on the ground that, in the absence of personal

service of the order to show cause on some officer, or authorized agent of the corporation, the judgment in the contempt proceeding was without due process of law, and therefore contrary to the Fourteenth Amendment of the Constitution of the United States; yet that point is made here, and it is possible its decision was necessarily involved in the final order that was made. For this reason the motion to dismiss is overruled; but there was sufficient color of right to a dismissal to warrant uniting a motion to affirm with the motion to dismiss, and on consideration of that motion we are entirely clear the case ought not to be retained for further argument. Section 187 of the Code of Civil Procedure in California is as follows:

"When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

Under this statute the courts of California hold that "when a party charged with contempt in disobeying a legal order wilfully conceals himself to avoid service of an order to show cause why he should not be adjudged guilty of contempt, the court is not powerless to proceed, or to prevent the continued disregard of its lawful order," but may order, as justice shall require, after due service of an order to show cause, on the attorneys of the party proceeded against. In *Golden Gate Mining Co.* v. *Superior Ct.*, 65 Cal. 187, 192, the Supreme Court said: "The defendant in the action [a corporation] had entrusted its attorneys with the protection of its interests and the defence of its rights. We can see no abuse of authority on the part of the court in directing that the order to show cause should be served on an attorney, since it was made to appear that the defendant by reason of his own acts could not be served personally. The process was 'suitable,' and the mode adopted by the court 'conformable to the spirit of the code.'" The good sense of this rule is manifest. A corporation can only be served with process through some officer or agent. It is

certainly competent for a state to determine who this officer or agent shall be, or how he shall be designated by the corporation. In California a foreign corporation is required to make such a designation, and to give public notice thereof by filing the instrument of designation in the office of the secretary of State. After this suit was begun that agency was changed by this corporation, and the person designated, instead of being located at San Francisco, where he could be easily found, was at the mines. This change was made after the service of the injunction on the former agent, and after the court had determined that the service upon him was sufficient to bring the corporation into court. It was also made after the corporation had been guilty, as was alleged, of a violation of the injunction and after an attempt had been made to serve an order to show cause on Cahn, the old agent. The new agent was to be found only at a place difficult of access, and even there he kept himself concealed from the officer who had been charged with the duty of making the service. As he was the only person in the State on whom process could be served, his concealment to avoid service was in law the concealment of the corporation itself, and the court was left free to act accordingly.

By section 1209 of the Code of Civil Procedure of California "disobedience of any lawful judgment, order, or process of the court" is declared to be a contempt of the authority of the court. As was said by this court *In re Chiles*, 22 Wall. 157, 168, the exercise of the power to punish for contempt "has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform." This being the case, to deny the court the power of calling on a concealed corporation through its chosen attorney of record in a suit to appear and answer to a charge of contempt for disobeying the orders of the court duly entered in that suit, would be to deny it the power of vindicating its authority and enforcing obedience to its lawful commands against a party personally subjected to its jurisdiction. Although the proceeding may be

criminal in its nature, it grows out of the suit to which the person proceeded against is a party and actually represented by an attorney. Ordinarily a corporation has in such a case a right to service of an order to show cause upon some officer or agent, but if its officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. The same principle applies here that governed this court in *Reynolds* v. *United States*, 98 U. S. 145, 158, where it was held that, although the Constitution gives an accused person the right to a trial at which he shall be confronted with the witnesses against him, yet, if a witness was absent by his own wrongful procurement he could not complain if competent evidence was admitted to supply the place of that which he kept away. It was said the Constitution "grants him the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away he cannot insist on his privilege." So here the corporation was perhaps entitled to service on its officers or agents, but as this was prevented by their wrongful acts, the privilege cannot be insisted upon.

The motion to dismiss is denied, but that to affirm is granted.

O'REILLY & Another *v.* CAMPBELL & Others.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued December 4, 1885.—Decided January 11, 1886.

An appellate Territorial court, having before it findings of the court below and new matter submitted by stipulation, makes no findings and sends up the case without the new matter. *Held*, That it must be determined here on those findings. *Stringfellow* v. *Cain*, 99 U. S. 610, approved.

An objection to want of proof of a fact which, if taken at the trial, can be met at once, must be taken there, or it will be considered as waived, except as to matters going to the jurisdiction of the court.

Opinion of the Court.

When, taking findings of fact in a Territorial court in connection with the pleadings, this court can see enough, upon a fair construction of them, to justify the judgment, it is immaterial that they are loosely drawn, with intermixtures of fact and law.

The location of a vein or lode of mineral as running in one direction indicated by a notice, and for years not marked on the surface and not developed, but subsequently found to run in a different direction and to cover another claim, located after the first on ground different from that indicated by the notice and developed by years of labor and great expenditure, both made without objection from the first locator, is invalid as against the latter claim.

The facts are stated in the opinion of the court.

Mr. J. G. Sutherland and *Mr. John R. McBride* for appellants submitted on their brief.

Mr. Samuel Shellabarger for appellees argued the question of jurisdiction; and on the merits submitted on his brief.

Mr. Justice Field delivered the opinion of the court.

This action was commenced in one of the District Courts of Utah, and arose as follows:

The defendants, the owners of mining land in that Territory known as the Omaha Lode, filed in 1877 a survey and plat of it in the land office at Salt Lake City, and applied for a patent thereof under section 2325 of the Revised Statutes. The plaintiffs are the owners of adjacent mining ground known as the Highland Boy Lode, and within the prescribed time after the commencement of proceedings for a patent, they filed an adverse claim to a portion of the land covered by the defendants' survey, embracing nearly three acres. To determine the right thereto this action was instituted. The District Court gave judgment in favor of the plaintiffs for the disputed premises, with the exception of a fractional part of an acre, and the Supreme Court of the Territory affirmed the decision.

The District Court found certain facts and conclusions of law upon which it based its judgment. The Supreme Court had before it these findings, and also, by stipulation of the parties, a statement of the evidence prepared for a motion for a

new trial in the lower court. This statement is not embodied in the record, nor were any findings filed by the Supreme Court. Under the authority of *Stringfellow* v. *Cain*, 99 U. S. 610, we must, therefore, take the findings of the lower court as adopted by the Supreme Court and determine the case on their sufficiency, considered in connection with the pleadings, to support the judgment.

The objections of the appellants, for which they ask a reversal of the judgment, may be reduced to two: first, that the findings do not show that the plaintiffs are citizens of the United States; and, second, that the findings of fact are confused, insufficient, and contradictory, and also mingled with conclusions of law, instead of being separately stated as required by the statute of Utah.

It is true that the mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to become such; and had the objection been taken in the court below that such citizenship of the plaintiffs had not been shown, it might, if not obviated, have been fatal. There is, however, nothing in the record to show that it was raised below. Proof of citizenship, in proceedings of this kind, may consist, in the case of an individual, of his own affidavit thereof, and in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made upon his own knowledge, or upon information and belief. Rev. Stat. § 2321. The objection to the want of proof of that fact, if taken below, might have been met at once, if, indeed, the plaintiffs are citizens. The rule is general that an objection which might be thus met must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction of the court. The parties to this controversy own adjoining claims, and it is probable that the citizenship of each was known to the other, and, therefore, no proof on the subject was required. Be that, however, as it may, the objection, in actions of this kind, cannot be taken in this court for the first time.

As to the findings, it is true they are not drawn with skill or precision; they are loose and somewhat confused. Facts

and conclusions of law are sometimes mingled together contrary to the direction of the statute, creating the impression that the findings were prepared under the pressure of other duties, and did not receive the necessary care and attention. But findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party, and the requisite correction of the findings would seldom be denied.

The facts, which appear to be sufficiently established, are substantially as follows: In March, 1870, the Omaha mining claim was discovered by one M. R. Williams, and some prospecting was then done by him for the vein or lode. Notice of the location was posted at the time by him and eight others associated with him, and on the 24th of June following it was recorded in the records of the mining district. By it they claimed two thousand feet along the lode, one thousand feet in an easterly direction, and one thousand feet in a westerly direction from the point at which they had a shaft. The claim was not marked on the ground until 1877, and until then it was not pretended that the vein or lode ran in any other course than east and west. But when the survey was made, preliminary to the application for a patent, it was claimed that the vein ran northeast and southwest from the shaft. The vein or lode did not appear on the surface of the ground, but when its actual course was ascertained to be northeast and southwest, the survey was made to conform to it. The defendants have succeeded to the rights of the original locators, and it is found that in regard to work they and their grantors have complied with the mining laws of the district and of the United States so as to entitle them to the ground as originally located and claimed.

In 1873 the plaintiffs and the parties through whom they derive their title discovered a vein or lode on unoccupied land

of the United States, which they called the Highland Boy Lode. During the year they made an ineffectual attempt to locate it, but it is found that the location "was perfected, made good and marked on the surface in 1874 and a record thereof made." Since then they have been continuously in the possession of it, working and developing it, and have expended upon it in labor and money several thousand dollars. At the time of its discovery and of its location in 1874, the defendants had not ascertained the course of the vein or lode which they subsequently claimed to be covered by their Omaha location. When they ascertained it they made their survey in accordance with it, and included in it a portion of the claim taken up and located by the predecessors of the plaintiffs, embracing the premises in controversy. The court found that the plaintiffs or their predecessors in interest had complied with the law of the mining district and of the United States, and gave judgment in their favor.

The question is, therefore, whether the location of a vein or lode as running in a certain direction, but not marked on the surface for years, nor developed, but simply indicated by a notice, will be allowed to prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditures, without objection by the first locators, because subsequent explorations by them disclose the fact that their vein runs in a different direction from what they supposed, and in its true course covers the subsequent claim. We do not think that the first claimants under these circumstances can appropriate the second claim. It is true the locators of the Omaha claim intended to take the vein or lode, and were ignorant of its true direction. But it was incumbent upon them to make explorations and ascertain its true course, and indicate it in some public and visible manner, so that others might not be excluded from explorations on adjacent ground or be deprived of the benefit of their labor. It is a rule among miners on the public lands, so often brought to our attention and so often declared that we may speak of it as part of our judicial knowledge, that discovery and appropriation are the source of title to min-

ing claims, and that development by working is the condition of their continued possession. *Jennison* v. *Kirk*, 98 U. S. 453, 457; *Jackson* v. *Roby*, 109 U. S. 440. This was the rule before Congress by its legislation sanctioned it. Four years after the defendants had made their location the predecessors of the plaintiffs took up the Highland Boy claim and for three years they, or their successors, continuously worked and expended money upon it without objection from the defendants or any indication from them to the public that their own Omaha claim was at all interfered with. It was too late afterwards to raise the objection.

Judgment affirmed.

CARRICK *v.* LAMAR.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued January 6, 1886.—Decided January 18, 1886.

In matters which require an executive officer of the United States to exercise judgment or consideration, or which are dependent upon his discretion, no rule will issue for a mandamus to control his action.

Whether the island in the Mississippi River opposite St. Louis, known as Arsenal Island, shall be surveyed and brought into the market is a matter within executive discretion and judgment.

This was an application to the Supreme Court of the District of Columbia for a mandamus to require the Secretary of the Interior to cause a survey to be made of an island in the Mississippi opposite St. Louis. Mandamus being refused, a writ of error was sued out. The facts are stated in the opinion of the court.

Mr. W. Willoughby for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This case comes before us on writ of error to the Supreme

Court of the District of Columbia. The petitioner applied for a writ of mandamus against the Secretary of the Interior to order the survey of Arsenal Island, which is situated in the Mississippi River, opposite the City of St. Louis. He represents that he is the head of a family, over twenty-one years of age, and a citizen of the United States; that on the first of September, 1883, he made a settlement in person on the island; that it contains about 230 acres, is ten feet above high-water mark, is not subject to overflow, is suitable for agricultural purposes and subject to preëmption under the laws of the United States; that he inhabited and had improved the land and erected a dwelling-house thereon for the purpose of obtaining a title thereto; that the land is not mineral, has not been reserved by the government and never been surveyed; that there are no improvements on it except such as have been placed by him; and that the General Government has constructed certain embankments and walls, so that the island is now fast and anchored, and not liable to be changed by the action of the river.

He further states that in September, 1883, for the purpose of obtaining a survey of the island, in order that he might avail himself of the rights he had acquired as such settler, he made application, in writing, according to the rules of the Interior Department, to the Commissioner of the General Land Office, for such survey, stating that the island had never been surveyed by the government, and that he was desirous that it should be brought into the market according to the laws of Congress and the regulations of the General Land Office relating to the disposal of lands embraced in fragmentary surveys.

He further states that upon the hearing of the application it was claimed by the City of St. Louis that the island was formerly known as the Quarantine Island, and had been surveyed and set apart to the city under the provisions of acts of Congress of June 13, 1812, and of May 26, 1824, relating to school lands; but that in fact the survey made was of an island above the place now occupied by Arsenal Island, and that no part of the space embraced by that survey is now covered by the present island; and in support of this averment

states that the report made to the Secretary of the Interior by the engineer of the War Department, in charge of the government works in the vicinity, shows that the island is not embraced within that survey, and is the property not of the City of St. Louis, but of the United States.

The Commissioner of the General Land Office rejected the application, but transmitted the papers to the Secretary of the Interior for his examination and instructions. The immediate predecessor of the present Secretary concurred with the commissioner. Upon the defendant's accession to office the application was renewed and rejected. The present petition was then laid before the Supreme Court of the District, which refused the rule upon him. To reverse its judgment and obtain the rule prayed, the case was brought here.

The former Secretary in his opinion adverted to the drifting character of the island, it being alleged to have changed 1700 feet from its position when surveyed; to the works of the government to stay its drifting and give it permanence; and to the title asserted to it by the City of St. Louis. He said that even during the time of a survey what would be a monument and a boundary to-day might require a change to-morrow, and that, therefore, as long as the same causes continued to operate and make the island a mere moving mass of alluvial deposits, it was useless to establish corners and monuments, which would be subject to immediate obliteration.

The application to the present Secretary was accompanied by evidence tending to show that the island was fast and anchored; a review of the previous decision being sought on the alleged ground of error in holding the island to be a moving mass of alluvial deposits. The Secretary declined to review the decision, and further held that it would be improper to order a survey, inasmuch as the War Department, under appropriations for the improvement of the river, was operating upon the island, and it was unknown to what extent or for what purpose the government might require the same in connection with the great public work about which it was engaged.

Without treating the matters set forth in the opinions of the

Secretaries as established facts, enough appears on the face of the petition to show that a survey could not properly have been ordered, and that there was no error in refusing a rule for a mandamus.

It appears that, under acts of Congress, an island situated some distance above the site of the present island, was surveyed and set apart to the City of St. Louis. It is contended that the present island represents the one surveyed; it having been carried down the river by the action of the current. It certainly would be a matter of doubt, requiring for its solution grave consideration, how far the title of the city to the island is affected by this movement. If any doubt may rightfully exist in the mind of the Secretary on the subject, an answer is furnished to the application for a mandamus directing him to order a survey to facilitate the acquisition of that title by others.

It also appears by the petition and the papers to which it refers, and the legislation of Congress, that the goverment is engaged in works connected with the improvement of the river to stop the drifting character of the island and give it stability and permanence. Expenditures largely exceeding any possible return from the sale of the island would seem to indicate that the government designs to appropriate it to special uses, and not to open it to preëmption and settlement. In the absence of positive enactment the Secretary might, therefore, properly withhold any action tending to encourage a settlement there. This consideration alone is sufficient answer to any rule for a mandamus.

It is settled by many decisions of this court, that in matters which require judgment and consideration to be exercised by an executive officer of the government, or which are dependent upon his discretion, no rule for a mandamus to control his action will issue. It is only for ministerial acts, in the performance of which no exercise of judgment or discretion is required, that the rule will be granted. *Decatur* v. *Paulding*, 14 Pet. 497, 499; *United States* v. *Guthrie*, 17 How. 284; *United States* v. *The Commissioner*, 5 Wall. 563; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577.

Syllabus.

Within this principle there can be no question as to the correctness of the action of the Supreme Court of the District. Its judgment is, therefore,

Affirmed.

COFFEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Argued December 10, 1885.—Decided January 18, 1886.

On a writ of error to review a judgment of forfeiture, entered after a trial by a jury and a general verdict for the United States, on an information *in rem*, filed in a Circuit Court of the United States, after a seizure of the *res* on land, for a violation of the internal revenue laws, there was no bill of exceptions, and no exception to the overruling of a motion for judgment *non obstante veredicto* and of a motion to set aside the verdict and in arrest of judgment: *Held*, That questions arising on demurrers to counts in the information, and as to the jurisdiction of the Circuit Court, could be reviewed.

The Circuit Court had jurisdiction of the suit.

A general verdict on several counts in such an information, which proceeds only for the forfeiture of specific property, will be upheld, if one count is good.

An information *in rem*, founded on section 3257 of the Revised Statutes, is sufficient if it follows the words of the section, and alleges that the person named was engaged in carrying on the business of a distiller and defrauded the United States of the tax on part of the spirits distilled by him; and it is not necessary it should set forth the particular means by which he defrauded the United States of the tax, or specify the particular spirits covered by the tax, or aver that the spirits seized were distilled by him, or were the product of his distillery, or that the distillery apparatus was wrongfully used.

Rule 22 of the Rules in Admiralty prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States, on land or water; and the general rules of pleading in regard to Admiralty suits *in rem* apply to a suit *in rem* for a forfeiture, founded on a violation of the internal revenue laws, brought by the United States, after a seizure of the *res* on land.

The answer of the claimant set up a prior judgment, and sentence to pay a fine, on a plea of guilty by him to a criminal information founded on the same violations of law alleged in the information in this suit: *Held*, That no reply

Statement of Facts.

to the answer was necessary to raise an issue of fact thereon, and such issue must be regarded as having been found against the claimant, by the general verdict; and that no question in regard to such defence could be raised on a writ of error, in the absence of a demurrer to the answer, and of a bill of exceptions raising specific questions.

This was an information filed by the attorney of the United States for the District of Kentucky, on behalf of the United States, in the Circuit Court for that District, against one copper still and worm and other distilling apparatus, one distillery, with all its appurtenances, consisting of boiler, engine, copper doubler complete, with 65 tubs, also 22 barrels and 2 pieces of apple brandy, estimated at 850 gallons, said to be the property of John W. Coffey, and under seizure on land, by a deputy collector of internal revenue, as being forfeited to the United States. The original information alleged that Coffey "did have said still and worm, and distillery, engine, boiler, and other distilling apparatus, under his control and set up, and was engaged in carrying on the business of a distiller, and did then and there change and alter the stamps, marks, and brands on certain casks and packages containing distilled spirits, and did put into certain casks and packages spirits of greater strength than was indicated by the inspection mark thereon, and did fraudulently use casks and packages having inspection marks and stamps thereon, for the purpose of selling other spirits, and spirits of different quantity and quality from the spirits previously inspected therein, and then and there attempted to defraud, and did defraud, the United States of the tax on the spirits distilled by him." Under a monition and attachment the marshal arrested the property and gave the notice required by law. Coffey filed a claim to all the property as owner, and all of it except the apple brandy was released to him on a bond. He answered the information, admitting the seizure, and denying the other allegations, except that as to his having under his control and set up the property in that behalf alleged. The notice published stated that the property was seized for a violation of Rev. Stat. §§ 3257 and 3326.

Afterwards, an amended information was filed, by leave of the court. It stated that the attorney of the United States

"amends his information herein, and gives the said judges further to know," that Coffey was engaged in carrying on the business of a distiller, and did "defraud, and attempt to defraud, the United States of the tax on part of the spirits distilled by him," and that the said distillery and distillery apparatus were used by him, and that the said 22 barrels and 2 pieces of barrels of apple brandy, to wit, distilled spirits, were found on his distillery premises. It stated, in a second count, that the said distilled spirits were subject to a tax imposed by law, which had not been paid, and were found in the possession, custody and control of said Coffey for the purpose of being removed and sold by him in fraud of the internal revenue laws, and with design of avoiding the payment of said tax. It stated, in a third count, that said Coffey was an authorized distiller, and did "knowingly and wilfully omit, neglect and refuse to do or cause to be done certain things required of him by law in the carrying on and conducting of his said business, to wit, did knowingly and wilfully omit, neglect and refuse to stamp and brand, and cause and require to be stamped and branded, as required by law, a large number, to wit, two certain packages of distilled spirits, containing more than twenty gallons each, before removing the same from the warehouse where the same were stored and deposited, and before selling and disposing of the same, and did sell and dispose of and remove from said warehouse the said spirits before the tax had been paid thereon or the said packages had been properly branded and stamped," and that he owned and was interested in the said 22 barrels and 2 pieces of barrels of distilled spirits.

The claimant demurred to the first count in the amended information, as insufficient in law and fact. He demurred to the second count, as presenting no cause of forfeiture of either the distillery or distilled spirits, and as insufficient in law. He demurred to the third count, as insufficient in law and not authorized, because a specific penalty other than forfeiture is provided for the act therein charged, to wit, in section 3296 of the Revised Statutes. The court overruled the demurrers.

The claimant then answered the amended information, denying the allegations of the first count; denying the allegations

of the second count, except the one that the distilled spirits seized were subject to a tax imposed by law, which tax had not been paid; and denying the allegations of the third count, except the one as to the ownership of the distilled spirits seized.

There was a trial by a jury in October, 1881, in which the jury failed to agree on a verdict. The claimant then filed an amendment to his answer, as follows: "The claimant, John W. Coffey, amends his answer herein to the information and amendments thereto, and states that the custody, possession, and control of the articles or objects on which a tax was by law imposed, and complained of in the information of plaintiffs, and found in his possession, to wit, twenty-two barrels (22) and two pieces of barrels of brandy, distilled spirits, and charged to have been in his possession for the purpose of selling the same in fraud of the internal revenue laws, and with design to avoid the payment of the taxes thereon, or sold or removed by him in fraud of the internal revenue laws, and the various assignments of breaches and violations of law now considered, are the same goods and wares and objects, or commodities and distilled spirits, named and set out in an information filed against him, the said John W. Coffey, at the February term of this court, 1881, and prior to the filing of the information herein. That all of the said twenty-two barrels and two pieces of barrels of brandy, distilled spirits, found in his custody, control, and possession, are the same found in his control and possession, prior to the information filed against him at the February term, 1881, of this court, and that all the acts complained of in plaintiffs' information herein might have been established, if said allegations be true, under the said information, either upon the counts in said information based upon sections 3450 or 3452 or 3257. That all the evidence which would be necessary to establish, and competent under, the various assignments of breaches and of intended frauds in plaintiffs' information herein, would be competent under and would tend to establish the allegations of said information at said February term, 1881. That the various assignments [of] frauds and attempts or intents to defraud the United States of the tax imposed upon said distilled spirits, to wit, the 22 barrels and two pieces of barrels

of apple brandy, relate to the same subject-matter and are based upon the same transaction as the various allegations in said information at the February term, 1881, contained, so far as they relate to offences under sections 3452, 3453, and 3257, or either of them, and that at the time when the said information at the February term, 1881, was drawn, considered, and presented by the attorney for the United States, all the facts which would be competent to sustain the allegations of plaintiffs' information herein were known to and within the possession of the representatives of the United States. And the claimant, John W. Coffey, says that the United States ought not to maintain this action for the penalty, punishment, and forfeiture, or either of them, claimed in sections 3450, 3453, 3457, or 3257, for, at the February term, 1881, an information was found, as recited above, in the district of Kentucky, at Louisville, and in this court, against this claimant, John W. Coffey, the claimant named herein, the counts of said information alleging that he had in his possession a large quantity of distilled spirits upon which a tax was by law imposed, and had not then been paid, with intent to defraud, or for the purpose of defrauding, the United States of the tax thereon, and with design to avoid the payment of the tax thereon, on a part of said spirits, or on the spirits so in his possession. That at said term of said court the defendant plead guilty to the charges and counts in said information, and was adjudged and sentenced to pay a fine of five hundred dollars ($500), which judgment was the full penalty and punishment for the violations of law imposed on him for the alleged offences charged in said information, which were the same violations and charges, offences, and allegations of fraud, design to avoid the payment of the taxes due and imposed on said spirits, and allegations of intent to sell the same in fraud of the internal revenue laws of the United States, and he pleads and relies on the facts herein set forth as a bar to plaintiffs' claim herein, and asks the same to be dismissed, with all proper relief, &c."

Four months after this amendment to this answer was filed, the case was tried by a jury, which rendered a general verdict for the plaintiffs. The claimant thereupon moved for a judg-

ment, notwithstanding the verdict, and at a later day moved to set aside the verdict and in arrest of judgment, on these grounds: "(1) The verdict is not authorized by law and the facts in the case. (2) Because the defendant has been tried for the same offence herein charged, in a former proceeding, a criminal information, and this court has no jurisdiction in forfeitures. (3) That the information itself is insufficient in law to sustain the action." The court overruled the motions, and entered a judgment condemning as forfeited the property attached, "for the reasons and causes in the information and amended information specified," and awarding costs against the claimant. To reverse this judgment the claimant sued out a writ of error.

Mr. Gabriel C. Wharton, *Mr. Samuel McKee*, and *Mr. T. T. Wharton* for plaintiff in error submitted on their brief.

Mr. Assistant Attorney-General Maury for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court. After stating the facts in the language reported above, he continued:

There is no bill of exceptions in the record, and no exception to the overruling of the motions; but the questions arising on the demurrers to the counts of the amended information, and the question as to the jurisdiction of the Circuit Court, are open for consideration.

The objection to the jurisdiction is not well taken. By § 629 of the Revised Statutes, subd. 4, original jurisdiction is given to the Circuit Courts "of all causes arising under any law providing internal revenue." In Title XXXV. of the Revised Statutes, concerning "Internal Revenue," § 3213 provides that "all suits for fines, penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any Circuit or District Court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before

any other court of competent jurisdiction." By § 563, subd. 1, jurisdiction is given to the District Courts "of all suits for penalties and forfeitures incurred under any law of the United States." By subd. 8 of § 563 jurisdiction is given to the District Courts of all seizures on land, and it is enacted that such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such seizures is given to the Circuit Courts. By subd. 4 of § 629, jurisdiction is denied to the Circuit Courts of suits for penalties and forfeitures arising under any act providing for revenue from imports and tonnage; but they have it in suits for penalties and forfeitures arising under the internal revenue laws.

Although, in practice, suits *in rem* for forfeitures for violations of the internal revenue laws are more frequently brought in the District Courts, yet cases are to be found of such suits originally brought in the Circuit Courts, where jurisdiction was taken and was not questioned. Such cases are *United States* v. *Two Tons of Coal, &c.*, 5 Blatchford, 386, in the Eastern District of New York, in 1867, before Judge Benedict; *United States* v. *One Still, &c.*, 5 Blatchford, 403, and *United States* v. 508 *Barrels of Distilled Spirits*, 5 Blatchford, 407, and *United States* v. 6 *Barrels of Distilled Spirits*, 5 Blatchford, 542, in the same district in 1867, before Mr. Justice Nelson and Judge Benedict; *United States* v. 7 *Barrels of Distilled Oil, &c.*, 6 Blatchford, 174, in the same district, in 1867, before Judge Benedict; and *United States* v. 200 *Barrels of Whiskey*, 2 Woods, 54, in the District of Louisiana, in 1874, before Mr. Justice Woods, then Circuit Judge. Like jurisdiction of a suit *in personam* for a violation of the internal revenue laws was taken in 1877, by the Circuit Court for the Eastern District of Missouri, held by Mr. Justice Miller and Judge Dillon, in *United States* v. *McKee*, 4 Dillon, 128.

It has been adjudged by this court, that informations under the revenue laws for the forfeiture of goods, which seek no judgment of fine or imprisonment against any person, though civil actions and not strictly criminal cases, are so far in the nature of criminal proceedings as to come within the rule, that a general verdict, upon several counts, seeking in different

forms one object, must be upheld if one count is good. *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216.

In this case, the first count in the amended information is good. It is founded on § 3257 of the Revised Statutes, which provides as follows: "Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits . . . found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years." The counts of the amended information are amendments of and additions to the original information, and the allegations of the latter as to the seizure of the property, on land, by the deputy collector, and as to the fact of forfeiture, and the prayer for process, and for a decree of forfeiture, form part of the amended information and apply to the counts therein. The language of the first count of the amended information follows that of § 3257, and is, we think, sufficient, against the general objection taken by the demurrer, that it is insufficient. In *United States* v. *Simmons*, 96 U. S. 360, an indictment founded on § 3281 of the Revised Statutes, alleged that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace," &c. Section 3281 provides that every person who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, shall be fined and imprisoned. This court held that the indictment was sufficient to authorize judgment, and that it was not necessary to state the particular means by which the United States were to be defrauded of the tax. So, in this case, it was not necessary, under § 3257, to set forth the particular means by which the claimant defrauded and attempted to

defraud the United States of the tax, or to specify the particular spirits covered by the tax. The first count of the amended information is in substantial compliance with Rule 22 of the Rules in Admiralty. That Rule prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States on land or water; and the general rules of pleading in regard to Admiralty suits *in rem* apply to a suit *in rem* for a forfeiture, brought by the United States, after a seizure on land. *The Sarah*, 8 Wheat. 391; *Union Ins. Co.* v. *United States*, 6 Wall. 759, 765; *Armstrong's Foundry*, 6 Wall. 766, 769; *Morris' Cotton*, 8 Wall. 507, 511. It was not necessary to aver, in the information, that the distilled spirits found on the claimant's distillery premises, and seized, were distilled by him, or were the product of his distillery, or that the distillery apparatus was wrongfully used; because § 3257 does not make these facts elements of the causes of forfeiture denounced by it. The only necessary elements are, that the person shall be engaged in carrying on the business of a distiller, and that he shall defraud, or attempt to defraud, the United States of the tax on the spirits distilled by him. The answer admits that the claimant owned the property seized.

As to the plea of a former conviction, the proceedings being kindred to those in a suit in Admiralty *in rem*, so far as the pleadings are concerned, no reply or replication to the answer was necessary to raise an issue of fact on the matters averred in it. New matter in an answer is considered as denied by the libellant. Rule 51, in Admiralty. The issue of fact as to the former conviction must be held to have been found against the claimant, by the general verdict; and no question in regard to the defence set up can be raised, in the absence of a demurrer to the answer, and of a bill of exceptions raising specific questions.

Judgment affirmed.

COFFEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Argued December 10, 1885.—Decided January 18, 1886.

A judgment of forfeiture, on an information *in rem*, for a violation of the internal revenue laws, filed by the United States, in a Circuit Court of the United States, after a seizure of the *res* on land, was rendered after a general verdict. On a writ of error by the claimant, there being no bill of exceptions: *Held*, that questions as to the sufficiency of the information, and the regularity of the proceedings, not having been formally raised in the Circuit Court, could not be raised in this court.

After a specific denial, by answer, of the allegations of the information, the claimant cannot, in a court of error, on such a record as that above mentioned, be heard to say that he did not know the charge made in the information and could not defend against it.

After a general verdict, one good count in the information is sufficient to uphold the judgment, on such a record.

The Circuit Court had jurisdiction of the suit.

The claimant set up, by answer, a prior judgment of acquittal on a criminal information against him by the United States, in the same Circuit Court, founded on the same sections of the Revised Statutes sued on in this suit, and alleged that such criminal information contained charges of all of the violations of law alleged in the information in this suit. There was a general demurrer to the answer. After the general verdict for the United States, the claimant moved for judgment *non obstante veredicto*. The motion was denied. There was no bill of exceptions. On a writ of error: *Held*, That, although one section counted on in the information declared, as a consequence of the commission of the prohibited act (1) that certain specific property should be forfeited, and (2) that the offender should be fined and imprisoned, yet, as the issue raised as to the existence of the act or fact had been tried in a criminal proceeding against the claimant, instituted by the United States, and a judgment of acquittal rendered in his favor, that judgment was conclusive in his favor in this suit; and that the judgment of the Circuit Court must be reversed, and the case be remanded, with a direction to enter a judgment for the claimant, dismissing the information, and to take proper proceedings in regard to restoring the property attached.

This was an information filed by the attorney of the United States for the District of Kentucky, on behalf of the United States, in the Circuit Court for that District, against 10 barrels of apple brandy, 1 apple mill, 37 tubs, and 2 copper stills, said

to be the property of A. G. Coffey, and under seizure, on land, by a deputy collector of internal revenue, as being forfeited to the United States. The first count of the information alleged that Coffey, being engaged in carrying on the business of a distiller, defrauded, and attempted to defraud, the United States of the tax on part of the spirits distilled by him, and that the two copper stills and other distillery apparatus were used by him, and the distilled spirits were found on his distillery premises. The second count alleged that the distilled spirits, in respect of which a tax was imposed by law, and which tax had not been paid, were removed, deposited and concealed with intent to defraud the United States of part of such tax, and that the two stills and other distilling apparatus, vessels, and utensils were proper, and intended to be made use of, for and in the making of such distilled spirits. The third count alleged that the distilled spirits, on which a tax was imposed by law, were found in the possession of Coffey for the purpose of being sold and removed by him in fraud of the internal revenue laws, and with the design to avoid the payment of said tax, and that the two copper stills, and other tools and property, so seized, were in the place, yard, and enclosure where the distilled spirits were found.

The first count was founded on § 3257 of the Revised Statutes, which provides as follows: "Whenever any person engaged in carrying on the business of a distiller defrauds, or attempts to defraud, the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits . . . found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

The second count was founded on § 3450 of the Revised Statutes, which provides as follows: "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, are removed, or are deposited or concealed in any

place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited. . . . And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. . . ."

The third count was founded on § 3453 of the Revised Statutes, which provides as follows: "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession or custody, or within the control, of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district . . . and shall be forfeited to the United States; . . . and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure, where such articles . . . are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding *in rem*, in the Circuit Court or District Court of the United States for the district where such seizure is made."

Under a monition and attachment the marshal arrested the property and gave the notice required by law. Coffey filed a claim to all the property except one barrel of the distilled spirits, as owner, and an answer to the information. The answer denied the allegations of the three counts of the information, and in a fourth paragraph set up the following defence: "Fourth. And further answering, the said claimant states, that the alleged removals and concealments of distilled spirits set forth in the various assignments and charges of fraud, and attempts at and intent of fraud, in carrying on and engaging in the business of a distiller, and in removals, disposing, and concealing of distilled sprits, alleged against him

and now answered, are the same removals, concealments, and depositing, and same carrying on of business of a distiller, as are recited in a criminal information filed against him, at the October term of this court, 1881, and that all of said 'removals,' 'concealments,' 'depositing,' and 'intents to defraud,' the same complained of in plaintiffs' information herein, might have been established, if said allegations be true, under sections 3450, 3452, 3296, or 3257, upon which or some one or more of which the counts in said criminal information were based; that all of the evidence which would be necessary to establish, and competent, under the various assignments and charges of fraud set out in plaintiffs' libel herein, would also be competent and would tend to establish the allegations of said criminal information; that the various charges of fraud and causes of forfeiture alleged by plaintiffs herein relate to the same subject-matter, and are based on the same transactions, as the various allegations in said criminal information contained, so far as they relate to alleged offences under sections 3450, 3452, 3453, 3296, or 3257; and that, at the time when said criminal information was drawn by the attorney for the United States, and at the time it was considered by him, all of the facts which would be competent to sustain the allegations of plaintiffs' libel herein were known to and within the possession of the representative of the United States. And he avers and says, that the United States ought not to maintain its action herein for the penalty denounced in sections 3257, 3450, and 3453, for, at the October term, 1881, in this circuit and district and in this court herein, a criminal information, the same above referred to, was found against him, the counts of which were based on sections 3257, 3256, 3450, 3453, and 3296, or on some one or more of them, alleging the carrying on the business of a distiller with intent to defraud the United States, and that he was concerned in depositing, concealing, and removing a large quantity of distilled spirits, with intent to defraud the United States of the taxes imposed thereon, and having had in his custody a large quantity of distilled spirits, with the design to avoid the payment of the taxes imposed thereon; that the counts in said criminal information contained the same charges,

in substance and effect, and are the same allegations of offences and frauds, and attempts at frauds, and are founded on the same sections of the statutes of the United States, as the matters and things herein alleged in plaintiffs' libel; and he says that all and singular of said matters at said term and in this court were tried and inquired into and fully heard, and, on the hearing thereof, the jury, duly empanelled and sworn, found this defendant not guilty, and the court rendered a judgment acquitting this defendant of the charges of frauds and attempts at frauds therein alleged; and all of which are the same frauds now set out by plaintiffs and herein answered by this defendant."

The sections referred to in this fourth paragraph of the answer, other than those above set forth, are as follows:

"SEC. 3256. Whenever any person evades, or attempts to evade, the payment of the tax on any distilled spirits, in any manner whatever, he shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded."

"SEC. 3296. Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits, authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months, nor more than three years."

"SEC. 3452. Every person who shall have in his custody or possession any goods, wares, merchandise, articles, or objects on which taxes are imposed by law, for the purpose of selling the same in fraud of the internal revenue laws, or with design to avoid payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudently attempted to be evaded."

The United States filed a demurrer to the fourth paragraph of the answer, "because it does not state facts sufficient to constitute a defence."

Eight days afterwards the issues of fact were tried by a jury, which found a general verdict for the United States. The claimant then moved the court to set aside the verdict, alleging as grounds, among others, that the court had no jurisdiction, and that the information was insufficient. He also moved for judgment on the pleadings, notwithstanding the verdict. The court made an order denying the motions, and entering a judgment condemning the property as forfeited to the United States, and awarding costs against Coffey. There was no bill of exceptions, but the claimant sued out a writ of error to review the judgment.

Mr. G. C. Wharton Mr. T. T. Alexander and *Mr. Samuel McKee* for plaintiff in error submitted on their brief.

Mr. Solicitor-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The assignment of errors filed in this court asserts these propositions: (1) that the information is not sufficient in law; (2) that the Circuit Court had no jurisdiction of the subject-matter of the action, or of the property seized, or of the person of the claimant; (3) that there was no sufficient monition, attachment or seizure of the property, and no legal publication and notice of the seizure, and no valuation of the goods, as required by law; (4) that it was error to submit the case to the jury before the demurrer to the fourth paragraph of the answer was disposed of; (5) that it was error to overrule said demurrer.

In regard to the 1st, 3d and 4th assignments, the questions presented by them were not formally raised in the Circuit Court, and are not presented by a bill of exceptions, and cannot be considered here.

As to the 1st assignment, that respecting the insufficiency of the information, it is supposed, by the claimant, that his motion for judgment, notwithstanding the verdict, raises that question. But there is no exception to the order of the court denying that motion. There is an exception to the written opinion of the court overruling a motion for a new trial, and to an order made, after judgment, overruling a motion made, after judgment, for a new trial. But, there is no other exception in the record. Assuming, however, that the point as to the information can be raised here, it is urged that the first count, that founded on section 3257, is insufficient because the count does not set forth the facts from which the court can infer that Coffey defrauded or attempted to defraud the United States. It is a sufficient answer to this objection to say, that the claimant, in his answer, denies the allegations of the first count, specifically, as they are made. After that, he cannot, in a court of error, on such a record as this, be heard to say that he did not know the charge made, and could not defend against it, although, if he had excepted or demurred to the count, the objection might have been presented for consideration. After a general verdict for the United States, one good count in the information is sufficient to uphold the judgment. *Coffey* v. *United States*, *ante*, 427.

The objection to the jurisdiction of the Circuit Court is overruled, in accordance with the decision in *Coffey* v. *United States*, *ante*, 427.

The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit. The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.

It is true that § 3257, after denouncing the single act of a dis-

tiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited: and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

When an acquittal in a criminal prosecution in behalf of the Government is pleaded, or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason, that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same.

Whether a conviction on an indictment under § 3257 could

be availed of as conclusive evidence, in law, for a condemnation, in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence, in law, for a conviction on a subsequent indictment under it, are questions not now presented.

The conclusion we have reached is in consonance with the principles laid down by this court in *Gelston* v. *Hoyt*, 3 Wheat., 246. In that case Hoyt sued Gelston, the collector, and Schenck, the surveyor, of the port of New York, in trespass, for taking and carrying away a vessel. The defendants pleaded that they had seized the vessel, by authority of the President, as forfeited for a violation of the statute against fitting out a vessel to commit hostilities against a friendly foreign power, and that she had been so fitted out and was forfeited. At the trial it was shown, that, after seizure, the vessel was proceeded against by the United States, by libel, in the United States District Court, for the alleged offence, and Hoyt had claimed her, and she was acquitted, and ordered to be restored, and a certificate of reasonable cause of seizure was denied. The defendants offered to prove facts showing the forfeiture. The trial Court excluded the evidence. In this court, the question was presented whether the sentence of the District Court was or was not conclusive on the defendants, on the question of forfeiture. This court held that the sentence of acquittal, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions could not again be litigated in any forum.

This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between

them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex* v. *Duchess of Kingston*, 20 Howell's State Trials, 355, 538, and which were formulated thus: The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court, and had jurisdiction, and the judgment was directly on the point now involved, and between the same parties.

In a case before Mr. Justice Miller and Judge Dillon, *United States* v. *McKee*, 4 Dillon, 128, the defendant had been convicted and punished under a section of the Revised Statutes, for conspiring with certain distillers to defraud the United States, by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The two alleged transactions were but one; and it was held that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

There ought to have been a judgment for the claimant on the demurrer to the fourth paragraph of the answer, notwithstanding the verdict, and, as the facts set forth in that paragraph were admitted by the demurrer, and constituted a defence to the suit,

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to enter a judgment for the claimant, dismissing the information, and to take such proceedings in regard to restoring the property attached as may be proper and not inconsistent with this opinion.

WALLING *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Argued December 3, 1884.—Decided January 18, 1886.

A tax imposed by a statute of a State upon an occupation, which necessarily discriminates against the introduction and sale of the products of another State or against the citizens of another State, is repugnant to the Constitution of the United States.

The police power of a State to regulate the sale of intoxicating liquors and preserve the public health and morals does not warrant the enactment of laws infringing positive provisions of the Constitution of the United States.

A State statute which imposes a tax upon persons who, not residing or having their principal place of business within the State, engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State, is a regulation in restraint of commerce repugnant to the Constitution of the United States: and the defect is not cured by a subsequent enactment, imposing a greater tax upon all persons within the State engaged in the business of manufacturing or selling such liquors therein.

In 1875 the legislature of the State of Michigan passed an act relating to the sale of liquors in that State to be shipped into the State by persons not residing therein, known as Act No. 226 of the Session Laws of 1875, of which the following is a copy:

"An Act to impose a tax on the business of selling spirituous and intoxicating, malt, brewed, and fermented liquors in the State of Michigan to be shipped from without this state.

"Section 1. *The People of the State of Michigan enact:* That every person who shall come into, or being in this state, shall engage in the business of selling spirituous and intoxicating, malt, brewed, or fermented liquors to citizens or residents of this state, at wholesale, or of soliciting or taking orders from citizens or residents of this state for any such liquors, to be shipped into this state, or furnished, or supplied at wholesale to any person within this state, not having his, their, or its

principal place of business within this state, shall, on or before the fourth Friday of June in each year, pay a tax of three hundred dollars if engaged in selling, or soliciting, or taking orders for the sale of such spirituous and intoxicating liquors, and one hundred dollars for malt, brewed, or fermented liquors. Such tax shall be paid to the Auditor General and be by him paid into the state treasury, to the credit of the general fund.

"SEC. 2. Upon the payment of such tax, the Auditor General shall issue to such person a receipt therefor, and in case of loss thereof, a duplicate, when required by the person to whom the original receipt was issued. Every person making sales, or soliciting, or taking orders, as in the first section of this act provided, shall exhibit such receipt to every person to whom he makes sale, or from whom he takes or solicits orders for such liquors, and shall exhibit such receipt to any supervisor, justice of the peace, sheriff, under sheriff or deputy sheriff, city or village marshal, chief of police, policeman, or constable, when required so to do, during business hours.

"SEC. 3. Any person liable to pay any tax under this act, who shall sell any liquors, or solicit, or take orders for liquors to be shipped from without this state to any person within this state, furnished or supplied by a person, copartnership, association, or corporation, not resident in, or having his, their, or its principal place of business within this state, without the tax herein provided for having been paid, and having in his possession and exhibiting the receipt therefor, or a duplicate thereof; and any person residing or being in this state who shall purchase liquors from a person liable to pay a tax under this act, who has not paid such tax, or shall give an order for liquors to such person liable to pay a tax under this act, which order is to be filled, and such liquors are to be shipped from without this state to a person within this state, furnished or supplied by a person, copartnership, association, or corporation, not resident in or having his, their, or its principal place of business within this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars; and in default of payment thereof, shall be imprisoned not less than

ten nor more than ninety days, or both such fine and imprisonment, in the discretion of the court.

"SEC. 4. Selling at wholesale shall be deemed to mean and include all sales of such spirituous and intoxicating, malt, brewed or fermented liquors in quantities of five gallons or over, or one dozen quart bottles or more, or soliciting orders therefor at any one time of any person."

In addition to the foregoing act there was another independent law in operation in Michigan in 1883, being an act passed May 31, 1879, entitled "An act to provide for the taxation of the business of manufacturing and selling spirituous and intoxicating, malt, brewed, or fermented liquors," and to repeal a previous act for the same purpose, passed in 1875. Sess. Laws of 1879, 293. The act of 1879 was amended by an act passed May 19th, 1881. Howell's Annotated Statutes, § 1281. As amended it reads as follows:

"§ 1281. Sec. 1. In all townships, cities, and villages of this state there shall be paid annually the following tax upon the business of manufacturing, selling, or keeping for sale, by all persons whose business, in whole or in part, consists in selling or keeping for sale or manufacturing distilled or malt liquors, or mixed liquors, as follows: Upon the business of selling or offering for sale spirituous or intoxicating liquors, or mixed liquors, by retail, or any mixture or compound, excepting proprietary patent medicines, which in whole or in part consists of spirituous or intoxicating liquors, the sum of three hundred dollars per annum; upon the business of selling or offering for sale, by retail, any malt, brewed, or fermented liquors, two hundred dollars per annum; upon the business of selling brewed or malt liquors at wholesale, or at wholesale and retail, two hundred dollars per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, or at wholesale and retail, five hundred dollars per annum; upon the business of manufacturing brewed or malt liquors for sale, if the quantity manufactured be less than fifteen hundred barrels, sixty-five dollars per annum, and twenty-five dollars upon each additional thousand barrels, or part thereof; upon the business of manufacturing for sale spirituous or intoxicating

liquors, five hundred dollars per annum. No person paying a tax on spirituous or intoxicating liquors, under this act, shall be liable to pay any tax on the sale of malt, brewed, or fermented liquors. No person paying a manufacturer's tax on brewed or malt liquors, under this act, shall be liable to pay a wholesale dealer's tax on the same." Howell's Annotated Statutes of Mich., 378.

It was not contended that this act altered or affected the act of 1875, on which the prosecution against Walling was based, except so far as it might have the effect of removing the discrimination against the citizens or products of other States, which would be produced by the act of 1875 standing alone. The counsel for the State contended that the effect of the act of 1881 was, not only to annul any such discrimination, but to create a discrimination against the citizens and products of Michigan in favor of the citizens and products of other States. Whether this was so is a question discussed in the opinion.

In June, 1883, Walling, the plaintiff in error, was prosecuted under the act of 1875, No. 226, being charged in one count of the complaint with selling at wholesale without license, and in another count with soliciting and taking orders for the sale, without license, and at wholesale, of spirituous and intoxicating liquors, to be shipped from out of the State, to wit, from Chicago, in the State of Illinois, into the State of Michigan, and furnished and supplied to citizens and residents of said State by Cavanaugh & Co., a firm doing business in Chicago, not residents of Michigan and not having its principal place of business therein. The prosecution was instituted in the Police Court of Grand Rapids, and Walling was convicted and sentenced to pay a fine, and to be imprisoned in default of payment. He appealed to the county Circuit Court, in which the case was tried by a jury, who, under the charge of the court, rendered a verdict of guilty. Exceptions being taken, the case was carried to the Supreme Court of Michigan, which adjudged that there was no error in the proceedings, and directed judgment to be entered against the respondent. The decision of the Supreme Court was brought here by writ of error.

By the bill of exceptions it appeared that one Chapin Pease was

called as a witness for the prosecution, and was asked what business the respondent (Walling) was engaged in. The respondent objected to the giving of testimony under the complaint, on the ground that the act of 1875 was repugnant to the Constitution of the United States and therefore void; that it was in conflict with paragraph 3 of Section 8, Article 1, giving Congress power to regulate commerce, &c.; paragraph 2 of Section 10, Article 1, prohibiting *ex post facto* laws and laws impairing the obligation of contracts; and paragraph 1 of Section 2, Article 4, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The defendant also objected to the admission of any testimony, because the law referred to is in conflict with the State constitution. All the objections were overruled, and exceptions were duly taken. The witness then testified that Walling, on June 1, 1883, and before and since that time, was engaged as a traveling salesman for the firm of Cavanaugh & Co., of Chicago, Illinois, (shown to be wholesale liquor merchants residing in Chicago,) and that his business was that of selling liquor at wholesale for that firm; that the place of business of Cavanaugh & Co. was in Chicago, and that the firm had no place of business in Michigan; that on the first of June, 1883, Walling solicited the witness's order for a barrel of whiskey to be shipped to him by Cavanaugh & Co. from the city of Chicago, and from without the State of Michigan; that witness gave his order for a barrel of whiskey, and the same was shipped to him by said firm from Chicago, and he paid for the same, and that Walling exhibited to witness no receipt from the Auditor-General of Michigan to show that he had paid the tax required by the statute. It was also shown that Walling had never paid any such tax nor received any such receipt.

The evidence being closed, the respondent, on the ground of the alleged conflict of the law with the Constitution of the United States, made various distinct applications to the court: first, to strike out the evidence and grant him a discharge; secondly, to charge the jury that the statute of 1875 was in conflict with the Constitution of the United States and therefore void, and, therefore, that their verdict should be not guilty; thirdly to

charge that, under the facts disclosed, the jury should find the respondent not guilty. These applications were severally refused and exceptions taken. The court then charged the jury that the act in question must be regarded as within the power of the legislature, and as being a valid statute; and that if they should find that the evidence sustained the allegations of the complaint they must find the respondent guilty; to which charge the respondent excepted.

Mr. O. W. Powers for plaintiff in error.

Mr. J. J. Van Riper, Attorney-General of the State of Michigan, for defendant in error.

I. The statute in question does not conflict with the provision in the Constitution which grants to Congress the power to regulate commerce among the several States. Art. I., sec. 8, Par. 3. It is well settled that a statute taxing or prohibiting the sale of intoxicating liquors is not a regulation of commerce, but an exercise of police power. *Commonwealth* v. *Kimball*, 24 Pick. 359, 363; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *License Cases*, 5 How. 504; *Gibbons* v. *Ogden*, 9 Wheat. 1, 205; *Passenger Cases*, 5 How. 283. In the *License Cases* almost every phase of the liquor question, and the power of States to legislate on it was fully discussed, and their absolute control over it was settled. In considering the questions raised in this case it is important to remark that the tax is not to be levied solely upon non-residents, but upon every person coming into or being in the State, and engaging in the business. There is no unjust discrimination against citizens of other States. It is true that in order to be liable under the statute, the person soliciting orders or selling must do so for persons or corporations non-resident and not having their principal place of business in the State. But the tax is not upon the non-resident party who ships the goods, but upon the person soliciting whether resident or non-resident, and is therefore not a tax upon commerce, within the decisions cited above. It is a tax upon *occupations*, not upon *commerce*. The essential right of the State to levy and collect such a tax is recognized in the

following cases: *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Brown* v. *Maryland*, 12 Wheat. 419, 444; *License Cases*, 5 How. 504, 593; *Nathan* v. *Louisiana*, 8 How. 73, 80; *Hinson* v. *Lott*, 8 Wall. 148; *Machine Co.* v. *Gage*, 100 U. S. 676.

It may be claimed that in this case it is a tax upon the business and not upon the individual, and is therefore an attempt to regulate commerce among the several States; and that *Brown* v. *Maryland* above cited settles the point that taxation upon the individual is a tax upon the business; but upon examination of this case it will be found that the facts are not similar. The State of Maryland required every *importer* of goods to pay a license fee of fifty dollars before he should be permitted to sell a package of *imported* goods. This was held to be a tax upon importation. It cannot be maintained that a tax like that imposed by Michigan upon persons soliciting orders for liquors to be shipped into the State by non-residents, stands upon the same footing as the tax declared unconstitutional in *Brown* v. *Maryland*. We tax neither *importer* nor *imports*. It is well settled that the terms "imports" and "exports" do not refer to goods brought from one State into another. *Woodruff* v. *Parham*, 8 Wall. 123; *License Cases*, above cited. The latter cases even settle that a State may require a license to sell spirits of foreign manufacture, and that a State statute imposing a tax for such license is not a regulation of commerce, but an exercise of the reserved police power. See the remarks of McLean, J., in the *Passenger Cases* on page 283, 7 How.; and of Marshal, C. J., in *Gibbons* v. *Ogden*, on page 208, 9 Wheat.

In *Pierce* v. *New Hampshire*, 5 How. 593, the third of the license cases, the power of a State to tax goods brought from, and manufactured in another State, was fully discussed and settled. The defendants in that case imported a barrel of gin from the State of Massachusetts to the State of New Hampshire, and there sold it in the same barrel, and claimed that they could not be required to pay a license tax upon such sale. The court, however, sustained the law of New Hampshire, and held that the statute imposing the tax was not in conflict with the constitution, distinguishing the case from *Brown* v. *Mary-*

land. In the latter case there was a discrimination against the persons taxed. In the present case the discrimination is in favor of the non-resident, and against the resident citizen engaged in the business of selling liquors at wholesale, within the State. In every case in which there has been no unjust discrimination between the tax or license imposed upon goods within the State imposing it, and goods brought into it from other States, the tax has been upheld as constitutional. *Woodruff* v. *Parham*, 8 Wall. 123; *Webber* v. *Virginia*, 103 U. S. 344; *Ward* v. *Maryland*, 12 Wall. 418; *People* v. *Waring*, 3 Keyes, 374; *Gibbons* v. *Ogden*, 9 Wheat. 1, 199; *Nathan* v. *Louisiana*, 8 How. 73, 82; *Hinson* v. *Lott*, 8 Wall. 148, 151; *Connor* v. *Elliott*, 18 How. 591, 593; *State* v. *North*, 27 Missouri, 464, 467; *Paul* v. *Virginia*, 8 Wall. 168, 177; *Guy* v. *Baltimore*, 100 U. S. 434; *Machine Co.* v. *Gage*, 100 U. S. 676.

II. The Michigan statute does not conflict with that provision of the Constitution which prohibits States, without the consent of Congress, from laying imposts or duties on imports or exports. Art. I., sec. 10, par. 2. It has been held by this court, that the terms "imposts" and "duties," refer solely to the duties upon foreign and imported articles, and do not refer to taxes in the nature of license taxes, or special taxes which grow out of the internal police regulations of the State; and that the terms "imports" and "exports" do not refer to goods brought from one State into another, but only to articles imported from, or exported to, foreign countries. *Brown* v. *Maryland*; *Woodruff* v. *Parham*; *License Cases*; all cited above.

III. Nor does it conflict with the provision of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. IV., sec. 2, par. 1. It will be seen by reference to the act in question, that the person selling, or soliciting the sale of intoxicating liquors at wholesale, to be shipped into this State by non-resident dealers, is required to pay a tax of $300; and for selling malt, brewed, or fermented liquors, the sum of $100, while the resident wholesale dealer is, by the above section, required to pay a tax of $500; and for malt, brewed, or fer-

mented liquors, a tax of $200, from which it will be found that the non-resident may sell intoxicating liquors at wholesale, by paying only three-fifths of what is required of the resident dealer, and may sell malt and fermented liquors by paying one-half of that required of the resident dealer. This discrimination is all in favor of the non-resident, and so long as the non-resident does not pay a greater sum than the resident, there is no unjust discrimination against him. He has no cause for complaint, and is not deprived of the privileges and immunities of citizens of this State. *Guy* v. *Baltimore; Ward* v. *Maryland;* both cited above.

Mr. Justice Bradley delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The single question, now before us for consideration is, whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself, and without having reference to the act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri*, 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product, or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product, or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott*, 8 Wall. 148; *Ward* v. *Maryland*, 12 Wall. 418; *Guy* v. *Baltimore*, 100 U. S. 434, 438; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Webber* v. *Virginia*, 103 U. S. 344.

A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several States and with the Indian tribes, is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions on the subject, the most important of which are collected in *Brown* v. *Houston*, 114 U. S. 622, 631, and need not be cited here. We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Welton* v. *Missouri*, 91 U. S. 275, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Brown* v. *Houston*, 114 U. S. 622, 631. In Mr. Justice Johnson's concurring opinion in the case of *Gibbons* v. *Ogden*, 9 Wheaton, 1, 222, his whole argument (which is a very able one) is based on the idea that the power to regulate commerce with foreign nations and among the several States was by the Constitution surrendered by the States to the United States, and therefore, must necessarily be exclusive, and that where Congress has failed to restrict such commerce, it must necessarily be free. He says: "Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by act of Congress, any otherwise than by not being forbidden." "The grant to Livingston and Fulton interferes with the freedom of intercourse among the states." The same sentiment was expressed by Mr. Justice Grier in his opinion in the *Passenger Cases*, 7 How. 283, 462, where he says: "And to what weight is that argument entitled, which assumes, that because

it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each state may put as many restrictions upon it as she pleases?" And one of the four propositions with which the opinion concludes is as follows, to wit: "4th. That Congress has regulated commerce and intercourse with foreign nations and between the several states, by willing that it shall be free, and it is, therefore, not left to the discretion of each state in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

The argument of these eminent judges, that where Congress has exclusive power to regulate commerce, its non-action is equivalent to a declaration that commerce shall be free, (and we quote their opinions for no other purpose,) seems to be irrefragable. Of course the broad conclusions to which they arrive, that the power is exclusive in all cases, are subject to the modifications established by subsequent decisions, such as *Cooley* v. *The Board of Wardens*, 12 How. 299, and others.

The law is well summarized in the opinion of this court delivered by Mr. Justice Field in *County of Mobile* v. *Kimball*, 102 U. S. 691, 697, where it is said: "The subjects indeed upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discrim-

inating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."

Many State decisions might also be cited in which the same doctrine is announced. Thus in the case of *Higgins* v. *Three Hundred Casks of Lime*, 130 Mass. 1, 3, it is said: "The result of all the decisions is, that the several states have no authority to prescribe different regulations in relation to the commerce in certain articles, dependent upon the state from which they are brought. This rule in no manner controls or limits the power of a state to enact appropriate health or inspection laws; for such laws are necessarily uniform, and are not dependent upon place." In *State* v. *Furbush*, 72 Maine, 493, 495, construing a statute of Maine, the Supreme Court of that State says: "The act is unconstitutional. It allows goods manufactured in this state to be peddled free, and exacts a license fee from those who peddle similar goods which are manufactured out of the state. Such a discrimination in favor of goods manufactured in this state, and against goods manufactured in other states, violates the federal constitution." In *State* v. *North & Scott*, 27 Missouri, 464, 471, 476, where an act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, produce, or manufacture of that State, and manufactured articles the growth or produce of other States, it was held by the Supreme Court of that State that the law was unconstitutional and void. The court say: "From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the states, in the exercise of the right of taxation, to discriminate between products of this state and those manufactured in our sister states." And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the

court say: "But, whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports, and its exercise by the states is entirely at war with the spirit of the constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences." See also *Norris* v. *Boston*, 4 Met. (Mass.) 282, 293; *S. C.* in error among the *Passenger Cases*, 7 How. 283; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Pierce* v. *The State*, 13 N. H. 536, 582; *McGuire* v. *Parker*, 32 La. Ann. 832; *Wiley* v. *Parmer*, 14 Ala. 627; *Scott* v. *Watkins*, 22 Ark. 556, 564; *State* v. *McGinnis*, 37 Ark. 362; *State* v. *Browning*, 62 Missouri, 591; *Daniel* v. *Richmond*, 78 Ky. 542.

In view of these authorities, especially the decisions of this court on the subject, we have no hesitation in saying that the act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax to that which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States.

The question then arises whether the act of 1879, as amended by that of 1881, has removed the objection to the validity of the act of 1875. We have carefully examined that act, and have come to the conclusion that it has not done so. We will briefly state our reasons for this conclusion.

The counsel for the State suppose that the act of 1881 imposes a heavier tax on Michigan dealers in liquors of domestic

origin than that imposed by the act of 1875 on those who deal in liquors coming from outside of the State, and, hence, that if there is any discrimination it is against the domestic and in favor of the foreign dealer or manufactured article. We do not think that this position is correct. Let us compare the two acts.

Of course the act of 1875 does not assume to tax non-resident persons or firms for doing business in another State. They are subject to taxation in the States where they are located. It is the business of selling for such non-resident parties, or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of three hundred dollars per annum. Now, is such a tax, or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that State? Clearly not. The tax imposed by the act of 1881 is a tax on the manufacturer or dealer. He is taxed in the city, township, or village in which his distillery or principal place of business is situated. He is subject to a single tax of five hundred dollars per annum. No tax is imposed on his clerks, his agents, or his drummers, who sell or solicit orders for him. They are merely his servants, and are not included in the law. It is he, and not they, whose business is the manufacture or sale of liquors, and who is subject to taxation under the law. Whereas the drummers and agents of the foreign manufacturer or dealer, located in Illinois or elsewhere, are all and each of them subject to the tax of three hundred dollars per annum. In the one case it is a single tax on the principal; in the other it is a tax, not on the principal, for he cannot be taxed in Michigan, but on each and all of his servants and agents selling or soliciting orders for him. The tax imposed by the act of 1875 is not imposed on the same class of persons as is the tax imposed by the act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that State, is perfectly manifest.

It is suggested by the learned judge who delivered the

opinion of the Supreme Court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650.

Another suggestion in the opinion referred to is, that, although the tax imposed by the act of 1875 may be a regulation of the introduction of spirituous liquors from another State into the State of Michigan, yet that regulation is not prohibition, and that there is nothing in the act that amounts to prohibition. The language of the court is: "The statute does not prohibit the introduction and sale of liquors made outside of the state. It simply taxes the person who carries on the business here by making sales in this state. It in no way interferes with the introduction of the liquors here. It tolerates and regulates, but seeks not to prohibit. I think in this case no question can be successfully made under the clause of the constitution until the point has been reached where regulation ceases and prohibition begins." We are unable to adopt the views of that learned tribunal as here expressed. It is the power to "regulate" commerce among the several States which the Constitution in terms confers upon Congress; and this power, as we have seen, is exclusive in cases like the present, where the subject of regulation is one that admits and requires uniformity, and where any regulation affects the freedom of traffic among the States.

Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation which, it is averred, the State has an undoubted right to impose, and reference is made to *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Nathan* v. *Louisiana*, 8 How. 73, 80;

Pierce v. *New Hampshire*, 5 How. 593; *Hinson* v. *Lott*, 8 Wall. 148; *Machine Co.* v. *Gage*, 100 U. S. 676. None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State.

We think that the act in question operates as a regulation of commerce among the States in a matter within the exclusive power of Congress, and that it is for this reason repugnant to the Constitution of the United States, and void.

The judgment of the Supreme Court of Michigan is reversed, and the cause remanded, with instructions to take such further proceedings as may not be inconsistent with this opinion.

The CHIEF JUSTICE did not sit in this case, nor take any part in the decision.

LONDON ASSURANCE COMPANY *v.* DRENNEN & Others.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Submitted January 6, 1886.—Decided January 18, 1886.

An agreement by A. with B. that on the payment of a sum of money B. shall participate in the profits of A.'s business, gives B. no interest, as between themselves, in A.'s stock in trade, when it appears that it was their intention that he should have no such interest.

This case was before the court at the last term, 113 U. S. 51, when the court gave a construction to the contract between the Assurance Company and the present defendants in error, then plaintiffs in error. That contract, and other facts in that case which also enter into this case, will be found on pages 51, 52, 53 and 54 of vol. 113. At the new trial had in September,

1885, a verdict was rendered for plaintiffs for $6770, and judgment accordingly. This writ of error was sued out to review that judgment. There was a bill of exceptions which incorporated all the evidence, including the agreement reported in the statement of facts in vol. 113, and the evidence offered by the Insurance Company to show that there was a partnership between the defendants in error and Arndt, and rebutting testimony offered by defendants in error, and then continued:

"Upon the foregoing admissions and testimony, which was all that was received or considered on said trial, the defendant prayed the court to charge the jury that 'On the undisputed evidence in this case the jury are instructed that Mr. Arndt became a copartner in the insured property with the plaintiffs, Drennen, Starr & Everett, and was such copartner at the time of the fire, and your verdict must be for the defendants;' which charge the court refused to give, and the defendant then and there duly excepted to the said ruling, and said exception was then and there duly noted and allowed.

"The defendant prayed the court to charge the jury that 'The question is whether Arndt, in paying his money into the firm and executing his note to the firm, became a lender of money to the firm, and the firm a mere borrower from him, or whether he acquired an interest in the business and property of the firm itself as a member thereof. On this subject the law is: If it was not the understanding that Arndt became a lender to the concern, and if it was the understanding between the parties that the amount of his investment was to be risked in their business and become part of the capital stock, and he was to have a share of the net profits, he is not a mere lender, but a partner'; which charge the court refused to give, and the defendant duly excepted to the said ruling, and said exception was then and there duly noted and allowed.

"The defendant prayed the court to charge the jury that 'Where a person contributes a portion of the common capital which is mingled with the contributions of the other parties, and the whole is managed for the joint interests of those who contribute, the contributors each having a share of the net profits of the business, they become thereby partners as between them-

selves in the capital stock or property of the concern;' which charge the court refused to give, and the defendant then and there duly excepted to the said ruling, and said exception was then and there duly noted and allowed.

"The court charged the jury that the making of the written contract, Exhibit 'K,' and the payment of money and giving of note by Arndt to plaintiffs, as shown, could not be considered as proving partnership relation between the plaintiffs and Arndt; and that the issue as to whether such partnership relation was formed must be determined from all the other testimony and facts in the case, outside and independent of said contract and payment under it; that said payment of money must not be considered as evidence of such partnership, but must be taken in connection with said contract and as part performance thereof. The defendant then and there duly excepted to the said instruction so far as it excluded from the consideration of the jury the payment of said money and giving of said note as evidence upon the question of partnership, and said exception was then and there duly noted and allowed.

"The court charged the jury as follows: 'Even if you should find from the evidence that the apparent relation between the plaintiffs and Arndt was such as would charge them as partners at the suit of creditors or third persons, that alone would not be sufficient to constitute them as partners as between themselves, or to maintain the defense in this action—that is, Arndt might have an interest in the profits without being an actual partner.' To which charge the defendant then and there duly excepted, and the said exception was then and there duly noted and allowed.

"The court charged the jury as follows: 'If you find from the evidence that up to the time of the fire it was not the intention of the plaintiffs and Arndt to become partners, but that it was their intention to organize a corporation of which they should be members and stockholders, and that the goods and property of the plaintiffs should be transferred to said corporation when organized, and they should take stock in said corporation to the extent of the ascertained value thereof, and that Arndt should take stock in said corporation to the extent of ten thou-

sand dollars contributed by him, and that no change should take place in the name or character of the firm of Drennen, Starr & Everett until such corporation should be organized, then the defense fails, and the plaintiffs are entitled to a verdict for the full amount of the policies, with interest, as claimed in the complaint. That is another way of putting it, that if there was no partnership—that is, if Arndt was not taken in as a partner—then the plaintiffs are entitled to recover.' To which charge the defendant then and there duly excepted, and the exception was then and there duly noted and allowed.

"The court charged the jury as follows: 'If you find from the evidence that said Arndt was to be a participant in the profits realized from the business of the plaintiffs, to a certain extent from January 1st, 1883, this would not necessarily constitute him a partner in or joint owner of the goods and property of the plaintiffs insured by these policies. He might have an interest in such profits without having any joint title or interest with the plaintiffs in the ownership of their goods.' To which charge the defendant then and there duly excepted and said exception was then and there duly noted and allowed.

"The court charged the jury as follows: 'If you find from the evidence that the plaintiffs, in consideration of Arndt's paying in $10,000 with interest thereon from January 1st, 1883, in advance of the formation of the contemplated corporation, agreed that he should receive a proportionate share of the profits of their business from said January 1st to the formation of said contemplated corporation, that fact would not have the effect to assign or transfer to him any title or interest in the insured goods or property of the plaintiffs in the absence of any agreement to that effect.' To which charge the defendant then and there duly excepted, and the exception was then and there duly noted and allowed.

"The court charged the jury as follows: 'The defendant is entitled to contradict or vary the written contract of May 24, 1883, by parol evidence; and the parol evidence which has been received may be considered by you and is competent. And if you find from it that, contemporaneous with the making of the written contract of May 24th the plaintiffs entered

into a verbal contract with Mr. Arndt for a present partnership, you are not precluded from finding that fact because of said written contract.'"

Mr. C. K. Davis and *Mr. C. W. Bunn* for plaintiff in error.

I. Where the bill of exceptions is certified to contain all the evidence, and where the court, upon all the evidence, was requested to direct a verdict, and the exception to the refusal so to instruct the jury is properly preserved, this court, under the authorities, will examine the question, and determine upon all the evidence whether, as a matter of law, the verdict ought to have been directed as requested; and if it ought to have been directed, error has been committed. *Lancaster* v. *Collins*, 115 U. S. 222. Taking this as the rule, there can be no doubt from the record what were the relations of the parties prior to the fire, nor what relations existed at the time of the fire; nor what legal conclusions flow from them. We admit that we must establish a partnership *inter sese*. At the time of the fire Arndt had an interest which would have entitled him to maintain a bill for a receiver and accounting in case of gross fraud upon the partnership by one of defendants in error. Can there be any doubt of this? He was not a mere lender of money. There was no time fixed for repayment; no arrangement for interest. His money went into the concern, paid for its goods, paid its debts; he was one of the losers at the fire, and his remedy to recover his proportionate share was in equity, not at law. The cases are uniform, even where a party makes no contribution to the capital stock, but simply renders services, if he shares in the the net profits as profits, he is a partner. Where he makes contribution to the capital, and shares in the profits as such in proportion to his contribution, the question has never been one which is even open to doubt.

It will doubtless be said that if Arndt was a partner, he was a partner in the profits only, and not in the property. Whatever plausibility this claim might have if Arndt only contributed his labor and skill, it is clearly unsound, and not supported by any precedent, when applied to a case like the one at bar, where Arndt contributes ten seventy-fifths of the capital stock,

and shares in the profits in proportion to his contribution. This contribution *per se* made him jointly interested in the property of the firm. When the assured all testify that Arndt added his $10,000 to their capital as a part of it, and was to share profits according to his contribution, they make him a partner *per se*, both as to creditors and as between themselves. *Berthold* v. *Goldsmith*, 24 How. 536; *Beauregard* v. *Case*, 91 U. S. 134, 140; *Whitcomb* v. *Converse*, 119 Mass. 38; *Livingston* v. *Blanchard*, 130 Mass. 341; *Ex parte Owen*, 4 DeG. & Sm. 351; *Syers* v. *Syers*, 1 App. Cas. 174. Note to *Waugh* v. *Carver*, 1 Smith's Lead. Cas. 491; *Chapline* v. *Conant*, 3 West Virginia, 507; *Fitch* v. *Harrington*, 13 Gray, 468, 474; *Vassar* v. *Camp*, 14 Barb. 341. It is not necessary that community of loss should be provided for, in order to constitute a partnership, nor that there should be community of loss in fact in order to create a partnership property to be owned by partners as such. *Bucknam* v. *Barnum*, 15 Conn. 67; *Munro* v. *Whitman*, 15 N. Y. Supreme Ct. (8 Hun), 553; *Ex parte Langdale*, 18 Ves. 299, 301; *Gilpin* v. *Enderly*, 5 B. & Ald. 954; *Hendrick* v. *Gunn*, 35 Geo. 234.

If the assured admitted Arndt as a partner in the property, and he was a joint owner in the same with them at the time of the fire, the policy of insurance was thereby avoided. We do not deny that one of several joint owners may transfer his interest to the others without avoiding the policy. That was the case in *Lockwood* v. *Ins. Co.*, 47 Conn. 553, 564. But the theory is, that the insurance company has the right to say with whom it will contract, and in whom it will rest its confidence; in whom it will repose the trust of bearing for it the moral hazard incident to the insurance. Any process by which a new party to the contract is introduced, by which the insured shifts the moral hazard from himself to a stranger, creates a new contract and a new relation which the company has not consented to assume. *Malley* v. *Ins. Co.*, 51 Conn. 222; *Hoffman* v. *Ins. Co.*, 32 N. Y. 405; *Burnett* v. *Ins. Co.*, 46 Ala. 11; *Pierce* v. *Ins. Co.*, 50 N. H. 297; *West* v. *Ins. Co.*, 27 Ohio St. 1; *Dix* v. *Ins. Co.*, 22 Ill. 272; *Barnes* v. *Ins. Co.*, 51 Maine, 110; *Ins. Co.* v. *Ross*, 23

Ind. 179; *Finley* v. *Ins. Co.*, 30 Penn. St. 311; *Ins. Co.* v. *Riker*, 10 Mich. 279; *Dey* v. *Ins. Co.*, 23 Barb. 623; *Wood* v. *Ins. Co.*, 31 Vt. 552; *Keeler* v. *Ins. Co.*, 16 Wisc. 550; *Ins. Co.* v. *Hauslein*, 60 Ill. 521; *Lappin* v. *Ins. Co.*, 58 Barb. 325; *Dreher* v. *Ins. Co.*, 18 Missouri, 128; *Savage* v. *Ins. Co.*, 52 N. Y. 502; *Pindar* v. *Ins. Co.*, 47 N. Y. 114; *Briggs* v. *Home Ins. Co.*, 88 Nor. Car. 141; *Oakes* v. *Ins. Co.*, 131 Mass. 164. Mr. Justice Miller at the first trial of this cause, *Drennen* v. *London Assurance Co.*, 20 Fed. Rep. 657.

II. The court erred in instructing the jury that the payment of money and the giving of note by Arndt to the plaintiffs, as shown, could not be construed as proving partnership relations between the plaintiffs and Arndt; and that the issue as to whether such partnership relations were formed must be determined from all the other testimony and facts in the case outside of said contract and payment under it; that said payment of money must not be construed as evidence of such partnership, but must be taken in connection with said contract, and as part performance thereof. Upon the trial (this court having decided that the written contract had sole reference to a future corporation, and no reference to a partnership relation) a large amount of parol testimony was taken to show that there was a partnership relation between the parties prior to the formation of the contemplated corporation. It may well be, as these defendants in error have positively testified, that this $10,000 was paid in, not only to secure Mr. Arndt a share in the corporate stock, but in order to entitle him in the meantime, and before the formation of the corporation, to a share of the net profits in the partnership business. We were entitled to have it submitted to the jury to say whether this money was not, as testified by the defendants in error, paid in for this double purpose. The Circuit Court, by withdrawing from the jury any consideration of this payment by Arndt, deprived the plaintiff in error of a great and almost controlling part of the *res gestæ* of the transaction.

The rule is thus laid down in Chitty on Contracts: "But though parties and privies, as between themselves, are estopped from contradicting a written statement by parol proof, yet the

rule does not apply to strangers who have an interest in showing the true state of the case." 1 Chitty on Contracts, (11th Am. Ed.) 141, note (*e*). A long list of American authorities might be cited to sustain our position. We think the following are entirely sufficient for the purpose: *Barreda* v. *Silsbee*, 21 How. 146, 169; *Dempsey* v. *Kipp*, 61 N. Y. 462, 471; *McMaster* v. *Ins. Co.*, 55 N. Y. 222, 234; *Smith* v. *Moynihan*, 44 Cal. 53; *Hussman* v. *Wilke*, 50 Cal. 250; *Edgerley* v. *Emerson*, 23 N. H. (3 Foster), 555, 564; *Krider* v. *Lafferty*, 1 Wharton, 303; *Furbush* v. *Goodwin*, 25 N. H. (5 Foster), 425; *Low* v. *Blodgett*, 21 N. H. (1 Foster) 121; *Reynolds* v. *Magness*, 2 Iredell Law, 26; *Venable* v. *Thompson*, 11 Ala. 147. Especially see the following in Minnesota: *Van Eman* v. *Stanchfield*, 10 Minnesota, 255; *Sanborn* v. *Sturtevant*, 17 Minnesota, 200.

Mr. Justice Harlan delivered the opinion of the court.

This case has been once before in this court. *Drennen* v. *London Assurance Co.*, 113 U. S. 51. It is an action upon two policies of fire insurance executed March 10, 1883, and covering certain goods, wares, and merchandise belonging to the firm of Drennen, Starr & Everett. Each policy contains the following provisions: "If the property be sold or transferred, or any change takes place in title or possession, (except by succession by reason of the death of the insured,) whether by legal process, or judicial decree, or voluntary transfer or conveyance, . . . then, and in every such case, this policy shall be void." "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, . . . it must be so represented to the corporation and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold or delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

The insurer contends that after the execution of the policies, and before the loss of July 29, 1883, there was, by the

voluntary act of the insured, a sale or transfer of the property, or such a change in title or possession as rendered the policies, by their terms, void. This defence rests entirely upon the claim that, prior to the loss, one Arndt was admitted as a partner in the firm of Drennen, Starr & Everett. The plaintiffs [below] deny that he ever became a partner with them, or ever acquired an interest in the property insured. Upon the record as it was at the former hearing, that question depended mainly upon the construction of the written agreement of May 24, 1883, which is given in full in 113 U. S. 52, whereby the insured agreed to receive Arndt "into their business," upon certain terms and conditions, among which are the following: That the company should be incorporated; that Arndt should pay into the firm for its use, on or before June 14, 1883, the sum of $5000, and a like sum on or before January 1, 1885, the latter amount, until paid, to be evidenced by his promissory note, dated January 1, 1883, and each payment to bear interest at eight per cent. from the date last named; that the business "to be carried on by the new company to be formed" —the name of which was to be thereafter determined—should be of the same nature as that then conducted by Drennen, Starr & Everett; and that "no change in the name or character" of that firm "shall be made until said corporation shall be formed." Arndt paid to the firm, on the 18th of June, 1883, the sum of $5000, and executed on the 3d of July of the same year the required note for a like amount, the money and note being entered to his individual credit on the books of Drennen, Starr & Everett. Upon this state of facts this court, reversing the judgment rendered for the insurer, said: "The instruction by the court below proceeded upon the ground that the payment by Arndt in cash and notes of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest as partner in the business; whereas such facts only establish the performance of some, not of all, the conditions prescribed; for, by the agreement, the formation of the proposed corporation was expressly made a condition, with the others named, to Arndt's becoming interested in the business. In our judgment, looking at the

whole agreement, the parties did not contemplate a partnership, and none was ever established between them. The agreement looked only to a corporation, the payment and other things specified being in preparation for its ultimate formation, which was an adequate, as it was the actual, consideration; consequently there was, prior to the loss, and under the most liberal interpretation of the policies, no change in the title or possession of the property, nor any transfer thereof, that avoided the policies."

At the last trial there was evidence to the effect that Arndt, after paying the $5000 in cash, and executing his note for the same amount, became entitled, by agreement with the insured, to participate in the profits of their business from January 1, 1883—he paying interest on these amounts from that date. And there was some slight proof that Drennan upon one occasion spoke of Arndt as a member of his firm.

On behalf of the insured it is contended that, even if Arndt had become a partner in their firm, the policy would cover their interest in the property. This results, it is claimed, from that clause in the policy providing for the termination of the insurance if the property be sold or delivered or otherwise disposed of, "so that *all* interest or liability on the part of the insured herein named has ceased." We deem it unnecessary to consider this question, because the case can be satisfactorily determined upon other grounds. In view of all the evidence, the court, when delivering its charge, might well have assumed that there was no purpose on the part of the insured, or of Arndt, that the latter should have such an interest in the property as would belong to a partner. The court, therefore, rightfully refused to instruct the jury that upon the undisputed evidence Arndt became a partner in the firm of Drennen, Starr & Everett. Such an instruction could not have been given without disregarding the interpretation which this court at the former hearing gave to the written agreement of May 24, 1883; for, it was then said that the parties, by that agreement, appeared, *ex industria*, to have excluded the possibility of Arndt's acquiring an interest in or any control of the insured property in advance of the formation of an incorporated com-

pany. That interpretation was not affected by the fact that Arndt paid $5000 in cash and gave his note for a like amount; for, as heretofore said, those acts were simply in execution of the agreement and in preparation for the ultimate formation of the proposed corporation, and were not, as the court below properly decided, evidence of a partnership. The payment of the money and the execution of the note were plainly required by the agreement, and the purpose of both acts is to be ascertained from its provisions.

The main ground upon which the defendant, at the last trial, claimed exemption from liability on the policies, is indicated in two of its requests for instructions to the jury: 1. That "if it was not the understanding that Arndt became a lender of money, and if it was the understanding between the parties that the amount of his investment was to be risked in their business and become part of the capital stock, and he was to have a share of the net profits, he is not a mere lender, but a partner;" 2. That "when a person contributes a portion of the common capital stock, which is mingled with the contributions of other parties, and the whole is managed for the joint interests of those who contribute, the contributors each having a share of the net profits of the business, they become thereby partners as between themselves in the capital stock or property of the concern."

We are of opinion that the court did not err in declining to so instruct the jury. The question is not whether Arndt, by reason of his participation in the profits of the business of Drennen, Starr & Everett, could have been charged at the suit of creditors as a partner in that firm. The inquiry is, whether the insured, after the execution of the policies, and before the loss, sold or transferred the property covered by the policies, or whether there occurred, during that period, any change in title or possession. If there had been a sale or transfer of the entire property to one who had no interest in it nor any right to control it at the time the contract of insurance was made, there would undoubtedly have been such a change in the title as to render the policies void. And, for the purposes of the present case, it may be conceded that such would have been the result

Statement of Facts.

had Arndt become a partner in the firm of Drennen, Starr & Everett. But the sale or transfer to which the policies refer was one that would pass an interest in the property itself. Mere participation in profits would give no such interest contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title. As the charge to the jury was in accordance with these principles, and as the evidence conclusively showed that Arndt did not, prior to the loss, acquire an interest in, or any control of, the property insured, but was only entitled to participate in the profits arising from its management after a named date, there is no reason to disturb the judgment. It is, therefore,

Affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY.

ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

After argument of the cause is heard, the court of its own motion gives counsel an opportunity to file printed arguments on a plea to the jurisdiction which was overruled in the Circuit Court, and was not argued here.

These cases were argued on the 14th and 15th of January, 1886, by *Mr. John M. Butler* and *Mr. Joseph E. McDonald* for the St. Louis, Alton and Terre Haute Railroad Company,

and by *Mr. Stevenson Burke* and *Mr. Ashley Pond* for the Pennsylvania Railroad Company.

Mr. Chief-Justice Waite, on the 25th day of the same January, made the following announcement:

The St. Louis, Alton and Terre Haute Railroad Company, the complainant in this case, is described in the bill as "a body politic and corporate, duly organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois." It is also averred in the bill that, "under and by virtue of the statutes of the States of Indiana and Illinois, your orator was and is the owner of a railroad extending from the city of Terre Haute, . . . in the State of Indiana, to East St. Louis, . . . in the State of Illinois, . . . having power to operate its said road under the laws of said States. And that, for all the equities sought by this bill, the complainant represents the corporation by the same name with complainant created and existing under and by virtue of the statutes of Indiana." In the "operating contract," so-called, made Exhibit B to the bill, the complainant is described as "a corporation duly formed and organized under the laws of the said State of Indiana, and also duly formed and organized under the laws of the State of Illinois." Some of the defendants are Indiana corporations, and so alleged to be in the bill. A plea to the jurisdiction of the court was interposed by the defendant, the Indianapolis and St. Louis Railroad Company, on the ground that the complainant was in fact a corporation of Indiana, and, therefore, not a citizen of a different State from all the defendants. This plea was overruled by the Circuit Court. No error has been assigned on this ruling, and it was not referred to in the argument here. We do not, however, feel at liberty to pass it by unnoticed. Counsel may, if they desire to do so, file printed arguments on that question, together with copies of the statutes the consideration of which is involved, at any time before February 20.

UNITED STATES *v.* REDGRAVE.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 6, 1886.—Decided January 25, 1886.

Cadet-engineers who had finished their four years' course at the Naval Academy, had passed their final academic examinations, and had received their diplomas before the passage of the act of August 5, 1882, 22 Stat. 284, became graduates, and were not made naval cadets by that act.

The provision in the act of August 5, 1882, 22 Stat. 284, for the discharge of surplus naval cadet graduates was prospective only, and did not apply to the classes of 1881, and 1882.

The facts of the case brought here by this appeal, as found by the Court of Claims, were in substance as follows:

In 1877 the appellee, who was the claimant below, entered the Naval Academy as a cadet-engineer, and on June 10, 1881, received a certificate signed by its officers that he had completed the prescribed course of study at the academy and had successfully passed the required examination before the academic board. He was on the same date detached from the academy and ordered to report for duty on board the U. S. practice steamer Mayflower. On August 30, 1881, he was detached from the Mayflower and ordered to proceed home on waiting orders. On October 28, 1881, he was ordered to proceed to the navy-yard at League Island for duty on board the United States Steamship Essex. On April 16, 1883, he reported to the superintendent of the Naval Academy, in pursuance of orders, for examination, which assumed that the act of Congress of August 5, 1882, operated upon him as a naval-cadet, requiring a six years' course before graduation, and a final examination at its conclusion. On June 23, 1883, he was detached from the Naval Academy on waiting orders. On June 26, 1883, the Secretary of the Navy addressed to him a letter, in which it was recited that he had successfully completed his six years' course at the Naval Academy, and had received a certificate of graduation by the academic board, but "not being required to fill any vacancy in the naval service happening

during the year preceding your graduation, you are hereby honorably discharged from the 30th of June, 1883, with one year's sea-pay, as prescribed by law for cadet-midshipmen, in accordance with the provisions of the act of Congress approved August 5, 1882."

From August 5, 1882, to June 30, 1883, the claimant was paid $769.86 for service in the Navy during that period. If paid during the same period as a graduated cadet-engineer he would have been entitled to receive $796.71.

Since then the claimant has received no pay and has been held by the Navy Department and the accounting officers of the Treasury to be out of the naval service.

After leaving the Academy, the claimant and all his classmates were classified on the official Navy Register, issued in July, 1881, as having "graduated;" and up to August 5, 1882, they were regularly paid as such at the rates prescribed by section 1556 of the Revised Statutes, viz.: $1000 at sea, $800 on shore duty, and $600 on leave or waiting orders. In the same manner the cadet-engineers who completed their four years' course in 1878, 1879, and 1880 were all regularly classified in the succeeding Navy Registers as having graduated in those years respectively; and prior to August 5, 1882, they were all uniformly paid as such.

The regulations prescribing the qualifications for appointment of cadet-engineers fixed a higher average age by two years for cadet-engineers entering the Academy than was required by law for cadet-midshipmen so entering. After completing the four years' course, cadet-engineers were permanently detached from the Academy, and were never required to return to that institution. They remained in active service at sea, or upon other duty, two or three years, or longer, until vacancies occurred in the grade of assistant engineer, when they were ordered singly or in groups for examination for promotion, under the provisions of section 1392 of the Revised Statutes, before a board of engineer officers, which held its sessions at Philadelphia.

The last two years of the academic course of cadet-midshipmen were spent "at sea in other than practice ships." After

four years at the Academy they were temporarily detached from that institution by orders from the Navy Department, and were sent to sea singly or in squads. On shipboard they performed such active duties as were assigned to them. At the end of the two years, they were required to return and did return to the Naval Academy, where they were subjected to a "final graduating examination" before the academic board. If successful at such examination, they received appointments as midshipmen, and were thereafter classified in the Navy Register as having "graduated" at that date, and they were never so designated either in the Navy Register or elsewhere until after they had passed such examination at the end of the six years' course.

The provisions of the act of August 5, 1882, being the naval appropriation act, 22 Stat. 284, ch. 391, which apply to the case, are as follows:

"For the pay of the Navy, for the active list, namely: . . . Sixty-nine chief engineers, one hundred past assistant engineers, thirty-five assistant engineers, seventy-three cadet-engineers (graduates), . . . one hundred and two cadet-engineers, one hundred and thirty cadet-midshipmen (not graduates); in all four million forty-eight thousand three hundred dollars: *Provided*, That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets.' And from those who successfully complete the six years' course, appointments shall hereafter be made, as it is necessary to fill vacancies in the lower grades of the line, and Engineer Corps of the Navy and of the Marine Corps: *And provided further*, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course in the order of merit, as determined by the

academic board of the Naval Academy, the assignment to the various corps to be made by the Secretary of the Navy, upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea-pay, as now provided by law for cadet-midshipmen. . . .

"That the pay of naval cadets shall be that now allowed by law to cadet-midshipmen, and as much of the money hereby appropriated as may be necessary during the fiscal year ending June thirtieth, eighteen hundred and eighty-three, shall be expended for that purpose. . . .

"That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps: *Provided*, That no further appointments of cadet-engineers shall be made by the Secretary of the Navy under section three of the act of eighteen hundred and seventy-four."

The Court of Claims, following its previous decision in the case of *Leopold* v. *United States*, 18 C. Cl. 546, affirmed the following propositions of law:

"1st. Cadet-engineers who had finished their four years' course at the Naval Academy, passed their final academic examinations, and received their diplomas before the passage of the act of August 5, 1882, 22 Stat. 284, became graduates, and are not made naval cadets by that act. They are therefore entitled to pay provided by the Revised Statutes, section 1556, page 268. 2d. The provision in the act of August 5, 1882, for the discharge of surplus naval cadet graduates is prospective only, and does not apply to the classes of 1881 and 1882." 20 C. Cl. 226.

Judgment was accordingly rendered in favor of the claimant, from which this appeal was prosecuted by the United States.

Mr. Assistant Attorney-General Maury for appellant.

Mr. J. W. Douglass for appellee.

Mr. Justice Matthews delivered the opinion of the court.

In order to understand the operation of the act of August 5, 1882, upon the status of cadet-engineers, at the time it took effect, it will be necessary to consider what that was, according to laws then in force. That class or grade in the naval service owes its origin to provisions of law, now contained in the Revised Statutes, as follows:

"Sec. 1522. The Secretary of the Navy is authorized to make provision, by regulations issued by him, for educating at the Naval Academy, as naval-constructors or steam-engineers, such midshipmen, and others, as may show a peculiar aptitude therefor. He may, for this purpose, form a separate class at the Academy, to be styled cadet-engineers, or otherwise afford to such persons all proper facilities for such a scientific mechanical education as will fit them for said professions.

"Sec. 1523. Cadet-engineers shall be appointed by the Secretary of the Navy. They shall not at any time exceed fifty in number, [Reduced to twenty-five by the act of June 22, 1874, § 3, 18 Stat. 191, Sup. Rev. Stat. 83,] and no person, other than midshipmen, shall be eligible for appointment unless they shall first produce satisfactory evidence of mechanical skill and proficiency, and shall have passed an examination as to their mental and physical qualifications.

"Sec. 1524. The course for cadet-engineers shall be four years, including two years of service on naval steamers. [By the act of February 24, 1874, 18 Stat. 17, Sup. Rev. Stat. 6, this provision was changed so as to require the course of instruction at the Naval Academy for cadet-engineers to be four years instead of two, but not dispensing with the additional two years' service on naval steamers.]

"Sec. 1525. Cadet-engineers shall be examined from time to time, according to regulations prescribed by the Secretary of the Navy, and if found deficient at any examination, or if dismissed for misconduct, they shall not be continued in the Academy or

in the service except upon the recommendation of the academic board."

By § 1394 Rev. Stat. it was provided, that "cadet-engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be appointed by the President, and confirmed by the Senate, as second assistant engineers;" but by § 1392 no person could be so appointed until after he had been found qualified by a board of competent engineers and medical officers designated by the Secretary of the Navy. By § 1556 Rev. Stat. the pay of cadet-engineers was, "before final academic examination, five hundred dollars; after final academic examination and until warranted as assistant engineers, when on duty at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave or waiting orders, six hundred dollars."

At the same time the students at the Naval Academy styled cadet-midshipmen were required to take an academic course of six years, § 1520 Rev. Stat., when, having passed successfully the graduating examination at the Academy, they were entitled to receive appointments as midshipmen. § 1521 Rev. Stat. The pay of cadet-midshipmen was five hundred dollars; for midshipmen, after graduation, when at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave or waiting orders, six hundred dollars. § 1556. Rev. Stat. By the act of March 3, 1877, 19 Stat. 390, Sup. Rev. Stat. 294, cadet-midshipmen, "during such period of their course of instruction as they shall be at sea in other than practice ships, are entitled to receive, as annual pay, nine hundred and fifty dollars."

It is contended on the part of the Government, in opposition to the conclusions of the Court of Claims, that the act of August 5, 1882, when it took effect converted all cadet-engineers who had not completed their six years' course during that year into naval cadets, all other cadet-engineers being regarded as graduates; and that those who were not at that time graduates in that sense were subject to the provisions of the act in regard to pay and discharge.

The controversy would seem to turn on the meaning to be given to the word "graduates" as used in this act of Congress.

It is certain that the act divides all who, at the date when it took effect, were known as cadet-engineers, into two classes—graduates and not graduates. Prior to that date a cadet-engineer might be pursuing the four years' course of study at the Academy, or the two additional years of service on board a naval steamer, or, having successfully passed both periods, might be waiting promotion to the grade of assistant engineer.

It is found as a fact by the Court of Claims that, before the passage of the act, cadet-engineers who had successfully passed their examination at the end of the four years' course of study at the Academy, were called and considered graduates. The seventy-three cadet-engineers, styled graduates, for whose pay the act of August 5, 1882, makes appropriation, include all of that description, and, among them, the appellee in this case, while the one hundred and two cadet-engineers, styled in the same act "not graduates," are those who at that date were still at the Academy pursuing their four years' course. This classification was followed by the Navy Department in the Navy Register. The Naval Appropriation Act of March 3, 1883, 22 Stat. 472, ch. 97, provides for the pay of sixty-two cadet-engineers, which it is not denied is the exact number of cadet-engineers who had graduated at the Academy, but were not yet eligible to promotion, or whose promotion had been delayed, and includes the classes who completed their four years' course in 1880, 1881, and 1882. The same act appropriates for the pay of three hundred and thirty-five naval cadets, being presumably the whole number of the "under-graduates" referred to in the act of August 5, 1882.

This would seem to settle the meaning of the words, according to the sense adjudged by the Court of Claims, unless some other meaning is required to be attached to them by other and controlling provisions of the same act. It is argued by the Assistant Attorney-General that a consistent reading of the entire context does in fact require such other meaning to be given to the words "graduates" and "not graduates."

In support of this conclusion our attention is called to the

provisos of the act, whereby it is enacted that appointments to fill vacancies in the lower grades of the line and the engineer corps, and of the marine corps, shall be thereafter made only from those who successfully complete a six years' course as naval cadets; that no appointments into these grades shall be made each year, except to fill vacancies therein which occurred during the preceding year; that such appointments are to be made only from the graduates of the year at the conclusion of their six years' course; that the exception made, that a graduate who completed his six years' course during the year 1882 shall not be deprived of his appointment, carries with it the implication that those who had not completed a six years' course at that time were included in the rule of exclusion; and that the surplus of graduates, not receiving such appointment, are therefore subject to discharge from the service, on graduation, with one year's sea-pay, in the language of the act "as now provided by law for cadet-midshipmen." No similar provision of law then in force relating to cadet-midshipmen however appears, and the reference is without application. Such a provision did exist in reference to the appointment of graduates of the Military Academy as second lieutenants of the Army, and the discharge of supernumeraries after July 1, 1882, by virtue of § 3 of the act making appropriations for the support of the Military Academy, approved June 11, 1878, 20 Stat. 108, Sup. Rev. Stat. 346, but no such legislation in regard to cadet-midshipmen is to be found in force at the date of the act of August 5, 1882. This, however, is not important, as nothing depends on the accuracy of this reference.

The general purpose of this act is quite apparent. One main object was to abolish the distinctions previously made by law between cadet-engineers and cadet-midshipmen, and for the future to merge both classes in the new designation of naval cadets. The previous differences between them grew out of separate provisions as to their number, their manner of appointment, their course and term of study, and their pay after their four years' course at the Academy. Another principal purpose of the act was to prevent the increase of the number of officers in the navy, by providing for the annual discharge from the

service of all graduates of the year not needed to fill vacancies, in the grade to which they were eligible for promotion, actually existing at the time of their graduation. But this was to be accomplished consistently with the declaration of the act, "that no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps." And to this end the whole scheme of reform embodied in the legislation was made prospective. Its express language is, that no appointments of cadet-midshipmen or cadet-engineers shall be made hereafter; that all the under-graduates at the Naval Academy shall hereafter be designated and called "naval cadets;" that from those, that is those now called naval cadets, who successfully complete their six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line, and engineer corps of the Navy and of the marine corps. But none of these provisions touch the case of the cadet-engineer who has already graduated, at the date of the act, that is, who had at that time successfully completed his four years' course of study at the Academy and was serving on board a naval steamer. And the further provisions limiting the number of appointments to the number of vacancies occurring during the preceding year, and providing for the discharge of the surplus graduates, equally refer to those who become graduates after the year 1882, under this act, which now requires for graduation a full course of six years for all naval cadets, including the two years of service on board a naval steamer, which before had constituted the service of a cadet-engineer after graduation. This leaves the state and condition of cadet-engineers, who at the date of the passage of the act were already graduates according to the law as it then stood, unchanged, and to this class the appellee belonged. He is therefore entitled to the pay claimed and withheld, and the judgment of the Court of Claims in his favor is therefore

Affirmed.

UNITED STATES *v.* PERKINS.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 6, 1886.—Decided January 25, 1886.

When Congress by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interests.

A naval cadet-engineer, not found deficient at examination ; not dismissed for misconduct under the provisions of Rev. Stat. § 1525 or upon and in pursuance of a sentence of a court-martial ; but honorably discharged by the Secretary of the Navy against his will, remains in the service notwithstanding the discharge, and is entitled to recover in the Court of Claims the pay attached to the position.

The facts are stated in the opinion of the court

Mr. Assistant Attorney-General Maury for appellant.

Mr. J. W. Douglass for appellee.

Mr. Justice Matthews delivered the opinion of the court.

The object of this suit was to recover $100 as the salary of the plaintiff as a cadet-engineer of the Navy, from June 30, 1883, to September 1, 1883, at the rate of $600 per year, as provided by Rev. Stat. § 1556. Judgment was rendered in his favor for that amount. 20 C. Cl. 438.

The plaintiff entered the Naval Academy as a cadet-engineer in 1877, and graduated therefrom on June 10, 1881. On June 26, 1883, he received a letter from the Secretary of the Navy giving him notice that, as he was not required to fill any vacancy in the naval service happening during the preceding year, he was thereby honorably discharged from the 30th of June, 1883, with one year's sea-pay, as prescribed by law for cadet-midshipmen, in accordance with the provisions of the act of Congress approved August 5, 1882.

He protested against this order as illegal and refused the pay, and, regarding himself as continuing in the service, he sued for his pay subsequently accruing.

The case differs from that of Redgrave, just decided, in one particular only, that the claim is for pay after the alleged discharge.

The single question now raised as to that point is, that, although the discharge may not be justified by the act of August 5, 1882, the Secretary of the Navy, irrespective of that act, had lawful power to discharge him from the service at will. This authority is claimed on the ground that the plaintiff was not an officer in the naval service within the meaning of Rev. Stat. § 1229, which provides that "No officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof;" and that consequently the right to remove and discharge him from the public service is implied in the power of appointment.

In reply to this position, the Court of Claims, in its opinion in this case, said:

"In this view we cannot concur. That a cadet-engineer like the claimant was a graduate and in the naval service we have already decided; that he was an officer is made manifest by the terms of the Constitution, which provides that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments." Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy, and when thus appointed they become officers and not employés. *United States* v. *Germaine*, 99 U. S. 508; *Moore* v. *United States*, 95 U. S. 760: *United States* v. *Hartwell*, 6 Wall. 385.

"It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, section 2) does not arise in this case and need not be considered.

Syllabus.

"We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

"The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.

"It follows that as the claimant was not found deficient at any examination, and was not dismissed for misconduct under the provisions of Revised Statutes, section 1525, nor upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof, according to Revised Statutes, section 1229, he is still in office and is entitled to the pay attached to the same."

We adopt these views, and affirm the judgment of the Court of Claims.

Affirmed.

LAUGHLIN *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 14, 1886.—Decided January 25, 1886.

A, having done work on the streets of Washington under a contract with the board of public works, received certificates that his accounts were audited and allowed for specified amounts; on pledge of which he borrowed money of B, giving his note therefor shortly before the abolition of the board by Congress, and the creation of the board of audit. A requested the treasurer of the board of public works in writing, not to pay these certificates, but assigned no reason for the request. Afterwards C presented them to the board of audit, by whom they were allowed, and C received district bonds for them under the law. Neither B nor C has accounted to A for the certificates, nor returned his note. A sued the District for the amount due on the certificates. *Held*, That he had no cause of action.

Opinion of the Court.

This was a suit in the Court of Claims against the District of Columbia. The facts are stated in the opinion of the court.

Mr. Enoch Totten for appellant.

Mr. Solicitor-General for appellee.

Mr. Chief-Justice Waite delivered the opinion of the court.

This is a suit brought July 28, 1880, under the act of June 16, 1880, ch. 243, 21 Stat. 284, by Matthew J. Laughlin against the District of Columbia to recover an amount claimed to be due upon five certificates of the auditor of the board of public works. The facts are these:

Laughlin contracted with the board of public works to do certain work and furnish certain materials in grading the streets in Washington. The work was done and the board, according to its usage with contractors, issued to the attorney in fact of Laughlin certificates of accounts allowed by its auditor, as follows:

"No. 4763. Office of Auditor of Board of Public Works,
Washington, D. C., Dec. 24th, 1873.

"I hereby certify that I have this day audited and allowed the account of M. J. Laughlin, per J. F. Murray, att'y, for work, as per schedule, amounting to fifteen hundred dollars.

"$1500. J. C. Lay, Auditor."

Three other certificates for $6000, $5000, and $2000 respectively, numbered 4764, 4766, and 4767, were issued to the same person and in the same form, all having the same date. Another certificate for $597 was also issued, but as the right to recover on that was abandoned at the argument it need not be specially referred to.

After the certificates were issued Laughlin demanded payment from the treasurer of the board of public works, which was refused for want of funds. He then borrowed money on them from Rudolph Blumenburg, at the rate of thirty-three cents on the dollar of their face value, giving his notes for the

amount borrowed, and delivering the certificates indorsed by him in blank as collateral. Certificates Nos. 4764, 4766, and 4767 were hypothecated January 20, 1874, and No. 4763, February 14, 1874.

On or about the 5th of June, 1874, a written document was delivered to James A. Magruder, treasurer of the board of public works, which he filed with the papers of the board, where it has ever since remained, and of which the following is a copy:

"Washington, D. C., June 5th, 1874.

"Col. James A. Magruder, treasurer B. P. W.

"Sir: I do most respectfully ask of you not to pay the following auditor's certificates, dated December, 1873, issued to 'M. J. Laughlin, per J. F. Murray, attorney,' viz: No. 4763, for $1500; No. 4764, for $6000; No. 4766, for $5000; No. 4767, for $2000.

"Also a certificate issued in the name of M. J. Laughlin, No. 4426, for $597.

Very respectfully,

J. F. Murray."

Previous to that date Laughlin had orally notified Magruder not to pay the certificates, but at what exact time does not appear. He did not, however, bring any suit to enjoin the payment or conversion of the certificates, or to establish his interest in or title to them.

On the 20th of June, 1874, Congress passed "An act for the government of the District of Columbia and for other purposes," ch. 337, 18 Stat. 116, by which "all provisions of law providing for an executive, for a secretary for the District, for a legislative assembly, for a board of public works, and for a delegate in Congress in the District of Columbia," were repealed, and a commission created to exercise "all the power and authority now lawfully vested in the governor or board of public works of said District," except as thereinafter limited. This commission was authorized to "take possession and supervision of all the offices, books, papers, records, moneys, credits, securities, assets, and accounts belonging or appertaining to

the business or interests of the government of the District of Columbia and the board of public works, and exercise the power and authority" conferred by the act. By § 6 the First Comptroller of the Treasury and the Second Comptroller of the Treasury of the United States were constituted a board of audit "to examine and audit for settlement," among other things, "the debt purporting to be evidenced and ascertained by certificates of the auditor of the board of public works." This board was required to "issue to each claimant a certificate, signed by each of said board and countersigned by the comptroller of the District, stating the amount, found to be due to each and on what account." Power was given the board to "subpœna witnesses, administer oaths, and examine witnesses under oath," and it was allowed "full access to all of the records, books, papers, and vouchers of every kind whatsoever of the board of public works;" "and to the end that said books and accounts may be thoroughly examined, and the indebtedness of the District and of the board of public works, and the state of the books and accounts of the officers aforesaid, may be accurately ascertained," the board was authorized to "employ one or more skilful and impartial accountants . . . and such other assistants as they may deem necessary to make examination of said books, vouchers, and papers, and discharge their duties, . . . and shall procure inspection of such bank books and papers as may be necessary." The board was also to give notice for the presentation of claims, and no claim could "be audited or allowed unless presented within ninety days after the first publication of such notice." By § 7 the sinking-fund commissioners were required to exchange the three-sixty-five bonds of the District at par for like sums of any debt evidenced by certificates of the board of audit.

On the 16th of July, 1874, N. A. Cowdrey presented the certificates now in dispute to this board of audit for allowance and settlement. Before their presentation, and after their delivery by Laughlin to Blumenburg, there had been printed over the indorsement in blank which was on them when delivered the following:

"For value received, the within debt is assigned and transferred to N. A. Cowdrey, who is authorized to collect the same for his own use." This was done without the knowledge of Laughlin. Certificates of allowance were issued to Cowdrey in due form by the board of audit, and these were taken up by an exchange of bonds for them by the sinking-fund commissioners. Neither Blumenburg nor any assignee of his has accounted to Laughlin for the proceeds of the certificates, nor returned the notes for which they were transferred as security.

Upon these facts the Court of Claims gave judgment against Laughlin, and to reverse that judgment this appeal was taken.

It has been settled in this court, that if the owner of certificates of the auditor of the board of public works, like those now in question, places them in the hands of a third person, indorsed in blank, so as to give him apparent authority for their collection, payment by the District to the person so invested with apparent authority, without notice of a want of actual authority, will discharge the debt. *Cowdrey* v. *Vanderburg*, 101 U. S. 572; *Looney* v. *District of Columbia*, 113 U. S. 258. The Court of Claims so held in *Adams* v. *District of Columbia*, 17 C. Cl. 351, decided at the December Term, 1881, which was but a little more than a year after the act giving that court jurisdiction in this class of cases was passed.

Such being the law, the only question we have now to consider is, whether the letter of June 5, 1874, addressed by the attorney of Laughlin to the treasurer of the board of public works and placed on file with the papers of the board, makes the District answerable to Laughlin for the amount due on the certificates notwithstanding the payment to Cowdrey upon the allowance by the board of audit. The Court of Claims was of opinion that it did not, and in this we concur.

The board of audit was in no sense the board of public works or its successor. It was a department of the District government established "to examine and audit for settlement" certain classes of the debt of the District. It was invested for this purpose with *quasi* judicial powers. The commission, which was the general governing body of the District, had no

control over it. No claim against the District of either of the classes this board was required to audit could be paid except upon a certificate of allowance signed by each of the members of the board and countersigned by the comptroller of the District. The board could not begin its work until public notice had been given the creditors of the District to appear and present their claims, and it could act only for a limited period. This notice was to all the world and required all who had claims to appear or suffer the consequences if they kept away. Laughlin was bound to take notice of the statute creating the board and of the duties of the board in respect to claims like his. He knew that his certificates were outstanding in the hands of some one invested by him with an apparent title as owner, or at least with an apparent authority to collect them. He knew or ought to have known that the holders of the certificates might present them and demand their allowance. The law charges him also with notice of the power of the board to examine witnesses and consider the rights of contesting parties. It is true he may have had the right to suppose that his letter to the treasurer of the board of public works would be brought to the attention of the board, but that letter was nothing more than a request to the treasurer not to pay. No reason was assigned for the request, and no statement was made of the facts connected with the title or authority of the person who might present them for payment. If the certificates had been presented to the treasurer after the letter was delivered to him, it would have been his duty to notify Laughlin before payment, so that the proper steps might be taken to contest the right of the holder to the money. But when the office of treasurer of the board of public works was abolished and the board of audit created, an entirely new condition of things arose. The statute authorizing the board gave notice to Laughlin that he must himself appear before that tribunal to assert his rights as against the holder of his certificates, or take some other steps to prevent their payment, and, if he did not, that his claim against the District might be lost. The board, even if his letter had been brought to its attention, would not have been compelled to give him any other notice to appear than that which

he already had. As he failed to appear at all, there was nothing for the board to do but to act upon the evidence which was before it, and decide accordingly. In *Cowdrey* v. *Vandeburg* the suit was by Vandeburg, the owner of a certificate like those now in question, against Blumenburg and Cowdrey, to compel surrender of the certificate to him, upon allegations as to their title very similar to those which are here made against them. Upon proof of the charge against Blumenburg and a failure by Cowdrey to show that he paid value for the certificate, the decree sought was granted. So here, if Laughlin had appeared before the board and made his showing, it is possible he might have got the pay instead of Cowdrey, but he failed to do so, and it is now too late for him to assert his rights against the District.

The judgment of the Court of Claims is

Affirmed.

DUNPHY *v.* RYAN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Argued January 15, 1886.—Decided January 25, 1886.

An agreement, on the part of A to acquire title in his own name to a tract of land upon the best terms possible, and when acquired to convey to B an undivided part thereof, and on the part of B to pay to A his proportionate part of the purchase money and expenses incurred in obtaining title, is a contract for the sale of lands within the Statute of Frauds: and the contract being verbal and not in writing as required by the Statute, A, after performing his part of the agreement, cannot recover from B his share of the price and expenses in an action at law founded upon and seeking to enforce the contract; nor in equity, under a statute which prescribes the same forms at law and in equity, when the pleadings show no allegation to lay a foundation for equitable relief.

Under the statute law of the Territory of Montana there is no distinction between legal and equitable remedies, and there is "but one form of action for the enforcement or protection of private rights and the redress or prevention of private

wrongs," which is "the same at law and in equity." Revised Statutes of Montana of 1879, page 41. This law being in force, James M. Ryan, the defendant in error, brought this suit in the District Court for the Third Judicial District in the County of Lewis and Clarke, Montana Territory, against Elijah M. Dunphy, the plaintiff in error, to recover judgment against the latter on his promissory note for $1511.50, dated June 1, 1879, and payable to the plaintiff in error on December 1st following.

The defendant admitted in his answer the execution and delivery of the note, and that it had not been paid, and, by way of cross-action and counterclaim, alleged that in February, 1879, one Rumsey and one Embrey were the owners of certain placer mining ground, with the appurtenances particularly described, situate in Grizzly Gulch, Minnesota Mining District, in Lewis and Clarke County, Montana, and that at the time mentioned, the defendant being in negotiation for the purchase thereof, entered into a contract with the plaintiff, which is thus stated in the defendant's answer:

"The said defendant was to effect the purchase of the two-thirds of the above-described property upon the best terms possible, exercising and using his best judgment for the joint use and benefit of said plaintiff and defendant; that the title thereto and all deeds of conveyance for the said interest in and to said premises and property were to be taken in the name of the defendant herein, and that the plaintiff herein was not to be known in the transfers and purchase until such time as the purchase was completed and all of the conveyances executed, and when so completed and a good and sufficient title acquired to said property by defendant, the defendant was to make and deliver to the said plaintiff a good and sufficient deed of conveyance for the undivided one-third thereof; and that upon the execution and delivery of such deed the said plaintiff promised and agreed to pay to this defendant the one-third of all moneys paid by him as the consideration for such conveyance and transfer, and the one-half of all expenses incurred and paid in and about obtaining the title to the said property as aforesaid."

Statement of Facts.

The answer further averred, in substance, that on July 26, 1879, the defendant had acquired a complete and perfect title to the entire interest and estate in said property by conveyances from Rumsey and Embrey; that the consideration for said conveyances was $5200, and the expenses incident to acquiring the title were $2200, and that on the day last mentioned the plaintiff was indebted to the defendant, under said contract, on account of the said purchase and expenses, in the sum of $1935.51, and that on that day he tendered to the plaintiff a good and sufficient deed for the one undivided third of said property and demanded of him the payment of the last-mentioned sum of money, and the plaintiff refused to receive the deed or pay the money demanded of him, and denied the existence of the agreement above set forth. The defendant therefore prayed judgment against the plaintiff for the sum of money so demanded, with interest from July 26, 1879.

The plaintiff filed a replication, in which he denied that he ever made the contract set out in the answer.

Upon the trial of the cause, as appeared by the bill of exceptions, the defendant being upon the stand as a witness in his own behalf, and having stated that he did, in February, 1879, enter into a verbal contract with the plaintiff for the purchase of the mining ground described in the answer, and that there was no written agreement, was asked to state what the agreement was. "The plaintiff objected to the witness answering said question, for the reason that the agreement, not being in writing," was "void by the statute of frauds. The court sustained the objection and refused to permit the said witness to answer the question." "The defendant then proposed to prove by said witness the truth of the matters alleged and set up in his answer, and read the same to the court. The court refused to permit the defendant to prove said matters on the ground that the said matters rested in parol and were not in writing." The defendant excepted to these rulings. There being no further evidence the jury returned a verdict for the plaintiff for $1733, the amount due on the note sued on, for which sum the court rendered judgment against the defendant.

Upon appeal by the defendant to the Supreme Court of the

Territory this judgment was affirmed. By the present writ of error the defendant seeks a reversal of the judgment of affirmance.

Mr. M. F. Morris for plaintiff in error.

I. It is of no consequence whether the set-off or counter-claim interposed as a defence is a legal or equitable one. Law and equity proceedings are blended by the laws of Montana, and such laws have been sustained by this court. *Hornbuckle* v. *Tombs*, 18 Wall. 648.

II. The Statute of Frauds of 29 Charles II. has been re-enacted in Montana with some modification. The Statute of Charles II. provided that the agreement or memorandum should be signed by the party to be charged therewith. The Statute of Montana, it will be noticed, requires signature only by the lessor or vendor, and therefore seems to imply that, as to the lessee or purchaser, no writing is necessary.

III. It would appear as if the territorial court had treated the case of the plaintiff in error as though it were one for the specific performance of a verbal contract for the sale and purchase of lands. It is respectfully submitted: 1st, that this is not the correct view of the case; and 2d, that even if it were, the plaintiff in error was entitled to recover.

IV. "If one has voluntarily done a thing which, being within the statute, he could not have been compelled to do, he may enforce payment of it—that is, recover the consideration orally agreed—from the other." Bishop on Contracts, §§ 503, 535, 545. If a conveyance is actually made, any oral promise to pay for the land is good. This is the tenor of all the authorities on the subject. *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 273; *Baker* v. *Wainwright*, 36 Maryland, 336; *Green* v. *Drummond*, 31 Maryland, 71; *Nutting* v. *Dickinson*, 8 Allen, 544; *Philbrook* v. *Belknap*, 6 Vt. 383; *Ray* v. *Young*, 13 Texas, 550; *Zabel* v. *Schroeder*, 35 Texas, 308; *Sims* v. *McEwen*, 27 Ala. 184; *Knowlman* v. *Bluett*, L. R. 9 Exch. 1; *Swain* v. *Seamens*, 9 Wall. 254.

V. No doubt it will be objected here, as it was in the court

below, if we may judge from the opinion filed in the case, that in order to "establish a resulting trust the purchase-money must be the property of the party paying it at the time of payment;" in other words, that if the plaintiff in error pays his own money, and not that of the defendant in error, there is no resulting trust, and no relation of principal and agent. But the answer to this is, that, if the plaintiff in error advances his own money for the use and benefit of the defendant in error, the payment is a loan to the latter in contemplation of law, and thereby becomes the money of the defendant in error.

Mr. Edwin W. Toole and *Mr. Joseph K. Toole* for defendant in error.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The defendant insists that the court erred in refusing to allow him to prove the contract set up in his answer. The statute law of Montana applicable to the question in hand is as follows: Chapter XIII., Art. I., of the Revised Statutes of Montana of 1879 provides as follows:

"Section 160. No estate or interest in land, other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

"Section 162. Every contract for the leasing for a longer time than one year, or for the sale of any lands or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made."

The denial in the replication of the plaintiff of the making of the contract on which the defendant based his cross-action is as effective for letting in the defence of the statute of frauds

as if the statute had been specifically pleaded. *May* v. *Sloan*, 101 U. S. 231; *Buttimere* v. *Hayes*, 5 M. & W. 456; *Kay* v. *Curd*, 6 B. Mon. 100. The question is, therefore, fairly presented, whether the contract alleged in the answer of the defendant, not being in writing, is valid and binding under the statutes of Montana.

We cannot doubt that the contract which the defendant seeks to enforce is a contract for the sale of lands. According to the averments of the answer it was this: The plaintiff, being in treaty for the purchase of the lands, agreed with the defendant to acquire title to the undivided two-thirds thereof in his own name upon the best terms possible, and, when he had acquired the title, to convey to the plaintiff, by a good and sufficient deed, an undivided third of the premises, for which the plaintiff promised to pay the defendant one-third of the purchase-money, and one-half the expenses incurred in obtaining the title. This is simply an agreement of the defendant to convey to the plaintiff a tract of land for a certain consideration. It, therefore, falls precisely within the terms of section 162, above quoted. It is a contract for the sale of lands, and, not being in writing signed by the vendor, is void. The circumstance that the defendant, not owning the land which he agreed to convey, undertook to acquire the title, instead of taking the case out of the statute, brings it more clearly and unequivocally within its terms. A contract void by the statute cannot be enforced directly or collaterally. It confers no right and creates no obligation as between the parties to it. *Carrington* v. *Roots*, 2 M. & W. 248; *Dung* v. *Parker*, 52 N. Y. 494. The defendant must, therefore, fail in his cross-action, unless he can take his case out of the operation of the statute of frauds.

The defendant seeks to evade the effect of the statute by the argument that in the transaction set out in his answer he was acting as the agent of the plaintiff as well as for himself, and that, having as such agent paid for the share of the land which he had agreed to convey to the plaintiff, he is entitled to recover back the price, as for money paid out and expended for the plaintiff at his request.

It is well settled that when one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid to the use of defendant at his request, or recover for the services upon the *quantum meruit* count. *Wetherbee* v. *Potter*, 99 Mass. 354; *Gray* v. *Hill*, Ryan & Moody, 420; *Shute* v. *Dow*, 5 Wend. 204; *Ray* v. *Young*, 13 Texas, 550. But in such cases the suit should be brought upon the implied promise. *Buttimere* v. *Hayes*, 5 M. & W. 456; *Griffith* v. *Young*, 12 East. 513; *Kidder* v. *Hunt*, 1 Pick. 328. Clearly the present case does not belong to that class. Here the suit is based upon, and its purpose is to enforce the void contract.

The cause of action set up in the defendant's answer is that the plaintiff, having contracted to purchase the land and receive a conveyance therefor, became liable, upon a tender to and refusal by him of the deed, to pay the agreed price. This is a suit upon the express contract. There is no implied contract on which the cross-action can rest, for the law implies a contract only to do that which the party is legally bound to perform. As the express contract set up by the defendant was void under the statute, the plaintiff was not bound in law to accept the deed tendered him by the defendant or pay the purchase money. The defendant paid no money to or for the plaintiff. The money paid out by him was to enable him to perform his contract with the plaintiff. He paid it out for himself and for his own advantage. The plaintiff has received neither the money nor the land from the defendant. Neither reason nor justice dictate that he should pay the defendant the price of the land, and therefore the law implies no provision to do so. 2 Bl. Com. 443; *Ogden* v. *Sanders*, 12 Wheat. 213, 341. The cross-action cannot, therefore, be sustained on any supposed implied promise of the plaintiff.

But the defendant's counsel further insist that there has been such a part performance of the contract as entitles the defendant to equitable relief, on the ground that it would be a fraud on him not to enforce the contract.

The case, as stated in the defendant's answer, is not, either

in the averments or prayer, one for equitable relief. There is no averment, and no proof was offered, that the refusal of the plaintiff to accept the deed and pay the purchase price of the land has subjected the defendant to any loss. His answer avers that before he made his contract with the plaintiff he was negotiating with the owner for the purchase of the land. It is not alleged that he would not have purchased the land if he had not made his contract with the plaintiff. There is no averment that the land is not worth, or that it cannot be sold for, all it cost him. As between these parties there has been no payment, no possession, and no improvements. The only complaint of misconduct on the part of the plaintiff which can be inferred from the pleadings is his refusal to perform a verbal contract for the purchase of lands. But the mere breach of a verbal promise for the purchase of lands will not justify the interference of a court of equity. *Purcell* v. *Miner*, 4 Wall. 513. There is no fraud in such a refusal. The party who so refuses stands upon the law and has a right to refuse. Under the circumstances of this case the statute is as binding on a court of equity as on a court of law. If the mere refusal of a party to perform a parol contract for the sale of lands could be construed to be such a fraud as would give a court of equity jurisdiction to enforce it, the statute of frauds would be rendered vain and nugatory. The defendant knew or ought to have known that the statute requires such a contract as the one he seeks to enforce to be evidenced by writing. That he did not exact a contract in writing is his own fault. Courts of equity are not established to relieve parties from the consequences of their own negligence or folly.

The statute of frauds is founded in wisdom and has been justified by long experience. As was said by Mr. Justice Grier, in *Purcell* v. *Miner*, *ubi supra*, the statute "is absolutely necessary to preserve the title to real property from the chances, the uncertainity, and the fraud attending the admission of parol testimony." It should be enforced. Courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions. But this case is barren of any averment or proof, or offer of proof, which ought to

Syllabus.

induce a court of equity to afford relief. It follows that neither in a court of law nor a court of equity can the defendant maintain his suit on the cause of action set up in his answer by way of counter-claim or cross-action.

Judgment affirmed.

OBERTEUFFER & Another *v.* ROBERTSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued January 6, 7, 1886.—Decided January 25, 1886.

Under section 7 of the act of March 3, 1883, 22 Stat. 523, the cost or value of paper cartons or boxes, in which hosiery and gloves are packed, in Germany, and transported to the United States, and the cost or value of the packing of the goods in the cartons, and of the cartons in an outer case, are not dutiable items, either by themselves, or as part of the market value abroad of the goods, unless the cartons are of a material or form designed to evade duties thereon, or are designed for use otherwise than in the bona fide transportation of the goods to the United States.

Where the cartons are of the usual kind known to the trade before the act of 1883 was passed, as customarily used for covering and transporting such goods, and are intended to accompany them and remain with them, in the hands of the retail dealer, until the goods are sold to the consumer, they are designed for use in the bona fide transportation of the goods to the United States, within the meaning of the act, and their cost or value is not a dutiable item.

Where the importer is not dissatisfied with the appraisement of his goods *per se*, but only with the addition to the entry of items for cartons and packing, his proper remedy is not to apply for a re-appraisement, but to protest and appeal.

This was an action brought to recover back duties alleged to have been illegally exacted. The facts which make the case are stated in the opinion of the court.

Mr. Edwin B. Smith for plaintiffs in error. *Mr. Charles Currie*, *Mr. Stephen G. Clarke* and *Mr. William Stanley* were with him on the brief.

Mr. Solicitor-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action brought in a State Court in New York, by Reece M. Oberteuffer, Henry Abegg and Henry H. Daeniker, composing the mercantile firm of Oberteuffer, Abegg & Daeniker, against William H. Robertson, Collector of the port of New York, to recover $140.80 as an excess of duties, paid on coverings and putting up charges on hosiery and gloves, on which *ad valorem* duties were imposed by law. It was removed into the Circuit Court of the United States by the defendant. At the trial the jury rendered a verdict for the defendant, by direction of the court, and there was a judgment for him, for costs, to review which the plaintiffs have brought a writ of error.

In July, 1883, the plaintiffs imported from Bremen 2 cases of wool gloves, Nos. 4836, 4837; 21 cases of cotton hosiery, Nos. 4852 to 4872; and one other case of cotton hosiery, No. 168. There were three invoices covered by one entry.

The invoice of the 2 cases of gloves was dated at Leipzig and Chemnitz, in Saxony, June 29, 1883, and was of goods purchased by the plaintiffs. It covered 500 dozen of gloves, in 5 items, the prices of which per dozen were given, and amounted to 2415 marks. There was a deduction of 3 per cent. discount for cash, or 72 marks, 45 pfennigs, leaving 2342 marks, 55 pfennigs. There was then added, under the item of "packing charges," 25 marks "for cases," 220 marks "boxes," and 5 marks "packing," being a total of 250 marks, less 3 per cent. discount for cash, or 7 marks, 50 pfennigs, leaving 242 marks, 50 pfennigs, which added made 2585 marks, 05 pfennigs. In the entry, the value was stated at 2342 marks, 55 pfennigs.

The invoice of the 21 cases of hosiery was dated at Leipzig and Chemnitz, in Saxony, July 5, 1883, and was of goods purchased by the plaintiffs. It covered 2949 dozen of hose, in 21 items, the prices of which per dozen were given, and amounted to 13,530 marks, 70 pfennigs. There was a deduction of 3 per cent. discount for cash, or 405 marks, 95 pfennigs, leaving 13,124 marks, 75 pfennigs. There was then added, under the item

of "packing charges," 420 marks "for cases," 1204 marks, 50 pfennigs "boxes," and 42 marks "packing," being a total of 1666 marks, 50 pfennigs, less 3 per cent. discount for cash, or 50 marks, leaving 1616 marks, 50 pfennigs, which added made 14,741 marks, 25 pfennigs. In the entry the value was stated at 13,124 marks, 75 pfennigs.

The invoice of the one case of hosiery was dated at Hohenstein, Ernsthal, in Saxony, July 4, 1883, and was of goods consigned to the plaintiffs for sale. It covered 178 dozen of hose, in 6 items, the prices of which per dozen were given, and amounted to 1629 marks, 20 pfennigs. There was a deduction of 4 per cent. discount for cash, or 65 marks, 20 pfennigs, leaving 1564 marks. There was then deducted, for "case" 10 marks; "freight from Hohenstein to Bremen," 15 marks; "and to New York," 29 marks; "consul fees," 10 marks, 75 pfennigs; and "insurance," 10 marks, 25 pfennigs; being a total of 75 marks, less 4 per cent. discount for cash, or 3 marks, leaving 72 marks, which deducted left 1492 marks; which was the value stated in the entry.

On the invoice of the 2 cases of gloves the report of the appraiser was that 225 marks (being the 220 marks for "boxes" and the 5 marks for "packing,") less importer's discount, should be added "to make market value in marketable condition." This was done, and the duty paid on the added amount was $20.80.

On the invoice of the 21 cases of hoisery the report of the appraiser was that 1246 marks, 50 pfennigs, (being the 1204 marks, 50 pfennigs, for "boxes," and the 42 marks for "packing,") less importer's discount, should be added "to make market value in marketable condition." This was done, and the duty paid on the added amount was $114.80.

On the invoice of the one case of hosiery, the report of the appraiser was that 30 pfennigs per dozen should be added "to make market value in marketable condition." This was done, and the duty paid on the added amount was $5.20.

The importers filed a protest with the collector in due time, and duly appealed to the Secretary of the Treasury, and brought suit in due time. The protest covered the entry in

this case and was as follows: "We protest against the liquidation, as made by you, of our entries of merchandise, below referred to, and against the payment of the duties exacted thereon, and exacted on the charges of whatever nature thereon, on the following grounds, and upon each and every one of them:

"First. That under the act of March 3, 1883, the cost or market value of said merchandise is alone dutiable, whereas, in ascertaining the dutiable value thereof, there has been illegally estimated and included, as a part of such value, charges expressly declared by section 7 of said act to be non-dutiable.

"Second. That, under the act of March 3, 1883, only the value of said cotton hose or other merchandise is dutiable, whereas the value of the usual and necessary sacks, crates, boxes, and other coverings have been estimated as part of the value of said goods, in determining the amount of duties for which they should be liable, contrary to the provisions of section 7, act March 3, 1883.

"Third. By the act of March 3, 1883, all duties heretofore exacted upon charges incurred in the importation of merchandise are repealed, but there has been included, in estimating the dutiable value of said goods, actual, usual, and necessary charges for putting up, preparing, and packing said merchandise, and we hereby separately and distinctly protest against all duties assessed by reason of such additions to the actual cost or market value of the actual merchandise imported.

"Fourth. That, under the act of March 3, 1883, said cotton hose or other merchandise are only dutiable at their first cost or net market value in principal markets of countries whence exported, whereas the appraiser, in fixing the dutiable value of said merchandise, has illegally estimated and included as a part of such value the charges for finishing and putting up said merchandise, or one or more of said charges.

"Fifth. That the dutiable value of said merchandise is its cost or true market value, at the date of its exportation, in the principal markets of the country whence it was exported, free of charges, but you have assessed a duty thereon upon a valuation in excess of such net cost or value.

"Sixth. We further protest against the duty assessed hereon, claiming that, for reasons heretofore set forth, the net invoice or entered value is the true legal value upon which the duties should have been assessed, and that the additions made to such value are made contrary to the statutes of the United States, in that non-dutiable charges have been reckoned as a part of the dutiable value of said goods.

"And we give notice that we pay all higher duties or rates than is claimed above as the legal duty, under compulsion, and to obtain and keep quiet possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision, and to likewise apply to all future similar importations by us."

The main question involved in the case is as to whether it was lawful to impose duties on the items for "boxes" and "packing" in the invoices of the 2 cases and the 21 cases, and on the item added to the invoice of the one case, which item was one for like boxes and packing. There was no duty charged on the outside packing case. The "boxes" in question were paper boxes or cartons, which contained the goods, and were themselves packed in the outside case, and the item for "packing" was for packing the goods in the cartons and lining the outside case and packing the cartons in it. The cartons contained some of them a dozen, and some a half dozen, pairs, of the articles. The outside case had a lining of heavy paper

or oilcloth, to protect the goods from sea water. Some of the cartons had a partition running through the middle, with half a dozen pairs of the articles on each side of the partition; some had a dozen pairs in each carton; and some had half a dozen pairs in each carton. The prices affixed to the gloves and hosiery bought, in the invoices of them, represent the prices of the goods, without case or cartons or packing. The plaintiffs paid not only for the goods, but for the cases, the cartons and the packing, paying a price per dozen of the goods, which covered the cases, the cartons and the packing, which price was 50 pfennigs higher per dozen of the goods than if there had been no cartons. In the invoice of the one case, the prices affixed are the prices for the goods, including, in fact, the items deducted on the invoice, and also the charge for cartons, which charge was not deducted on the invoice, although there is nothing on the invoice to show that that charge was part of the price. The cartons are for the convenience of the trade, in transporting the goods, and preserving them, and handling them, and counting them; and the cartons go with the goods in them, until they become empty through the sale of their contents in the United States, to consumers who buy at retail, for use. The cartons have labels on, showing the article, and the style, and the size, and the quantity.

The contention of the plaintiffs is, that by virtue of § 7 of the act of March 3, 1883, 22 Stat. 523, referred to in the protest, it was unlawful to exact duty on the value of the cartons and the packing; that, in respect to the invoice of the one case, the addition made was for cartons already included in the entered value; and that it was error to direct a verdict for the defendant.

Before examining the provisions of the act of 1883, it will serve to make a determination of their meaning more easy if it is distinctly seen what were the enactments in force on the subject at the time that act was passed.

By § 7 of the act of March 3, 1865, 13 Stat. 493, it was provided as follows: "That in all cases where there is or shall be imposed any ad valorem rate of duty on any goods, wares or merchandise imported into the United States, and in all cases

where the duty imposed by law shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such goods, wares or merchandise, it shall be the duty of the collector within whose district the same shall be imported or entered, to cause the actual market value, or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed." The same section then provided for an addition, on entry, by the importer, to the invoice value, to make such actual market value or wholesale price, and for a duty of twenty per cent. ad valorem on the appraised value, in addition to other lawful duties, if the appraised value should exceed by ten per cent. or more the value so declared in the entry. It also provided that the duty should "not be assessed on an amount less than the invoice or entered value;" and then repealed §§ 23 and 24 of the act of June 30, 1864, 13 Stat. 216, 217, "and all Acts and parts of Acts requiring duties to be assessed upon commissions, brokerage, costs of transportation, shipment, transhipment, and other like costs and charges incurred in placing any goods, wares or merchandise on shipboard, and all Acts or parts of Acts inconsistent with the provisions of this Act." Section 24 of the act of 1864, thus repealed, was in these words: "That in determining the valuation of goods imported into the United States from foreign countries, except as hereinbefore provided, upon which duties imposed by any existing laws are to be assessed, the actual value of such goods on shipboard at the last place of shipment to the United States shall be deemed the dutiable value. And such value shall be ascertained by adding to the value of such goods at the place of growth, production or manufacture, the cost of transportation, shipment, and transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which such shipment is made to the United States, the value of the sack, box, or covering of any kind, in which such goods are

contained, commission at the usual rate, in no case less than two and one-half per centum, brokerage, and all export duties, together with all costs and charges, paid or incurred for placing said goods on shipboard, and all other proper charges specified by law."

The effect of the legislation thus embodied in § 7 of the act of 1865, as applicable to goods subject to ad valorem duty, was to fix as their dutiable value, their actual market value or wholesale price at the period of their exportation to the United States, in the principal markets of the country from which they were imported into the United States, instead of their actual value on shipboard at their last place of shipment to the United States. The provision in the act of 1864, for adding, as part of the dutiable value, to the value of the goods themselves, the value of any sack, box, or covering, containing the goods, was repealed; and, under the act of 1865, the dutiable value was such actual market value or wholesale price abroad of the goods themselves, without sack, box, or covering, and the value of the sack, box, or covering was not to be added, and was not dutiable.

So much of § 7 of the act of 1865 as related to additions by the importer, on entry, and to the duty not being assessed on an amount less than the invoice or entered value, was re-enacted as § 2900 of the Revised Statutes. So much of the same section as related to the rule for appraisement was re-enacted as § 2906, in these words: "When an ad valorem rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or be directed to be estimated or based upon, the value of the square yard, or of any specific quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value, or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed."

After the act of 1865, followed the act of July 28, 1866, § 9 of which, 14 Stat. 330, provided as follows: "That in deter-

mining the dutiable value of merchandise hereafter imported, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same shall have been imported into the United States, the cost of transportation, shipment, and transhipment, with all the expenses included, from the place of production, growth, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such goods are contained; commission at the usual rates, but in no case less than two and a half per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment. And all charges of a general character incurred in the purchase of a general invoice shall be distributed pro rata among all parts of such invoice; and every part thereof charged with duties based on value shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined: *Provided*, That all additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by ten per centum the value so declared in the entry, in addition to the duties imposed by law, there shall be levied, collected, and paid a duty of twenty per centum on such value."

These provisions of § 9 of the act of 1866 were re-enacted as §§ 2907 and 2908 of the Revised Statutes in these words: "Sec. 2907. In determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment, and transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission

at the usual rates, out in no case less than two and a half per centum; and brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed pro rata among all parts of such invoice; and every part thereof charged with duties based on value shall be advanced according to its proportion, and all wines or other articles paying specific duties by grades shall be graded and pay duty according to the actual value so determined. § 2908. All additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by ten per centum the value declared in the entry, in addition to the duties imposed by law, there shall be collected a duty of twenty per centum on such value."

Then followed § 14 of the act of June 22, 1874, 18 Stat. 188, which provided as follows: "That wherever any statute requires that, to the cost or market value of any goods, wares, and merchandise imported into the United States, there shall be added to the invoice thereof, or, upon the entry of such goods, wares, and merchandise, charges for inland transportation, commissions, port duties, expenses of shipping, export duties, cost of packages, boxes, or other articles containing such goods, wares, and merchandise, or any other incidental expenses attending the packing, shipping, or exportation thereof from the country or place where purchased or manufactured, the omission, without intent thereby to defraud the revenue, to add and state the same on such invoice or entry shall not be a cause of a forfeiture of such goods, wares, and merchandise, or of the value thereof; but in all cases where the same, or any part thereof, are omitted, it shall be the duty of the collector or appraiser to add the same, for the purposes of duty, to such invoice or entry, either in items or in gross, at such price or amount as he shall deem just and reasonable, (which price or amount shall, in the absence of protest, be conclusive,) and to impose and add thereto the further sum of one hundred per centum of the price or amount so added; which addition shall constitute a part of the dutiable value of such goods, wares, and merchandise, and shall

be collectible as provided by law in respect to duties on imports." Section 26 of the same act repealed all prior inconsistent provisions.

Such were the enactments in force when the act of 1883 was passed. When the duty was ad valorem, or based on the value of a given quantity or parcel of goods, there was, by § 2906 of the Revised Statutes, to be an appraisement here of the actual market value or wholesale price of the goods, at the period of exportation, in the principal markets of the country from which they were imported, and such appraised value was to be the dutiable value of the goods, as merchandise, without reference to any of the items required by § 2907 to be added as charges to such actual market value or wholesale price of the goods. All those items so required to be added were charges, and not part of the appraised value of the goods. By § 2908, if the items added for charges, after entry, exceeded by ten per cent. the entered value of the goods, a duty of twenty per cent., in addition to the duties imposed by law, was required to be collected "on such value." This additional duty did not depend on an intent to defraud, but was imposed for the mere omission of the charges from the entry. By § 14 of the act of 1874, the omission to add the charges, without intent to defraud, was declared not to be a cause of forfeiture, but when they were omitted, it was made the duty of the public officers to add them for the purposes of duty, and to add the further sum of one hundred per cent. of the amount so added, such additions to be a part of the dutiable value.

Then followed the 7th section of the act of 1883, in these words: "That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the Act entitled 'An Act to amend the customs revenue laws, and to repeal moieties,' approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering, of any kind, be esti-

mated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings, of any kind, shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

By this § 7 of the act of 1883, in the first place, §§ 2907 and 2908 of the Revised Statues, and § 14 of the act of 1874, are repealed. This repeals the provision of § 2907, that, in determining the dutiable value of the merchandise, there shall be added to its appraised market value (to be ascertained under § 2906, which is left unrepealed,) the expenses and charges mentioned in § 2907, among which are "the value of the sack, box, or covering, of any kind, in which such merchandise is contained," "and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment." It also repeals the provision of § 2908 for the additional duty of twenty per cent. when the addition for the charges mentioned in § 2907 exceeds by ten per cent. the entered value. It also repeals the provision of § 14 of the act of 1874, for the addition of double the charges omitted, among which charges are specified "cost of packages, boxes, or other articles containing such goods, wares, and merchandise, and any other incidental expenses attending the packing, shipping, or exportation thereof from the country or place where purchased or manufactured."

The items thus specified in § 2907 of the Revised Statutes, and in § 14 of the act of 1874, being charges, and being eliminated as part of the dutiable value of goods, and § 2906 remaining for the appraisement of the goods *per se*, without the addition of any of the charges so abolished, it would seem that the meaning of § 7 of the act of 1883 was plain.

But that section goes on to say: "and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported." Nothing is imposed by § 2907 of the Revised Statutes but the addition to the appraised market value, pro-

vided for by § 2906, of the items specified in § 2907, all of which are thus declared by § 7 of the act of 1883 to have been "charges." Those charges are no longer to be added or estimated, as before, in determining the dutiable value of the goods. So, the repealed § 14 of the act of 1867 imposed nothing except in respect of the items it specified, which were items to be added to appraised market value, and are, therefore, declared by § 7 of the act of 1883 to have been "charges."

But that section goes on still further to say: "nor shall the value of the usual and necessary sacks, crates, boxes, or covering, of any kind, be estimated as part of their value in determining the amount of duties for which they are liable." This means, that not only, as the section had declared, shall none of the charges provided for in the repealed sections be added or estimated in ascertaining dutiable value, but the value of the sacks, crates, boxes, or covering, of any kind, shall not be estimated as part of the value, or included in the value, of the goods, but shall be omitted, leaving the value of the goods to be appraised *per se*, under § 2906, without estimating or including the value of the sack, crate, box, or covering, of any kind, and, therefore, requiring such latter value to be deducted, if the entry or invoice includes it, either separately, or as part of a price or value affixed to the goods, if it is capable of separation and deduction, unless the effect is to reduce the dutiable value below the invoice or entered value. For, by § 2907 of the Revised Statutes, "the value of the sack, box, or covering, of any kind, in which such merchandise is contained," was required to be added, that is, estimated in determining the dutiable value of merchandise;" and the items required by § 14 of the act of 1874 to be added to the market value of goods, for the purposes of duty, cover the "cost of packages, boxes or other articles containing" the goods, and the expenses of packing.

The last clause of § 7 of the act of 1883 adds force to the foregoing views. It is this: "*Provided*, That if any packages, sacks, crates, boxes, or coverings, of any kind, shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods

to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same." This implies that if the boxes or coverings of any kind are not of a material or form designed to evade duties thereon, and are designed to be used in the bona fide transportation of the goods to the United States, they are not subject to duty. If either of these things occurs they are subject to one hundred per cent. duty. There is not, in the present case, any suggestion that the cartons were of a form or material designed to evade duties thereon. They were of the usual kind known to the trade before the law was passed, as customarily used for the same purpose. They were designed to be used in the bona fide transportation of the goods to the United States, not only because they were and had been a customary article in the trade for covering and transporting these goods, but because they were intended to accompany the goods and remain with them in the hands of the retail dealer, until the goods should be sold to the consumer.

The change made by § 8 of the act of 1883 in the oaths required on entry, is in consonance with the above interpretation of the effect of § 7. Section 8 amends § 2841 of the Revised Statutes, as to the forms of the three several oaths, in the following manner, the particular parts referred to of the old forms and the new ones being placed side by side, and the parts in each which differ from the other being in italic:

Oath of consignee, importer, or agent.

Old oath.	*New oath.*
"that the invoice now produced by me exhibits the actual cost, (if purchased,) or fair market value, (if otherwise obtained,) at the time or times, and place or places, when or where procured, (as the case may be,) of the said goods, wares, and merchandise, *all the charges thereon,*	"that the invoice now produced by me exhibits the actual cost, (if purchased,) or fair market value, (if otherwise obtained,) at the time or times, and place or places, when or where procured, (as the case may be,) of the said goods, wares, and merchandise, *including all costs for*

and no other or different discount," &c.	*finishing said goods, wares and merchandise to their present condition*, and no other or different discount," &c.

Oath of owner in cases where merchandise has been actually purchased.

Old oath.	*New oath.*
"that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares, and merchandise, *of all charges thereon*, including *charges* of *purchasing, carriages, bleaching, dyeing, dressing*, finishing, *putting up, and packing*, and no other discount," &c.	"that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares, and merchandise, including *all cost* of finishing *said goods, wares, and merchandise to their present condition*, and no other discount," &c.

Oath of manufacturer or owner in cases where merchandise has not been actually purchased.

Old oath.	*New oath.*
"the invoice which I now produce contains a just and faithful valuation of the same, at their fair market value, *including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up, and packing*, at the time," &c.	"the invoice which I now produce contains a just and faithful valuation of the same, at their fair market value, at the time," &c.
"that the said invoice contains also a just and faithful account of all *charges actually paid*, and no other discount," &c.	"that the said invoice contains also a just and faithful account of all *the cost for finishing said goods, wares, and merchandise to their present condition*, and no other discount," &c.

It is apparent that these new forms of oath leave out

"charges" entirely, because the statute leaves them out as dutiable items. The "cost of finishing the goods to their present condition" is part of the value of the goods abroad outside of the abolished "charges." Goods may be bought abroad unfinished, and then caused to be finished; but in no case can the cost of finishing be left out of their value, however they have been obtained. So, the new oaths embrace only the value of the goods *per se*, and there is no oath as to any item before called "charges." The item of "finishing" is broad enough to include bleaching, dyeing, and dressing, but does not include any of the other charges specifically named in the old oaths.

The contention on the part of the government is that § 7 of the act of 1883 repeals only so much of the prior statutes as added to the market value abroad the charges which were incident to the shipment of the goods, after they were put in a condition for the market abroad, as usually sold; that the expense of the cartons was necessary to put them into that condition; that the value of the cartons was part of the market value of the goods abroad; and that, therefore, it must enter into the dutiable value. It is urged that the carton is not incident to the transportation of the goods, but is part of their preparation for sale abroad; that it is an integral part of the value of the whole, carton and goods, as a unit; that, in valuing such unit, nothing more is done than valuing the goods, ready for sale; and that, although, in one sense, the carton is a charge, it is a charge incurred in putting the merchandise into the condition in which it is sold abroad, and it becomes part of the goods, and its value is merged in the value of the filled carton. The sufficient answer to these suggestions is, that they allow no weight to the declaration of the statute that the value of the usual and necessary box or covering, of any kind, shall not be estimated as part of the value of the goods, in determining the amount of duties for which the goods are liable. The carton is a usual box or covering. It is a necessary box or covering, within the meaning of the law, on the facts shown in the bill of exceptions. It was a box or covering in which the goods were contained, and so was a charge specifically imposed by § 2907 of the Revised Statutes; and

§ 7 of the act of 1883 says that no charge imposed by § 2907 shall be estimated in ascertaining the value of the goods.

The bill of exceptions shows, that, after the enactment of § 14 of the act of 1874, and prior to March 3, 1883, it was the practice of the custom-house at New York, where there were cartons with the goods, and the cartons were not set forth in the invoice, to treat the value of the cartons as a charge, under that section, and add such value, and one hundred per cent. thereon, to make dutiable value. No statute is referred to which ever recognized the value of cartons as other than a charge, and no such practice appears to have obtained before March 3, 1883.

As the action of the collector in this case appears to have been founded on a circular issued by the Treasury Department on May 15, 1883, and was sanctioned by the opinion of the Attorney-General, Mr. Brewster, given to the Secretary of the Treasury on January 11, 1884, and as there have been decisions of Circuit Courts in accordance with those views (although there have been some to the contrary), the question involved has been carefully considered by this court, and the judges are unanimously of opinion that the true view of the statute in force at the time the goods in this case were entered is that announced in this opinion.

It appears that, after verdict and before judgment, there was a motion made for a new trial in this case, in deciding which, *Oberteuffer* v. *Robertson*, 24 Fed. Rep. 852, the court stated that the verdict for the defendant was directed on the ground that the plaintiff's protest "was insufficient to present the objections relied upon by them to the exaction of the duties in controversy," but that the motion for a new trial was denied on the ground that the duties were not illegally exacted.

It it contended for the government, that a reappraisement should have been applied for by the plaintiffs, under § 2930 of the Revised Statutes, and that they mistook their remedy. We are of opinion that this is not a sound view. They were not dissatisfied with the appraisement of the value of the goods *per se*. That value was left at the value stated in the

invoice. The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under § 2906, to appraise the foreign market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the custom-house was only a decision of the collector, under § 2931, that the cartons and packing were dutiable costs and charges. Those items appeared distinctly, as to two of the invoices, on them and on the entry, as charges for boxes and packing, and, being deducted as such on the face of the entry, were again added as such by the appraiser. As to the third invoice, the value of the cartons and packing, being included in the invoice value, was left in in the entered value, and a sum was added which in fact represented a second time the value of the cartons and packing, as a dutiable charge. We are of opinion that the first, second, and third paragraphs of the protest in this case are sufficient to raise the points relied on by the plaintiffs, and that to protest was the proper way to raise those points.

The exaction of duty on the packing, whether packing the goods in the cartons, or the cartons in the outer case, or lining the outer case, was not warranted by law. These were "charges" under the former statutes and were abolished as charges by the act of 1883.

As to the one case of hosiery, the addition to the entered value, of thirty pfennigs per dozen for the cartons and packing, was unauthorized, and the goods were dutiable at only the entered value of 1492 marks. As, under § 2900 of the Revised Statutes, duty cannot, as to the goods, "be assessed upon an amount less than the invoice or entered value," whatever is put down in the invoice and entry as the value of the goods *per se* cannot be diminished, although in fact there may have been included in such value the cost of cartons and packing, unless the invoice or entry shows distinctly what such cost was and that it was included. In fact the cartons and packing were included twice, as to the one case of hosiery, in exacting duties, but only that which the appraiser added for them can be deducted, although their cost would not properly have been part of the dutiable value if the invoice and entry had not

stated the value of the goods at a price which in fact included the cost of the cartons and packing.

It results, from these views, that

The judgment of the Circuit Court must be reversed, and the case be remanded to that court, with a direction to grant a new trial.

COE *v.* ERROL.

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

Submitted October 13, 1885.—Decided January 25, 1886.

Goods and chattels within a State are equally taxable whether owned by a citizen of the State, or a citizen of another State, even though the latter be taxed in his own State for the value of the same goods as part of his general personal estate.

Goods, the product of a State, intended for exportation to another State, are liable to taxation as part of the general mass of property of the State of their origin, until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose; the carrying of them to, and depositing them at, a depot for the purpose of transportation is no part of that transportation.

When goods, the product of a State, have begun to be transported from that State to another State, and not till then, they have become the subjects of inter-state commerce, and, as such, are subject to national regulation, and cease to be taxable by the State of their origin.

Goods on their way through a State from a place outside thereof to another place outside thereof, are in course of inter-state or foreign transportation, and are subjects of inter-state or foreign commerce, and not taxable by the State through which they are passing, even though detained within that State by low water or other temporary cause.

Logs cut at a place in New Hampshire were hauled down to the town of Errol, on the Androscoggin River, in that State, to be transported from thence upon the river to Lewiston, Maine; and waited at Errol for a convenient opportunity for such transportation: *Held*, That they were still part of the general mass of property of the State, liable to taxation, if taxed in the usual way in which such property is taxed in the State.

In September, 1881, Edward S. Coe filed a petition in the Supreme Court of New Hampshire for the county of Coös, against the Town of Errol, for an abatement of taxes, and

therein, amongst other things, alleged that on the 1st of April, 1880, he and others, residents of Maine and Massachusetts, owned a large number of spruce logs that had been drawn down the winter before from Wentworth's location, in New Hampshire, and placed in Clear Stream and on the banks thereof, in the town of Errol, county of Coös, New Hampshire, to be from thence floated down the Androscoggin River to the State of Maine to be manufactured and sold; and that the selectmen of said Errol for that year appraised said logs for taxation at the price of $6000, and assessed thereon State, county, town, and school taxes, in the whole to the amount of $120, and highway taxes to the amount of $60. A further allegation made the same complaint with regard to a lot of spruce logs belonging to Coe and another person, which had been cut in the State of Maine, and were on their way of being floated to Lewiston, Maine, to be manufactured, but were detained in the town of Errol by low water. Similar allegations were made with regard to logs cut the following year, 1880, and drawn from Wentworth's location, and part of them deposited on lands of John Akers, and part on land of George C. Demeritt, in said town of Errol, to be from thence taken to the State of Maine; and, also, with regard to other logs cut in Maine and floated down to Errol on their passage to Lewiston, in the State of Maine, and both which classes of logs were taxed by the selectmen of Errol in the year 1881. The petition also contained the following allegations, to wit.:

"Said Coe further says that said logs of both years, so in the Androscoggin River, have each year been taxed as stock in trade in said Lewiston to said Coe and Pingree, and said Coe claims and represents that none of said logs were subject to taxation in said Errol for the reason that they were in transit to market from one State to another, and also because they had all been in other ways taxed.

"That said Androscoggin River, from its source to the outlet of the Umbagog Lake in the State of New Hampshire, through said State and through the State of Maine to said Lewiston, is now, and for a long time has been, to wit, for more than twenty years last past, a public highway for the

floatage of timber from said lakes and rivers in Maine, and from the upper waters of said Androscoggin River and its tributaries in New Hampshire down said river to said Lewiston, and has been thus used by the petitioner and his associates in the lumber business for more than twenty years last past."

Without further pleading, the parties made an agreed case, the important part of which was as follows, to wit:

"It is agreed that the facts set forth in the petition are all true except what is stated as to the taxation of the logs as stock in trade in Lewiston, Maine; and if that is regarded by the court as material, the case is to be discharged and stand for trial on that point. It is agreed that upon this petition the legality of the taxation is intended to be brought before the court for adjudication, and all formal objections to the proceedings in the town meeting, &c., and all other matters of form, are waived, and we submit the matter to the court for a legal adjudication as to whether or not any or all of the taxes shall be abated.

"And it is agreed that for many years the petitioner and his associates in the lumber business have cut large quantities of timber on their lands in Maine and floated them down the said lakes and rivers in Maine and down the Androscoggin River to the mills at said Lewiston; and timber thus cut has always lain over one season, being about a year, in the Androscoggin River, in this State, either in Errol, Dummer, or Milan; and the timber referred to in this petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation, according to the above custom."

Upon this case the Supreme Court of New Hampshire, in September term, 1882, adjudged as follows, to wit: "Now, at this term, the said questions of law having been fully determined in said law term, and an order made that that portion of said tax assessed upon the logs cut as aforesaid in said State of Maine be abated, and that the tax assessed upon all of said logs cut in the State of New Hampshire be sustained, and said order having been fully made known to the parties of this case and become a part of the record thereof, it is therefore ordered and decreed by the court that there be judgment in

accordance with said order made at said law term, without costs to either party."

The petitioner took a bill of exceptions, setting forth the agreed case, and stating, amongst other things, the points raised on the hearing before the Supreme Court of New Hampshire, and the decision of that court thereon, as follows:

"On said hearing the petitioner claimed that said taxes named in the petition and the statutes of this State, under the provisions of which said taxes were assessed, were illegal and void, because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to, the general provisions of the Constitution of the United States; because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to, that part of section 2, art. 4, of the Constitution of the United States, which provides that 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States;' because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to, those parts of sec. 8 of art. 1 of the Constitution of the United States which provide that 'The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States,' and section 10 of said article 1, which provides that 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.'"

Mr. Henry Heywood for plaintiff in error.

The legal *situs* of this property, for the purposes of taxation, is not in the town or place where the property, thus in transit, happens to be on the first day of April or other date of taxation. *Conley* v. *Chedic*, 7 Nev. 336; *Parker Mills* v. *Tax Commissioners*, 23 N. Y. 242, 245; *Ellsworth* v. *Brown*, 53 Maine, 519; *Campbell* v. *Machias*, 33 Maine, 419. By the statute of Maine, the logs taxed in Errol, were subject to taxation at Lewiston, where the owners occupied a mill and one of them resided. For the purposes of taxation Lewiston was the legal

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situs of this personal property. *Desmond* v. *Machias*, 48 Maine, 478. Revised Statutes of Maine, 1871, 131 §§ 13 and 14, as amended by ch. 182, laws of 1877. To sustain a taxation of the same property in New Hampshire must lead to double taxation and the statute attempting to authorize such taxation is in conflict with the Constitution of New Hampshire. Opinion of the Justices, 4 N. H. 565.

The resident owner of personal property in the State of New Hampshire has the right to use the public rivers of the State for the purposes of navigation without subjecting his property to the burden of double taxation. It is the privilege of the citizens of each State to use the public rivers and highways of the State for the purposes of transporting himself or property; and the like privilege or right is secured by the Federal Constitution to citizens of the other States upon equal terms. Article 4, section 2. To hold that the property of a citizen of Maine in transit through New Hampshire upon one of our public watercourses and legally liable to taxation in Maine, is also liable to taxation in New Hampshire, would not be according to the citizen of Maine the privilege of the citizen of New Hampshire, and the State statute attempting to authorize such taxation of the property of the citizen of Maine is to that extent in violation of the provision of the Federal Constitution just cited. *Oliver* v. *Washington Mills*, 11 Allen, 268. In *Crandall* v. *Nevada*, 6 Wall. 35, a State law assessing a tax on passengers through the State was held void. For the same reasons given in that case the citizen of another State has the right to transport his property from or through the State of New Hampshire upon its public highways by land or water without subjecting it to taxation in New Hampshire. *Brown* v. *Maryland*, 12 Wheat. 419; *Ward* v. *Maryland*, 12 Wall. 418; *Paul* v. *Virginia*, 8 Wall. 168; *Guy* v. *Baltimore*, 100 U. S. 434, 439.

We further claim that any taxation under the laws of any of the States of this property, at the time of the taxation being the subject of inter-state commerce, is in violation of the provisions of article 12, section 8, par. 3 of the United States Constitution, and of section 10, par. 2. It has uniformly

been held by the Supreme Court of the United States that a tax assessed under a State law, upon property being in transit through the State, or from a point in the State to another State, is in violation of these last provisions of the United States Constitution, or rather as we understand it, in violation of the above cited provision giving Congress power "to regulate commerce . . . among the several states." *Case of the State Freight Tax*, 15 Wall. 232; *Almy* v. *California*, 24 How. 169; *Woodruff* v. *Parham*, 8 Wall. 123; *Steamship Co.* v. *Port Wardens*, 6 Wall. 31; *Welton* v. *Missouri*, 91 U. S. 275; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Cook* v. *Pennsylvania*, 97 U. S. 566. Wherever the subjects, in regard to which a power to regulate commerce is asserted, are in their nature national or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress. Transportation of merchandise through a State or from one State to another is of this nature. *State Freight Tax*, 15 Wall. 232; *Hall* v. *DeCuir*, 95 U. S. 485. "The power to regulate commerce among the several states was vested in Congress, in order to secure equality and freedom in commercial intercourse against discriminating state Legislation." Field, J., in *Railroad Co.* v. *Richmond*, 19 Wall. 584, 589; *Welton* v. *Missouri*, above cited; *Webber* v. *Virginia*, 103 U. S. 344. The non-exercise by Congress of its power to regulate commerce among the States, is equivalent to a declaration by that body that such commerce shall be free from any restriction. *Welton* v. *Missouri*, 91 U. S. 275.

It will be said that these taxes, as is said by Blodgett, J., in the opinion in this case in the State court, is no attempt to regulate commerce upon the Androscoggin River passing from New Hampshire into Maine, and the like in relation to the Connecticut and other large rivers in the State, but is a tax upon property in fact located within the State and legally taxable there. The answer to this position is the practical effect of taxes assessed under State laws upon property thus situated. Admit the power of the State to assess taxes upon property in transit between the States, and inter-state commerce will be regulated by State taxation irrespective of any

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laws or regulations Congress can devise for that purpose, under the power given by the constitutional provision just cited. This position has always been taken to sustain State taxation, and has been answered by the Supreme Court substantially in the same way: Mr. Justice Strong in the case of the *State Freight Tax*, 15 Wall. 272, says: "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. The same has been decided in the following cases: *Bank of Commerce* v. *New York*, 2 Black, 620; *The Bank Tax Case*, 2 Wall. 200; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Brown* v. *Maryland*, 12 Wheat. 419; *Henderson* v. *New York*, 92 U. S. 259. See also *State* v. *Eagle*, 34 N. J. L. 425; and *Currier* v. *Gordon*, 21 Ohio St. 605.

The facts show that the property was in transit. At the date of the taxation the logs were the subject of inter-state commerce. A temporary delay on the way did not terminate the transit. The property is all the time, while in motion or at rest, in transit, and is during the whole time of its transit the subject of inter-state commerce. Just as much so as the logs that come from Maine, or as these Wentworth Location logs would have been had they started from that location just prior to the first day of April and had passed through the town of Errol on the spring freshet on the first day of April.

It has been recently decided by the Supreme Court of New Hampshire that the petition for abatement given by the statute is the only relief the property owner has in that State against an illegal assessment, which is not fraudulently made. *Edes* v. *Boardman*, 58 N. H. 580. And in our case we were denied the right to an abatement of the taxes upon the ground that the assessment was not in any manner in violation of any provision of the United States Constitution. So it cannot be said that this is not a proceeding in which we are entitled to a writ of error to this court.

Mr. S. R. Bond for defendant in error.

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MR. JUSTICE BRADLEY delivered the opinion of the court. After stating the facts in the language above reported he continued:

The case is now before us for consideration upon writ of error to the Supreme Court of New Hampshire, and the same points that were urged before that court are set up here as grounds of error.

The question for us to consider, therefore, is, whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another State.

We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view.

We recur, then, to a consideration of the question freed from this limitation: Are the products of a State, though intended for exportation to another State, and partially prepared for

that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

Of course they cannot be taxed *as* exports; that is to say,

they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, *Woodruff* v. *Parham*, 8 Wall. 123, that this clause relates to imports from, and exports to, foreign countries, yet when such imposts or duties are laid on imports or exports from one State to another, it cannot be doubted that such an imposition would be a regulation of commerce among the States, and, therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan*, *ante*, 446, decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding.

The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question. In regard to imports from foreign countries, it was settled in the case of *Brown* v. *Maryland*, 12 Wheat. 419, that the State cannot impose any tax or duty on

such goods so long as they remain the property of the importer, and continue in the original form or packages in which they were imported; the right to sell without any restriction imposed by the State being a necessary incident of the right to import without such restriction. This rule was deemed to be the necessary result of the prohibitory clause of the Constitution, which declares that no State shall lay any imposts or duties on imports or exports. The law of Maryland, which was held to be repugnant to this clause, required the payment of a license tax by all importers before they were permitted to sell their goods. This law was also considered to be an infringement of the clause which gives to Congress the power to regulate commerce. This court, as before stated, has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses before referred to; and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622.

But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real

estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall, 557, 565: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depôt where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depôt, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within

the character of property which, according to the principles herein laid down, is taxable. But granting all this, it may still be pertinently asked, How can property thus situated, to wit, deposited or stored at the place of entrepôt for future exportation, be taxed in the regular way as part of the property of the State? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed, or assessed for taxation, in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its destination. If thus taxed, in the usual way that other similar property is taxed, and at the same rate, and subject to like conditions and regulations, the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the State, it must be treated in all respects as other property of the same kind is treated.

These conditions we understand to have been complied with in the present case. At all events there is no evidence to show that the taxes were not imposed in the regular and ordinary way. As the presumption, so far as mode and manner are concerned, is always in favor of, and not against, official acts, the want of evidence to the contrary must be regarded as evidence in favor of the regularity of the assessment in this case.

The judgment of the Supreme Court of New Hampshire is

Affirmed.

IRON SILVER MINING COMPANY *v.* CHEESMAN & Another.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Argued December 18, 21, 1885.—Decided January 25, 1886.

The act of Congress, § 2322 Revised Statutes, gives to the owner of a mineral vein or lode, not only all that is covered by the surface lines of his established claim as those lines are extended vertically, but it gives him the right

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to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally.

But this right is dependent, outside of the lateral limits of the claim, upon its being the same vein as that within those limits. For the exercise of this right it must appear that the vein outside is identical with and a continuation of the one inside those lines.

The acts of Congress use the words vein, lode, or ledge as embracing a more or less continuous body of mineral, lying within a well-defined boundary of other rock, in the mass within which it is found, or, it may be said, to be a body of mineral, or a mineral body of rock within defined boundaries in this general mass.

A vein is by no means always a straight line or of uniform dip or thickness, or richness of mineral matter, throughout its course. The cleft or fissure in which a vein is found may be narrowed or widened in its course, and even closed for a few feet and then found further on, and the mineral deposit may be diminished or totally suspended for a short distance, but, if found again in the same course with the same mineral within that distance, its identity may be presumed.

But if the mineral disappears, or the fissure with its walls of the same rock disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimants' survey is gone.

Whether any deposit of mineral matter, about which a contest arises before a court or jury, has been shown to belong to one of these veins within a prior location, is a question to be decided by the application of these principles to all the evidence in the case.

When the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not.

This was an action in ejectment to recover possession of mineral lands in Colorado. The facts which make the case are stated in the opinion of the court.

Mr. Walter H. Smith and *Mr. G. G. Symes* for plaintiff in error.

Mr. C. S. Thomas for defendants in error. *Mr. T. M. Patterson* was with him on the brief.

Mr. Justice Miller delivered the opinion of the court.

The Iron Silver Mining Company brought its suit in the nature of an action of ejectment against Walter S. Cheesman, Walter S. Clarke, and Thomas Bennett, to recover possession of a part of a vein or lode of mineral deposit, the right to which

it asserted under a patent from the United States. The action was commenced in the Circuit Court of the United States for the District of Colorado. The defendants denied the title of the plaintiff to the vein at the point in controversy, and though they did not assert a claim under a patent, they did show such proceedings under the mining laws of the United States as justified their possession, unless plaintiffs had a better right.

There were three trials by jury in the case. The first resulted in a verdict in favor of the defendants. That was set aside and a new trial ordered under the statute of Colorado, which gives the unsuccessful party in such actions an absolute right to this second trial. The second trial failed by reason of a divided jury, and on the third trial the verdict was again for the defendants. It is to review the judgment rendered on this verdict that the present writ of error is taken.

The plaintiff relies on the accepted proposition, that the owner of a mineral vein covered by the superficial lines of his claim may not only pursue that vein perpendicularly within those lines, but may, when the vein passes beyond the side lines of this claim or survey, pursue that vein outside of a line drawn vertically from the superficial side lines, as far as the vein extends.

In pursuit of what is asserted to be a continuation of the vein on which its patent is located, but outside of the perpendicular of its side lines, the Iron Silver Mining Company, owning what it called the Lime lode and mining claim, came into collision with defendants, who were working the lode which they called the Smuggler. Of course the defendants, being in possession, could only be deprived of that possession by virtue of a superior title in the plaintiff. As the exterior surface lines of plaintiff's patent, when extended vertically to the plane of this deposit, did not include the piece of mineral which is the subject of this controversy, plaintiff could only recover by showing that this was a part of the same vein which his patent did cover, which, passing from his side lines, was such a continuation of that vein as gave the right to pursue it.

It seems to have been conceded throughout the long trials in the case, that if plaintiff could establish the sufficiency and con-

tinuity of his Lime lode, so as to make the defendants' Smuggler lode identical with it, he was entitled to recover; and on the other hand, if he did not do this, he had no right to the Smuggler lode, which was in that case a different lode, outside of the vertical extension of plaintiff's side lines.

This involved the consideration of the true definition of a lode or vein as used in the acts of Congress on the subject, and under what circumstances of continuity and of interruption a vein may be followed in the surrounding rock in which it is found, so as to preserve its identity.

On this subject a large mass of testimony was given to the jury, and to this point the charge of the court was directed.

If there were exceptions taken to the admission of any of this evidence, or to the refusal to admit other evidence, no assignment of error is based upon such admission or refusal; but the errors assigned relate solely to the charge given by the court to the jury, and to the refusal to give twenty-eight several instructions asked by the counsel of plaintiff.

As we have already said, the only question for the jury, the one on which their verdict depended, was whether plaintiff had identified the Lime lode or vein, and traced it continuously from its connection, inside of the lines of its patent, as the same vein in which defendants were working under the name of the Smuggler lode.

As the charge of the court was very full and clear as to the rules of law by which this was to be determined, there is no occasion to inquire into the soundness of each of the twenty-eight propositions of plaintiff on the same subject. If any of these propositions were covered by the charge made by the court, there was no obligation on the judge to repeat it in the language of counsel. If there was a conflict in the law as laid down by the court and that requested by plaintiff's prayer for instructions, the correctness of the charge of the court is raised by the exceptions to that charge, and can be best considered in these exceptions. *Clymer* v. *Dawkins*, 3 How. 674, 689; *Mills* v. *Smith*, 8 Wall. 27; *Indianapolis & St. Louis Railroad Co.* v. *Horst*, 93 U. S. 291; *Continental Improvement Co.* v. *Stead*, 95 U. S. 161.

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The act of Congress which confers the right under which plaintiff claims is in the following language of the Revised Statutes:

"SEC. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations, not in confiict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It is obvious that the vein, lode, or ledge of which the locator may have "the exclusive right of possession and enjoyment" is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location.

What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted. Mr. Justice Field, in the *Eureka Case*, 4 Sawyer, 302, 311, shows

that the word is not always used in the same sense by scientific works on geology and mineralogy, and by those engaged in the actual working of mines. After discussing these sources of information, he says:

"It is difficult to give any definition of the term as understood and used in the acts of Congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to a lode in the judgment of geologists. But, to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock."

This definition has received repeated commendation in other cases, especially in *Stevens* v. *Williams*, 1 McCrary, 480, 488, where a shorter definition by Judge Hallett, of the Colorado Circuit Court, is also approved, to wit: "In general it may be said, that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries, in the general mass of the mountain."

This lode, ledge, or vein, which may thus be possessed and enjoyed outside of the limits of the surface side lines extended vertically, must be the same vein or lode on the apex or outcrop of which the claim of the party has been located. He can only go outside of this imaginary perpendicular wall to possess or enjoy a vein which, being *his* inside of that artificial line, he has the right to follow or pursue in its extension outside of these lines. The identity of the vein is, therefore, essential to his right to its possession there.

Now, a vein containing the precious metals is by no means always a straight line of uniform dip, or thickness, or richness of mineral matter throughout its course. Generally, the veins

are found in what, when the mineral is taken out of them, constitute clefts or fissures in the surrounding rock, with a well-defined wall above and below of different kinds of rock, as porphyry on one side, above or below, and limestone on the other.

So long as these enclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no doubt that it is the same vein. But sometimes the cleft between the enclosing rocks, called in mining parlance the country rock, diminishes so as to be scarcely perceptible. Sometimes for a short distance the fissure disappears entirely and again is found distinctly to exist a little further on. Again it is seen that, though the underlying and superposing country rock is there, the mineral deposit ceases to be found, but, following the fissure, it reappears again very soon.

It also happens that both fissure and mineral come to an end and are found no more in that direction, or, if found, so far off, or so deflected from the original line as to constitute no part of that vein.

Of course it is sometimes easy to see that it is the same vein all through. It is also easy to see in some instances that the vein is run out; is ended.

But there are other cases of a class of which that before us is one, where it is a matter of extreme difficulty to lay down such rules for the guidance of the jury as will best aid them in arriving at a just verdict.

We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us to which the exceptions are taken, and we give here verbatim that part of it relating to this point, as found in the bill of exceptions:

"Upon the evidence before you, these parties are to be regarded as owning the surface of the land by them respectively claimed, and all that rightfully goes with the surface under the law. No question is presented as to the right of the plaintiff to the Lime location. Holding by patent from the Government, the plaintiff must be regarded as the owner of that claim,

and all lodes and veins existing therein. The statute gives the owner of a lode, the one who may locate it at the top and apex, the right to follow it to any depth, although it may enter the land adjoining. And if the Lime location was made on a lode or vein which descends from thence into the Smuggler location, the right of the plaintiff to follow the lode into the Smuggler ground and to take out ore therefrom cannot be denied. Thus, the principal question for your consideration is, whether there is a lode or vein in the Lime location which extends from that claim into the Smuggler claim? If a lode is found in that claim, all the evidence tends to prove that the top and apex of such lode is in that claim. There is no room for controversy on that point. To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein. To maintain the issue on its part, the plaintiff must prove that a lode as here defined extends from the Lime to and into the Smuggler claim.

"Reverting to that definition, if there is a continuous body of mineral or mineral-bearing rock extending from one claim to the other, it must be that there are boundaries to such body and the lode exists. Or if there is a continuous cavity or opening between dissimilar rocks in which ore in some quantity and value is found, the lode exists. These propositions are cor-

relative and not very different in meaning, except that the first gives prominence to the mineral body, and the second to the boundaries.

"Proof of either proposition goes far to establish a lode, and it may be said without proof of one of them a lode cannot exist. The proposition of the plaintiff is that the evidence before you shows that a lode exists in the ground in controversy as already defined. The defendants deny that proposition, and the case turns on that question. They concede that there is, in the territory open by the works, ore in detached masses or fragments, but so intermingled with the enclosing rocks that it cannot be regarded as a continuous body, or as marking the line of a lode or vein. All that has been said by witnesses about rock in place is valuable only as it tends to prove or disprove the existence of a crevice or opening extending from one claim to the other. Excluding the wash, slide, or debris on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein. Recognizing this, the plaintiff has given evidence to establish the existence of porphyry and lime in regular order with an opening between them, filled with vein matter.

"The defendants sought to show that the ground is broken and disjointed, and the several parts so intermingled that no lode can extend from one claim to the other.

"It is a question to be decided by the weight of testimony rather than the number of witnesses; upon the effect which the testimony has on your minds, accepting that which seems to you to be worthy of belief and rejecting the other. And that I believe, gentlemen, is the one and the only question in the case. If you find it affirmatively, of course you will return your verdict for the plaintiff, and if in the negative, you will find for the defendants."

"And to so much of said charge as reads as follows: 'But if it is not continuous or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein.' To which plaintiff's counsel then and there excepted."

If the language here excepted to stood alone it would be correct, though possibly too general or exclusive. Certainly the lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect if a little farther on it recurred again with mineral-bearing rock within it. And such is the idea conveyed in the previous part of the charge. "On the other hand," said the judge, "with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, *although at considerable intervals and in small quantities*, it is called a lode or vein."

The charge seems to us to be as favorable to plaintiffs as the principles we have laid down would justify.

We find no error in the record, and the judgment of the Circuit Court is therefore

Affirmed.

CENTRAL RAILROAD COMPANY *v.* BOURBON COUNTY.

ORIGINAL MOTION IN A CAUSE PENDING IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Submitted January 25, 1886.—Decided February 1, 1886.

Cases in which the execution of a State revenue law has been enjoined or stayed, will be advanced only on motion of the State, or of the party claiming under the law, and on proof that the operations of the State government will be embarrassed by the delay.

Statement of Facts.

This was a motion to advance, founded upon the following allegations:

"That said action was brought for the recovery of alleged delinquent taxes assessed and levied by the State Board of Equalization of Kentucky upon that part of the Kentucky Central Railroad which is in Bourbon County in said State. The assessments were made under and by virtue of an Act of the General Assembly of the Commonwealth of Kentucky, approved April 3, 1878, and entitled 'An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing the same.'

"Under said act taxes were assessed and levied for and by every city, town, and county through, or into which the Kentucky Central Railroad extends; and many suits, other than this, have been brought and are pending in the courts of Kentucky to collect said alleged taxes from the plaintiff in error. Of course the assessments are constantly accumulating, and so are the suits. This is one of the series of suits. It was brought in the Bourbon Circuit Court, where judgment was rendered against the plaintiff in error; on appeal, that judgment was affirmed by the Court of Appeals of Kentucky, and on writ of error, the case has been brought here. The determination of the many suits that have been and are being brought is dependent upon the decision of this court in this case.

"All the cases involve the same questions of constitutional law. *First:* It is maintained that the Kentucky Central Railroad and its appurtenances are exempt from taxation by cities, towns, and counties and for any local purpose, by reason of a contract contained in the charter of the plaintiff in error, that limits the exercise of the power of taxation as against the plaintiff in error and its said property; that the act of April 3, 1878, impairs the obligation of said contract, and is in conflict with the Federal Constitution; that consequently the alleged taxes sued for in this action, and in the numerous other like actions, have no legal basis and are void. *Second:* The contract contained in said charter limits taxation of plaintiff in error and its said property for State revenue purposes to a specified tax on every one hundred dollars of capital stock of the corporation.

The act of April 3, 1878, attempts to authorize, for purposes of State revenue, the laying of a greater tax, and in a different mode and manner than said contract permits; and, therefore, said act is, as to plaintiff in error, null and void because it is violative of the Federal Constitution.

"The delay in the settlement of these questions affects to a material extent the collection of State revenue by the Commonwealth; very largely affects and impedes the fiscal operations of all the cities, towns, and counties through or into which the Kentucky Central Railroad extends; and oppresses the plaintiff in error, and deranges its business." "Counsel for defendant in error makes no objection to this motion, nor does the Attorney-General of Kentucky."

Mr. J. G. Carlisle, on behalf of *Mr. J. W. Stevenson*, for plaintiff in error submitted the motion.

No one opposing.

Mr. Chief-Justice Waite delivered the opinion of the court.

This motion is denied. Cases in which the execution of the revenue laws of a State have been enjoined or stayed are only to be advanced on motion of the State or the party claiming under such laws. Rev. Stat. § 949. Here the motion is made by the party taxed, and the suit is by the county claiming under the tax laws for the recovery of a tax. Inasmuch as the county does not move we cannot presume that "the operations of the government of the State will be embarrassed by delay." Under the rule announced in *Hoge* v. *Richmond & Danville Railroad Co.*, 93 U. S. 1, it must be shown that such will be the effect of delay before a case will be advanced, even on motion by the State or those claiming under it.

Motion denied.

TYRE & SPRING WORKS COMPANY *v.* SPALDING.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted January 8, 1886.—Decided February 1, 1886.

Under these provisions as to duties on imports, in Schedule E of section 2504 of the Revised Statutes (2d ed., p. 465): "All manufactures of steel, or of which steel shall be a component part, not otherwise provided for: forty-five per centum ad valorem. But all articles of steel partially manufactured, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured." "Locomotive tire, or parts thereof: three cents per pound." "Steel, in any form, not otherwise provided for: thirty per centum ad valorem," (p. 466), articles known as "steel tire blooms," and which have passed through an important stage in the process of manufacture into steel tires, but are not shown to have been adapted or intended to be made into tires for the driving-wheels of locomotives, are dutiable at forty-five per cent. ad valorem.

Where a case is tried by a Circuit Court, without a jury, and that court makes a special finding of facts, but omits to find certain facts which a stipulation between the parties, made after the entry of judgment, states were shown by proof at the trial, this court, on a writ of error, can take notice only of the facts contained in the special finding.

The facts which make the case are stated in the opinion of the court.

Mr. Percy L. Shuman for plaintiff in error.

Mr. Assistant Attorney-General Maury for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

The Chicago Tyre and Spring Works Company, an Illinois corporation, brought this suit against Jesse Spalding, Collector of Customs at Chicago, in the Circuit Court of the United States for the Northern District of Illinois, to recover moneys alleged to have been illegally exacted as duties on imported merchandise embraced in three entries made at the custom-house in Chicago in 1882. The declaration did not mention what the merchandise was. After plea, the parties stipulated in writing that the cause should be tried by the court without

a jury. It was so tried, and on the 31st of January, 1884, the following entry, entitled in the suit and headed "Judgment," was made in the records of the court:

"This day came the plaintiff and defendant, by their attorneys, and, the parties having heretofore filed their stipulation in writing, waiving a jury, and submitting the facts in issue to the court, and the court having heard the evidence and arguments of counsel, and duly considered the same, now finds that the steel-tire blooms, in the declaration mentioned, are produced by first casting a flat round ingot of steel, somewhat in the shape of a cheese or grindstone, with no hole through the centre. It is then reheated and hammered, so as to reduce its thickness, thereby compacting its grain or fibre; a hole is swedged through its centre; and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference, and forming a grain or fibre in its circumferential direction, and, when intended for tires of driving-wheels, the rudiments of a flange are formed or swedged also upon the outer periphery of the circle. In this form these blooms are ready for rolling, and are imported at this stage of development. On arriving in this country, they are heated and placed in the rolling-machine, where they are rolled or spun into the size and shape adapting them for use for tires for locomotive driving-wheels or car-wheels, and, after being rolled, the inner and outer surfaces are turned and finished in a lathe. The court finds that, when imported, these blooms had passed through an important stage in the process of manufacture into steel tires, and are, therefore, articles of steel partly manufactured, and were, therefore, properly classified for duties as manufactures of steel, not otherwise provided for. The court, therefore, finds the issues joined for the defendant. And thereupon the plaintiff, by its attorney, moves the court for a new trial herein, and the court, being now fully advised upon said motion, overrules the same and awards judgment. It is thereupon considered and adjudged, by the court, that the defendant do have and recover of the plaintiff his costs in this behalf expended, amounting to —— dollars and —— cents, and that he have execution therefor."

On the same day the following stipulation, entitled in the cause and signed by the attorneys for the parties, was filed:

"It is hereby stipulated and agreed between the parties to the above-entitled cause, that, on the trial of the same, it was proved that the plaintiff imported the steel blooms mentioned in the pleadings and proofs in this case, at the port of Chicago, during the year 1882, and entered them at the custom-house as steel blooms, and that the same were assessed a duty of 45 per cent. ad valorem, by the defendant, collector, as 'manufactures of steel, not otherwise provided for,' under the provisions of Schedule E, § 2504, Revised Statutes; that the plaintiff paid the duty levied thereon, under protest, and in apt time took an appeal to the Secretary of the Treasury, claiming therein that the blooms in question were not dutiable as manufactures of steel, not otherwise provided for, and were not specially provided for by name in the tariff, but were dutiable at the rate of 30 per cent. ad valorem, as 'steel, in any form, not otherwise provided for,' under the provisions of Schedule E of the same section; that the Secretary of the Treasury decided such appeal, affirming the action of the collector, and that this suit was afterwards commenced, in due time, to recover the fifteen per cent. duty alleged to have been collected in excess, and so paid under protest; that issue was joined, and, a jury having been waived in accordance with the statute, the case was submitted to the Court for trial; that the proof shows that the steel tire blooms in question are produced by first casting a flat round ingot of steel, somewhat in the shape of a cheese or grindstone, with no hole through the centre. It is then reheated and hammered, so as to reduce its thickness, thereby compacting its grain or fibre; a hole is swedged through its centre; and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference, and forming a grain or fibre in its circumferential direction, and, when intended for tires, the rudiments of a flange are formed or swedged also upon the outer periphery of the circle. In this form, these blooms are ready for rolling and are imported at this stage of development. On arrival in this country, they are reheated and placed in the rolling-machine, where they are rolled or

spun into the size or shape adapting them for use for tires for locomotive driving-wheels or car-wheels, and, after being rolled, the inner and outer surfaces are turned and finished in a lathe; the work which had been expended on them to bring them from the ingot stage to tire blooms is shown to have been equal to ten or fifteen dollars per ton; that these blooms are classed in trade and commerce with steel bars, steel ingots, steel billets, steel rail blooms, steel plates, and all sorts of forgings, and are forms of steel known in trade and commerce as steel tire blooms; that a steel casting which has been hammered ready for rolling is a bloom; that hammering an ingot to prepare it for rolling is called blooming, regardless of the shape into which the steel is made by rolling or hammering; that, when imported, these blooms were ready for rolling and were imported at this stage of development. And the Court, after hearing all of the evidence, found, that, when imported, these blooms had passed through an important stage in the process of manufacture into steel tires, and are, therefore, articles of steel partly manufactured, and were, therefore, properly classified for duties as manufactures of steel, not otherwise provided for. And the Court found the issues for the defendant. That the plaintiff excepted to said finding of the Court, viz., that the blooms were properly classified for duties as manufactures of steel, not otherwise provided for, as not being in accordance with the evidence, and moved the Court to grant a new trial, which motion was overruled and judgment was entered for the defendant."

There is no bill of exceptions, but the plaintiff has sued out a writ of error to review the judgment.

Schedule E of § 2504 of the Revised Statutes, 2d ed., p. 465, in force at the time of these entries, contains the following provisions as to duties on imports:

"All manufactures of steel, or of which steel shall be a component part, not otherwise provided for: forty-five per centum ad valorem. But all articles of steel partially manufactured, or of which steel shall be a component part, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured."

"Locomotive tire, or parts thereof: three cents per pound."

"Steel, in ingots, bars, coils, sheets, and steel wire, not less than one-fourth of one inch in diameter, valued at seven cents per pound or less: two cents and one-fourth per pound; valued at above seven cents and not above eleven cents per pound: three cents per pound; valued at above eleven cents per pound: three cents and a half per pound, and ten per centum ad valorem." p. 466.

"Steel, in any form, not otherwise provided for: thirty per centum ad valorem." p. 466.

The contention on the part of the plaintiff is, that the articles in question were merely steel blooms, not manufactured articles, or partially manufactured articles, but only forms of steel, called steel tire blooms, and, therefore, subject to a duty of 30 per cent. ad valorem, and not to a duty of 45 per cent. ad valorem.

The court, in the paper which contains the judgment, finds certain facts, evidently intended to be facts specially found, under § 649 of the Revised Statutes. On these facts it bases its conclusion of law, that the articles were properly classified for duties as manufactures of steel, not otherwise provided for, and its judgment for the defendant. The stipulation in the record, above set forth, is a paper signed after the trial, intended to take the place and serve the purpose of a duly signed bill of exceptions. It states what was proved on the trial as to the importations, the entries, the assessments and payments of duties, the protests, the appeals, the action thereon, and the bringing of the suit in time. It then states what the proof showed, on the trial, as to the manner of producing the steel tire blooms in question, and as to their condition, when imported, and as to how they were treated on their arrival in this country. It then states what the proof showed as to the value per ton of the work put on them from the ingot stage until they arrived at the condition in which they were imported; and as to how they were classed and known in trade and commerce; and as to what a bloom and blooming are; but these last mentioned matters are none of them found as facts by the court, in its findings. The stipulation then states what the court found, as a conclusion of law, and that the

plaintiff excepted thereto. On this state of the record, this court is authorized, under section 700 of the Revised Statutes, to determine whether the facts specially found by the Circuit Court are sufficient to support the judgment; but it can take no notice of any facts not thus specially found, because they were not found by the court below, and this court, as an appellate court, cannot try an issue of fact. The stipulation, however, does not contain any agreement as to the existence of any facts, but merely a statement as to what the proof showed on the trial; and does not state that the parties agreed, in advance, on the facts found by the court, or how they were proved; but states that the court heard all the evidence. As to any facts stated in the stipulation to have been shown by proof at the trial, if they are not contained in the special findings, the only conclusion can be that the court did not find them to be facts. So, the case must be adjudicated on the special findings alone.

In the findings, the articles are described as "steel tire blooms;" not only steel and blooms, but steel tire blooms. This would indicate that they were steel blooms having some purpose in connection with tires. It is then set forth how they are produced. A flat round ingot of steel, somewhat in the shape of a cheese or a grindstone, is cast, but without a hole in its centre. It is then reheated and hammered, so as to reduce its thickness, thereby compacting its grain or fibre. A hole is then swedged through its centre, and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference, and forming a grain or fibre in its circumferential direction. It is plain, so far, that the articles are being put into a shape in which they can be worked into tires, either for the driving-wheels of locomotives or for car-wheels, depending on their size, shape and weight. The findings go on to say, that, "when intended for tires of driving-wheels, the rudiments of a flange are formed or swedged also upon the outer periphery of the circle." This is not a statement as to whether these particular blooms were intended to be tires for driving-wheels or for car-wheels. It is then stated that the blooms are ready for rolling and are imported at this stage.

Then it is said: "On arriving in this country, they are heated and placed in the rolling-machine, where they are rolled or spun into the size and shape adapting them for use for tires for locomotive driving-wheels or car-wheels, and, after being rolled, the inner and outer surfaces are turned and finished in a lathe." But this is not a statement as to whether these particular blooms were adapted or intended to be made into tires for driving-wheels, or for car-wheels, or for both, or some for one and some for the other.

It is not found by the court that these blooms were partly manufactured tires for the driving-wheels of locomotives. On the contrary, the concluding statement in the findings is, that "these blooms had passed through an important stage in the process of manufacture into steel tires." They may all have been blooms of which only tires for car-wheels, and no tires for driving-wheels, could have been made, or were intended to be made. The collector and the Secretary of the Treasury may have so decided. Those decisions stand and are conclusive, under § 2931 of the Revised Statutes, until the contrary is shown in a suit. *Arnson* v. *Murphy*, 115 U. S. 579. The contrary is not shown. The case is not one of a doubt as to the meaning of the statute, or of a doubt as to what statute applies to a specific article; but is one of a failure of the importer to show that the decisions of the collector and of the Secretary as to the rate and amount of duties were erroneous. These views also meet the suggestion of the plaintiff, that, if these steel blooms were partially manufactured locomotive tires or parts of tires, they were dutiable at three cents per pound. The stipulation states that the protest was that the articles were not specially provided for by name in the tariff, but were liable to the thirty per cent. duty, and not to the forty-five.

It being assumed, as it must be on the findings, that these blooms were adapted and intended for tires for car-wheels, and not for driving-wheels, it is clear, we think, that they were partially manufactured tires of that character, and were not otherwise provided for, and were subject to forty-five per cent. duty, and were not subject to thirty per cent. duty, because, though

forms of steel, they were provided for under the forty-five per cent. clause.

It is conceded by the Government, that, if these blooms were ordinary steel blooms, that is, merely hammered steel castings, they would not be articles of steel partially manufactured or liable to forty-five per cent. duty, but would be liable to only thirty per cent. duty. But the hammering on the horn of the anvil formed a grain or fibre circumferentially, and this is what the court, in its findings, called the "important stage" through which the blooms had passed, "in the process of manufacture into steel tires."

Judgment affirmed.

OTIS *v.* OREGON STEAMSHIP COMPANY.

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

Submitted January 25, 1886.—Decided February 1, 1886.

If a record shows on its face that a Federal question was not necessarily involved in the decision of a case in a State Court, and does not show affirmatively that one was raised, this court will not go out of the record to the opinion of that court, or elsewhere, to ascertain whether one was in fact decided.

Moore v. *Mississippi*, 21 Wall. 636, affirmed and applied.

This was a motion to dismiss a writ of error for want of jurisdiction. The facts which make the case are stated in the opinion of the court.

Mr. George H. Adams for the motion.

Mr. John H. Sessions and *Mr. John R. Abney* opposing.

Mr. Chief-Justice Waite delivered the opinion of the court.

This is a suit brought December 12, 1878, by the Oregon Steamship Company, the defendant in error, against George K.

Otis, the plaintiff in error. The complaint alleges that on the 2d of March, 1874, Otis, as agent of the Steamship Company, entered into "a certain steamboat contract" with the United States for carrying the mails between San Francisco, California, and Portland, Oregon, from June 1, 1874, to June 30, 1878, at the rate of $25,000 per annum; that the Steamship Company performed the contract, and that Otis received $97,131.38 on account of the service, which was the full amount due after certain deductions provided for in the contract were made; that of this amount he paid the company $83,675.24, and is entitled to retain $2500 as his agreed compensation, but that he neglects and refuses to pay over the balance, being $13,456.25, and for this judgment is asked. Otis, in his answer, admits the making of the contract as set forth in the complaint, but denies that he made it as agent for the Steamship Company. He also admits that he has received the amount of money which is stated, and that he has not paid over the balance claimed to be due.

The case was tried by a referee, who found that the contract was made by Otis as agent for the company, that the company had performed the service, that Otis had received the money as charged, and that there was due from him the amount claimed. Upon the filing of the report Otis excepted to the findings in these words:

"The defendant excepts generally to the findings of the referee of fact and law, and to each and every such finding save only such as were requested by the defendant. The defendant further specially excepts severally to each and every finding, and to each and every part of each and every such finding, designated in his report by the following numbers, namely, 2d, 3d, 4th, 5th, 6th, 7th."

Neither in the pleadings, nor in the evidence, nor in the findings, nor in the exceptions as shown by the record, was there any title, right, privilege, or immunity specially set up or claimed under the Constitution, or a law, or authority of the United States. The sole issue in the case was as to the agency of Otis. The Steamship Company alleged that he made the contract as its agent, and this he denied. There was no sug-

gestion of the illegality of such an agency. The only dispute was as to the fact of its existence.

In *Moore* v. *Mississippi*, 21 Wall. 636, 639, it was held that "if the record shows on its face that a Federal question was not necessarily involved, and does not show that one was raised, we will not go out of it, to the opinion or elsewhere, to ascertain whether one was in fact decided." That rule governs this case. There is not in the record the least suggestion of a Federal question. We will not look into the opinion, therefore, which has been annexed to the record below, in obedience to our Rule No. 8, section 2, to ascertain whether such a question was in fact decided. The only issue in the case was as to the agency, and that did not depend on the Constitution or any law of the United States. The contract was entered into by Otis, and it was performed by the company. Otis collected the money, and his liability depends, not on the effect of his contract, but on the fact of his having received the money for the Steamship Company.

The motion to dismiss is granted.

BARRY *v.* EDMUNDS.

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

Argued January 7, 8, 1886.—Decided February 1, 1886.

A suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record, create a legal certainty of that conclusion.

Where exemplary damages beyond the sum necessary to give a Circuit Court of the United States jurisdiction are claimed in an action for a malicious trespass, the court should not dismiss the case for want of jurisdiction simply because the record shows that the actual injury caused to the plaintiff by the trespass was less than the jurisdictional amount.

It is settled in this court that in an action for a trespass accompanied with malice, the plaintiff may recover exemplary damages in excess of the amount of his injuries, if the *ad damnum* is properly laid.

Statement of Facts.

This was an action of trespass brought by the plaintiff in error. The declaration set out the cause of action as follows:

"Robert P. Barry, plaintiff, complains of E. G. Edmunds, defendant, of a plea of trespass on the case, for this, to wit: that the plaintiff is a citizen and resident of Fauquier County, Virginia; that he owns property in said county, and that he was duly and lawfully assessed with the sum of fifty-six dollars and thirty-four cents as taxes upon said property, to be paid to the State of Virginia for the year 1884; that said taxes, by the laws of said State, were not leviable for prior to the first day of December, 1884, but if not paid prior to said last-named date were leviable for, after said date.

"That, by a further provision of the laws of said State, if the taxes assessed for the year 1884 are not paid on or before the first day of December, 1884, the person owing the same becomes liable to pay, in addition thereto, a further sum of five per centum upon the amount of the tax so due.

"That the plaintiff did not pay his said tax prior to the first day of December, 1884, and thereby became liable to pay an additional sum of two dollars and eighty-one cents, making the plaintiff thus liable after the 1st day of December, 1884, for the sum of ($59.15) fifty-nine dollars and fifteen cents.

"That the defendant is the treasurer of Fauquier County, in the State of Virginia, and as such it is made his duty, by the laws of Virginia, to collect all taxes due to the said State by residents of said county; that in the month of June, 1885, the plaintiff tendered to the defendant, in payment of his said taxes, fifty-nine $\frac{15}{100}$ dollars, in coupons and lawful money of the United States, the two together constituting the full amount due for said taxes; that each one of the said coupons was cut from a bond issued by the State of Virginia, under the authority of the provisions of an act of her General Assembly, approved March 28, 1879, entitled 'An act to provide a plan of settlement of the public debt;' that each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due to said State, and that each one was due and past maturity.

"That the defendant refused the said coupons and money in

payment of the plaintiff's taxes; that he refused to receive the same in payment of his taxes because an act of the General Assembly of the State of Virginia, approved January 26, 1882, entitled 'An act to provide for the more efficient collection of the revenue, to support government, maintain the public schools, and to pay interest upon the public debt,' forbade him to receive them, and because another act of the General Assembly of said State, approved January 14, 1882, entitled 'An act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenue,' likewise forbade him to receive them.

"That on the — day of June, 1885, the defendant, unlawfully, maliciously, and against the will of the plaintiff, entered upon the premises of the plaintiff, situated and being in the county of Fauquier, Virginia, with force and arms, and against the will of the plaintiff, and, acting as said treasurer aforesaid, did levy on and forcibly seize and carry away valuable personal property belonging to the said plaintiff, to wit, one valuable horse, of the value of one hundred and twenty-five dollars, for the purpose of selling the same, and thus compelling the plaintiff to pay his taxes in another medium than that already offered by the plaintiff.

"That on the day when the defendant so levied on the plaintiff's property, and before he did so, the plaintiff again tendered to the defendant the said coupons and money in payment of his said taxes, but the defendant refused to receive the same in payment thereof; and the plaintiff was always ready and willing up to the moment of said levy to deliver to the defendant the said coupons and money in payment of his said taxes, but the defendant always refused so to receive the same.

"That the defendant levied on the plaintiff's said property and carried the same away, because the 18th section of the act of the General Assembly of Virginia, approved April 1, 1879, which is chapter 60 of the acts of the special session of 1879, commanded him so to levy upon the plaintiff's property, notwithstanding said tender.

"That, by reason of the contract of the State of Virginia set forth upon the face of said coupons, the plaintiff had a right to

pay his said taxes with said coupons and money, and after he tendered the same to said treasurer his said taxes were, in point of law, paid and extinguished, and he held the said coupons and money for the defendant as his agent in that behalf thereafter.

"That, when the defendant so levied upon and seized the plaintiff's property, he knew that the Supreme Court of the United States had decided at its October Term, 1884, in the case of *Poindexter* v. *Greenhow*, that a tender by a tax-payer of the State's tax-receivable coupons, such as those tendered by the plaintiff in payment of taxes due the State, pays and extinguishes said tax, and that any and all laws of said State commanding her treasurers to refuse the same, and commanding them to levy after said tender, are repugnant to the Constitution of the United States, and are, therefore, null and void.

"That the defendant, so knowing the law, levied on and seized the plaintiff's property in contempt of and defiance of the law, and with the deliberate intention of defying the Constitution of the United States and the judicial powers thereof.

"That there exists in the State of Virginia a very great political party, which comprises a majority of the voters in said State, which has for its aims and purpose to enact laws that will defeat and destroy the effect of the judgment of the Supreme Court of the United States in said case of *Poindexter* v. *Greenhow*, and will defeat and destroy the protection afforded by the Constitution of the United States to tax-payers who seek to pay their taxes with said tax-receivable coupons.

"That said party, being in control of the Legislature of the said State, has enacted a great number of statutes which are intended to have that effect, and it openly proclaims that it intends to enact all other and further statutes which shall be necessary to make it impossible for tax-payers to pay their taxes with said coupons.

"That the defendant is a member of said political party, and sympathizes with and shares in its aims and purposes, and actively co-operates in every way in his power in every attempt to make it impossible for tax-payers to pay taxes due to said State with said coupons.

"That, when he refused to receive said coupons in payment

of plaintiff's taxes, and when he levied on plaintiff's property as aforesaid, he did it for the purpose of aiding and assisting his said political party in its attempts to defy and nullify the Constitution of the United States.

"That he intended thereby to intimidate the plaintiff and make him afraid to rely upon the Constitution of the United States and the judicial power thereof for protection in those rights guaranteed to the plaintiff by said Constitution.

"That he intended to make an example of the plaintiff, and thereby deter him and all others from relying upon the Constitution of the United States and the judicial power thereof for the protection in those rights guaranteed by the said Constitution; that in contempt of and defiance of the said Constitution and said judicial power the defendant made public advertisement in many parts of the county of Fauquier that he had levied on and seized plaintiff's property, because plaintiff was delinquent as a tax-payer, and that he would sell the same at public auction, on a day named, at the court-house of said county; that on the day named he did expose the said property to sale at public auction, at said court-house, in the presence of many of plaintiff's neighbors, friends, and fellow-countrymen, and publicly proclaimed that plaintiff was a defaulter and delinquent tax-payer; that by reason thereof plaintiff's credit and standing were greatly injured and his feelings cruelly wounded and mortified.

"That the defendant well knew when he made said levy and sale that they were forbidden by the Constitution of the United States, but he did so trusting and believing that his said political party would enact statutes of its State of Virginia that would shield and protect him from all harm; that he made said levy and sale maliciously and with the purpose and intent to trample on the plaintiff's rights under the law and do him all the injury in his power.

"And the said plaintiff further says that he is a citizen of Fauquier County, Virginia; that he owns property in said county, and that he was duly and lawfully assessed upon said property with the sum of fifty-six dollars thirty-four cents, as taxes to be paid to the State of Virginia for the year 1884,

which taxes, by the laws of Virginia, were not leviable for prior to the 1st day of December, 1884, but the same, if not paid prior to said last-named date, were leviable for after the said date; that by a further provision of the laws of said State, if the taxes assessed for the year 1884 are not paid on or before the 1st day of December, 1884, the person owing the same becomes liable to pay in addition thereto a further sum of five per centum upon the amount of the tax so due; that the plaintiff did not pay his said tax prior to the 1st day of December, 1884, and thereby became liable to pay an additional sum of $2.81, making the plaintiff thus liable after December 1, 1884, for the sum of $59.15; that the defendant is the treasurer of Fauquier County, in the State of Virginia, and as such it is made his duty, by the laws of Virginia, to collect all taxes due to the said State by residents and owners of property in said county.

"That in the month of June the plaintiff tendered to the defendant, in payment of his said taxes, coupons for $—— each, and $——, in lawful money of the United States, the two together constituting the sum of $59.15. That each one of said coupons was cut from a bond issued by the State of Virginia, under the authority and provisions of an act of her General Assembly, approved March 28, 1879, entitled 'An act to provide a plan of settlement of the public debt;' that each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes and demands due said State, and that each one was overdue and past maturity. That the defendant refused to receive the said coupons and money in payment of the plaintiff's taxes. That he refused to receive the same in payment of his taxes, because an act of the General Assembly of the State of Virginia, approved January 26, 1882, entitled 'An act to provide for the more efficient collection of the revenue, to support government, maintain the public schools, and to pay interest upon the public debt,' forbade him to receive them, and because another act of the General Assembly of the State of Virginia, approved January 14, 1882, entitled 'An act to prevent fraud upon the Commonwealth and the holders of her securities in the collection of

revenue,' likewise forbade him to receive them. That on the —— day of June, in the year eighteen hundred and eighty-five, the defendant, unlawfully and against the will of the plaintiff, entered upon the premises of the plaintiff, situate and being in the county of Fauquier, Virginia, with force and arms, and against the will of the plaintiff, and, acting as said treasurer aforesaid, he levied on and forcibly seized and carried away valuable personal property belonging to the plaintiff, to wit, one horse, to the value of $125.00, for the purpose of selling the same, and thus compelling the plaintiff to pay his taxes in another medium than that already offered by the plaintiff; that on the day when the defendant so levied on the plaintiff's property, and before he did so, the plaintiff again tendered to the defendant the said coupons and money in payment of said taxes, but the defendant refused to receive the same in payment thereof, and the plaintiff was always ready and willing, up to the moment of said levy, to deliver to the defendant the said coupons and money in payment of his said taxes, but the defendant always refused to receive the same.

"That the defendant levied on the plaintiff's said property and carried the same away because the 18th section of the act of the General Assembly of Virginia, approved April 1, 1879, which is chapter 60 of the acts of the special session of 1879, commanded him so to levy upon the plaintiff's property, notwithstanding said tender. That by reason of the contract of the State of Virginia, set forth upon the face of said coupons, the plaintiff had a right to pay his said taxes with said coupons and money, and after he tendered the same to the said treasurer his said taxes were, in point of law, paid and extinguished, and he held the said coupons and money for the defendant as his agent in that behalf thereafter. That when the defendant so levied upon and seized the plaintiff's property he knew that the Supreme Court of the United States had decided, at its October Term, 1884, in the case of *Poindexter* v. *Greenhow*, that a tender by a tax-payer of the State's tax-receivable coupons, such as those tendered by the plaintiff, in payment of taxes due the State, pays and extinguishes said tax, and that any and all laws of said State commanding her treasurer to

refuse the same, and commanding them to levy after said tender, are repugnant to the Constitution of the United States, and are, therefore, null and void.

"That the defendant, so knowing the law, levied on and seized the plaintiff's property in contempt of and defiance of the law, and with the deliberate intention of defying the Constitution of the United States and the judicial power thereof.

"That in contempt of and defiance of the said Constitution and judicial power the defendant made public advertisement in many parts of the county of Fauquier that he had levied on and seized plaintiff's property because plaintiff was delinquent as a tax-payer, and that he would sell the same at public auction, on a day named, at the court-house in said county. That on the day named he did expose the said property to sale at public auction, at said court-house, in the presence of many of the plaintiff's neighbors, and friends, and fellow-citizens, and countrymen, and publicly proclaimed that the plaintiff was a defaulter and delinquent tax-payer.

"That by reason thereof plaintiff's credit and standing were greatly injured, and his feelings cruelly wounded and mortified. That whilst the said defendant was unlawfully and wrongfully upon the plaintiff's premises, as aforesaid, he did many other wrongs and injuries to the plaintiff of a malicious nature, by all which wrongs and injuries the plaintiff has been injured and damaged six thousand dollars. And therefore he brings his suit."

To this declaration the defendant filed a plea to the jurisdiction of the Circuit Court, alleging that, as the plaintiff and defendant were both citizens of the State of Virginia, the courts of that State had exclusive jurisdiction of the alleged cause of action.

The record showed the following action and judgment of the court:

"This cause came on this day to be considered by the court upon a motion made by the plaintiff to set a day for argument of a demurrer to the special plea filed herein. Upon consideration whereof the court is of opinion that this suit does not really and substantially involve a dispute or controversy properly within

the jurisdiction of this court, for the reason that the amount of taxes due by the plaintiff to the State of Virginia was less than one hundred dollars, and the property levied on and seized by the defendant was worth less than two hundred dollars, and, therefore, that the matter in dispute in this cause does not exceed, exclusive of costs, the sum or value of five hundred dollars ($500).

"And it appearing to the court that this being an action for damages, if the jury should render a verdict for ($500) five hundred dollars damages such verdict would be excessive, and the court would feel compelled to set it aside; the court is further of opinion that this court is, for that reason, also without jurisdiction of this suit.

"The court is, therefore, for each of the aforesaid reasons, of opinion that it is required to dismiss this suit by the act of Congress approved March 3, 1875, 'to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes;' and this suit is accordingly hereby dismissed and stricken from the docket of the court, with costs."

The plaintiff below sued out this writ of error to review that judgment. This case was argued with *Chaffin* v. *Taylor*, *post* 567; *Royall* v. *Virginia*, *post* 572; and *Sands* v. *Edmunds*, *post* 585.

Mr. William L. Royall and *Mr. Daniel H. Chamberlain* for plaintiff in error. *Mr. James V. Brooke* filed a brief for same.

Mr. R. A. Ayres and *Mr. Walter R. Staples* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts as above reported, he continued:

It is not questioned but that the declaration discloses a cause of action within the jurisdiction of the Circuit Court, if the amount or value of the matter in dispute exceeds five hundred dollars, exclusive of costs, for it is a suit of a civil nature arising under the Constitution of the United States, and therefore within the words of § 1 of the act of March 3, 1875. 18 Stat.

470; *Smith* v. *Greenhow*, 109 U. S. 669; *White* v. *Greenhow*, 114 U. S. 307.

The ground on which the suit was dismissed was, that within the meaning of § 5 of the act of March 3, 1875, it did not "really and substantially involve a dispute or controversy properly within the jurisdiction" of the Circuit Court; and that conclusion was founded on the facts stated in the declaration, that the amount of taxes due by the plaintiff to the State of Virginia was less than one hundred dollars, and the property levied on and seized by the defendant was worth less than two hundred dollars; and on the proposition of law, that it followed from these facts that the matter in dispute did not exceed, exclusive of costs, the sum or value of five hundred dollars, so that a verdict for any amount beyond that would be excessive, and for that reason to be set aside.

The order of the Circuit Court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the Circuit Court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, "shall appear to the satisfaction of said Circuit Court."

This is quite consistent with what was said in *Smith* v. *Greenhow*, 109 U. S. 669, 671. There the value of the property taken was stated in the declaration to be $100, while the damages for the alleged trespass were laid at $6000, and no circumstances of malice or of special damage were averred. It was said by the court: "We cannot, of course, assume as a matter of law that the amount laid, or a less amount, greater than $500, is not

recoverable upon the case stated in the declaration, and cannot, therefore, justify the order remanding the cause on the ground that the matter in dispute does not exceed the sum or value of $500. But if the Circuit Court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of Congress, so that, in the words of the 5th section of the act of 1875 it appeared that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court,' the order remanding it to the State court could have been sustained."

It is true, indeed, that in some cases it might appear as matter of law, from the nature of the case as stated in the pleadings, that there could not legally be a judgment recovered for the amount necessary to the jurisdiction, notwithstanding the damages were laid in the declaration at a larger sum. In the early case of *Wilson* v. *Daniel*, 3 Dall. 401, 407, decided in this court in 1798, under the judiciary act of 1789, then in force, it was declared, by Chief-Justice Ellsworth, that, "The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in demand and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

The amount of damages laid in the declaration, however, in cases where the law gives no rule, is not conclusive upon the

question of jurisdiction; but if upon the case stated there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, "that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case" within the jurisdiction of the court. Then it would appear to the satisfaction of the court that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

In the present case the Circuit Court has not found, as matter of fact, that the amount of damages stated in the declaration was colorable and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case within the jurisdiction of the court. Its action is not based on evidence of an attempted fraud upon the jurisdiction of the court, but upon the assumption, as matter of law, that upon the face of the declaration no recovery could be legally had of an amount sufficient to make the matter in dispute equal to that required to maintain its jurisdiction.

Such cases, as we have already seen, may exist, where a rule of law, as in certain cases *ex contractu*, in which the amount recoverable is liquidated by the terms of the agreement, fixes the limit of a possible recovery. Such was the case of *Lee* v. *Watson*, 1 Wall. 337, where it appeared "that in the progress of the cause an amendment was made in the amount of damages claimed for the purpose of bringing the case within the appellate jurisdiction of this court." As was said in *Hilton* v. *Dickinson*, 108 U. S. 165, 174, "it is undoubtedly true, that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown and not the sum demanded will prevail." In *Bowman* v. *Chicago and Northwestern Railway Co.*, 115 U. S. 611, an amendment was made increasing

the amount demanded as damages, under circumstances that rendered it apparent, as a matter of fact, that it was done merely to give color to the jurisdiction of this court.

No such fact or finding appears on the record in the present case, and the question recurs whether, as matter of strict law, it can be judicially declared that, upon the cause of action stated in the declaration, the plaintiff is precluded from recovering anything in excess of $500 as damages exclusive of costs.

The cause of action stated in the declaration is a wilful and malicious trespass, in seizing and taking personal property, with circumstances of aggravation and averments of special damage. The trespass is alleged to have been committed by the defendant, *colore officii*, under the pretended authority of void process, in open defiance of known law, accompanied by conduct intended to bring the plaintiff into public contempt and odium, and amounting to oppression in office.

It is quite clear that the amount of the taxes alleged to be delinquent, for non-payment of which the seizure was made, is immaterial. It is equally clear that the plaintiff is not limited in his recovery to the mere value of the property taken. That would not necessarily cover his actual, direct, and immediate pecuniary loss. In addition, according to the settled law of this court, he might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions. "It is a well established principle of the common law," said Mr. Justice Grier in *Day* v. *Woodworth*, 13 How. 362, 371, "that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but, if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. . . . In actions of trespass, where the injury has been wanton and malicious or gross and outrageous, courts permit juries to add to the measured compensation of

the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case." In *The Amiable Nancy*, 3 Wheat. 546, which was the case of a marine tort, Mr. Justice Story spoke of exemplary damages as "the proper punishment which belongs to such lawless misconduct." In *Tracy* v. *Swartwout*, 10 Pet. 80, 95, it was said that "where a ministerial officer acts in good faith, for an injury done he is not liable to exemplary damages;" and this implies its converse, when his acts are not only illegal, but wanton, wilful, malicious, and oppressive. In *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Quigley*, 21 How. 202, 214, Mr. Justice Campbell said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." In *Milwaukee & St. Paul Railway Co.* v. *Arms*, 91 U. S. 489, 493, the rule was said to apply to actions on the case, for injuries arising from the negligence of the defendant. "Redress commensurate to such injuries," said Mr. Justice Davis, delivering the opinion of the court, "should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." In *Missouri Pacific*

Railway Co. v. *Humes*, 115 U. S. 512, 521, Mr. Justice Field said: "It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; yet the damages which should be awarded to the injured party are not always readily ascertainable. They are in many cases a matter of conjectural estimate, in relation to which there may be great differences of opinion. The general rule undoubtedly is that they should be precisely commensurate with the injury. Yet in England and in this country they have been allowed in excess of compensation whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of." In the English Court of Common Pleas, it was held, in the case of *Bell* v. *Midland Railway Co.*, 10 C. B. N. S. 287, that, where a railway company had obstructed a siding belonging to an adjoining landowner with a high hand and in violation of his rights under an act of Parliament, exemplary damages might justly be given. And the rule was applied in *Emblem* v. *Myers*, 6 H. & N. 54, against one who negligently and recklessly pulled down buildings on his own land so as to injure his neighbor with a view to make him give up possession. In that case Baron Bramwell said: "If a plaintiff, in his particulars, claimed £500 because the defendant walked over his lawn the jury might award that amount if they thought it was done for the purpose of annoyance and insult." In *Johnson* v. *Hannahan*, 3 Strobhart, 425, the Court of Appeals of South Carolina, in an action of trespass *quare clausum fregit*, where the plaintiff sought to recover damages for an invasion of his close, accompanied, as he alleged, by circumstances of oppression and insult, refused to set aside a verdict for $3000, as excessive, although the actual and mere pecuniary loss, it was shown, did not amount to $20. In *Kolb* v. *Bankhead*, 18 Texas, 228, which was an action of trespass for cutting down and carrying off timber from the land of another, where the defendant had wilfully or by gross negligence cut over his own line on the land of the plaintiff, it was said by the Supreme Court of Texas, that, "in estimating the damages the jury were not confined strictly to mere compensation for the timber cut and removed. It was their right to

look to the particular circumstances of the case, and give such damages as the facts were deemed by them to warrant, and as would, in their judgment, be adequate, not only for compensation, but also for prevention."

It is unnecessary, however, further to multiply authorities on this point. The precedents are indefinite in number, and the application of the rule as uniform as the circumstances of the cases are various. There was clear error in the Circuit Court in its ruling, as matter of law, that there could be no lawful recovery, in such a case as that stated in the declaration, of an amount equal to that which is necessary to support the jurisdiction of the court. The same error was repeated in acting upon the statement, that a verdict, if rendered for that amount, would be excessive and set aside for that reason—a statement which could not, at any rate, be judicially made before such a verdict was in fact rendered. It adds, indeed, to the principal error, if any distinction can be made, that which consists in encroaching upon the province of the jury. For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict. In *Whipple* v. *The Cumberland Manufacturing Co.*, 2 Story, 661, 670, Mr. Justice Story well expressed the rule on this subject, that a verdict will not be set aside in a case of *tort* for excessive damages "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated"—that is, "unless the verdict is so excessive or outrageous," with reference to all the circumstances of the case, "as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.

The case of *Beardmore* v. *Carrington*, 2 Wilson, 244, was an action of trespass and false imprisonment against the defendants, who were four of the King's messengers in ordinary. They justified the alleged trespass under a warrant of the Earl of Halifax, then one of the principal Secretaries of State, requiring them to arrest the plaintiff as the author of some seditious libels, and to seize his books and papers. There was a verdict for the plaintiff for £1000 damages, and a motion for a new trial on the sole ground that the damages were excessive. The court (Pratt, afterwards Lord Camden, being Lord Chief Justice) said: "Can we say that £1000 are monstrous damages as against him who has granted an illegal warrant to a messenger, who enters into a man's house and prys into all his secret and private affairs, and carries him from his house and business and imprisons him for six days; it is an unlawful power assumed by a great Minister of State; can anybody say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects; we cannot say the damages of £1000 are enormous." The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, if they are to be, not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition. *Huckle* v. *Money*, 2 Wilson, 205.

The section of the act of March 3, 1875, under which the Circuit Court acted in dismissing the present action confers a beneficial authority to be wisely exercised in defeating collusive and fraudulent experiments upon its jurisdiction; but the discretion it confers is judicial, proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors. For the reasons already given we are not able to uphold its exercise in the present instance, and

The judgment dismissing the action is accordingly reversed, and the cause is remanded, with directions to take such further proceedings therein as the law requires and in conformity with this opinion.

CHAFFIN *v.* TAYLOR.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Argued January 7, 8, 1886.—Decided February 1, 1886.

At the former hearing of this case, *Chaffin* v. *Taylor*, 114 U. S. 309, every question of law was decided which is raised by the pleadings filed below after the judgment of reversal at that hearing.

Whatever has been decided on one writ of error cannot be re-examined, on a subsequent writ of error brought in the same suit.

Supervisors v. *Kennicott*, 94 U. S. 498, again affirmed.

A former judgment in this case rendered against the plaintiff in error by the Supreme Court of Appeals of the State of Virginia was reversed by this court, a report of which will be found in 114 U. S. 309.

The record at that time showed the state of the pleadings as follows:

The declaration was in trespass *de bonis asportatis;* the defendant justified the taking, &c., as treasurer of Henrico County, charged by law with the duty of collecting taxes due the State of Virginia on property and persons in said county, alleging that the property was lawfully seized and taken for taxes due from the plaintiff to the State, which, on demand, he had refused to pay.

To this plea the plaintiff replied a tender in payment of the taxes, when demanded and before the trespass complained of, of the amount due in coupons cut from bonds of the State of Virginia, receivable in payment of taxes by virtue of the act of the General Assembly of that State, passed March 30, 1871.

To this replication the defendant demurred, specially on the ground, first, that, by the act of January 26, 1882, he was forbidden to receive coupons in payment of taxes; and, second, that, by the act of March 13, 1884, an action of trespass would not lie in such a case; the two acts referred to being set out in the report of the opinion of this court in the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, 275.

Statement of Facts.

On this demurrer judgment was rendered for the defendant, which was reversed by this court, for the reasons set out in the opinion in the case of *Poindexter* v. *Greenhow*, *ubi supra*, on the ground that the statutes referred to were unconstitutional, null and void, as impairing the obligation of the contract entered into by the State with the holders of its bonds in the act of March 30, 1871.

The cause was remanded, with directions to proceed therein in conformity with law and the opinion of this court. The mandate being received and entered of record in the Circuit Court of Henrico County, that court, against the objection of the plaintiff, on motion of the defendant, permitted the latter to file a rejoinder to the replication, as follows:

"And the said defendant, by his attorney, as to the replication of the plaintiff, says: That the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that at the time the said plaintiff offered to the defendant, as treasurer and collector of taxes for the county of Henrico, in payment of the taxes of the said plaintiff for the year 1883 due to the State of Virginia, a paper or instrument in print, writing, or engraving purporting to be a coupon detached from a bond of the Commonwealth of Virginia, issued under the act of assembly of 1871, entitled 'An act to fund the public debt,' he, the said plaintiff, demanded that the said defendant should receive the same, together with a small sum of national bank currency, in full for said taxes due by the plaintiff for the year 1883, and gave him, the said plaintiff, a receipt in full discharge of said taxes, notwithstanding the act of the General Assembly, approved January 14, 1882, which provides that, whenever any tax-payer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts, or demands, due the Commonwealth any papers or instruments in print, writing, or engraving purporting to be coupons detached from bonds of the Commonwealth issued under the act of 1871, entitled 'An act to fund the public debt,' in payment of any such taxes, debts, and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering a receipt, stating that he has received the same for the purpose of identi-

fication and verification; he shall at the same time require such tax-payer to pay his taxes in coin, legal-tender notes, or national bank bills, and upon payment give him a receipt for the same; in case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected. The said defendant, as treasurer and tax collector for the county of Henrico, as was his duty, did, on account of said act of January 14, 1882, refuse to comply with the demands of the said plaintiff, but was willing and ready to receive, and is still ready to receive, the said paper or instrument in print, writing, or engraving purporting to be a coupon detached from a bond of the Commonwealth, issued under the act of 1871, entitled 'An act to fund the public debt,' and give said plaintiff a receipt for the same, for the purpose of identification and verification, at the same time receiving from the said plaintiff his taxes in coin, legal-tender notes, or national bank bills, giving him a receipt for the same, as required by said act of January 14, 1882, and for the purpose herein set forth. But the said plaintiff was not willing to comply with said act of January 14, 1882, and did not comply with the same, as by law he was required to do; and he refusing to pay his taxes aforesaid, the defendant, as treasurer and tax collector for the county of Henrico, as was his duty under the law, proceeded to collect the taxes from the said plaintiff in the manner set forth in the plea of the defendant heretofore filed, and as provided for in said act of January 14, 1882, and this he is ready to verify."

The cause was finally submitted on a demurrer to this rejoinder, when the court being of opinion, as the record recites, that the judgment and opinion of this court in this cause did not preclude and forbid the defendant from pleading in bar the act of assembly of January 14, 1882, set forth by him in his rejoinder, and that the Constitution of the United States did not make said act of assembly null and void as a defence to the defendant in this action, rendered judgment on the demurrer in favor of the defendant. A petition to the Supreme Court of Appeals of Virginia for a writ of error to that judgment was denied, and the cause is now brought here again for review.

This case was argued with *Barry* v. *Edmunds*, *ante*, 550;

Royall v. *Virginia*, *post*, 572; and *Sands* v. *Edmunds*, *post*, 585.

Mr. William L. Royall and *Mr. Daniel H. Chamberlain* for plaintiff in error.

Mr. R. A. Ayres and *Mr. Walter R. Staples* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the above reported language, he continued:

The rejoinder which the Circuit Court of Henrico County permitted the defendant to file tendered no issue of fact, but one of law merely; and every question of law in the case had been covered by the former judgment of this court in this case. The proper action of the Circuit Court of Henrico County upon the mandate of this court would have been to have entered judgment on the pleadings in favor of the plaintiff, and proceeded to an assessment of his damages.

The act of January 14, 1882, set up in the rejoinder, is the same that was considered by this court in *Antoni* v. *Greenhow*, 107 U. S. 769, where it was adjudged that, as an amendment to the law regulating the proceeding by *mandamus* to compel the acceptance by the officers of the State of tax-receivable coupons in payment of taxes, it was not a law which impaired the obligation of the contract under the act of March 30, 1871.

The same act was necessarily considered in the opinion of the court in *Poindexter* v. *Greenhow*, 114 U. S. 270, as it was claimed in argument on the part of the defendant in error that the case then under consideration ought to be governed by the decision in the case of *Antoni* v. *Greenhow*, *ubi supra*, on the ground that the remedies provided by the subsequent acts of January 26, 1882, and of March 13, 1884, were, like that provided by the act of January 14, 1882, adequate, and therefore exclusive.

But we expressly pointed out that the last-named act of January 14, 1882, the one set up and relied on in the rejoinder of the

defendant, had no application to the case, so far as the decision in *Antoni* v. *Greenhow*, *ubi supra*, upheld it, because the present action was not one to specifically compel the tax collectors to receive coupons in payment of taxes, but proceeded on the ground that after the tender of coupons, in pursuance of the law of March 30, 1871, the tax collector in distraining property for the payment of the tax as still delinquent was guilty of a trespass.

In *Antoni* v. *Greenhow* that question was not decided. The court there said: "The question we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract if the collector refuses to take the coupon." p. 774. And again: "In conclusion, we repeat that the question presented by the record is not whether the tax collector is bound in law to receive the coupon, notwithstanding the legislation which, on its face, prohibits him from doing so, nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons." p. 782.

The question that was not decided in *Antoni* v. *Greenhow* was the very question decided in the present case, and in the case of *Poindexter* v. *Greenhow*, where the grounds of the judgment are set out in full. It was there decided that the tax-payer had a contract right to pay his taxes in coupons, that a tender of them for that purpose, as to subsequent steps to collect the tax as delinquent, was equivalent to payment, and that a seizure of property under a levy thereafter for their non-payment was a trespass, notwithstanding any act of the General Assembly to the contrary, for such an act, being in breach of

the obligation of the contract of the State, is unconstitutional, and therefore null and void.

The rejoinder of the defendant allowed to be filed after the judgment of reversal, therefore, sought again to draw in question the very matter which had been already finally adjudged by this court in the same case. It did not deny the genuineness of the coupons tendered, nor the fact of tender, and the question of law broadly decided on the demurrer to the replication necessarily involved every defence, arising as matter of law, that could be made upon any existing acts of the General Assembly of Virginia, for the whole law of the case, as to the plaintiff's legal right to recover on his cause of action, was presented by the pleadings, and was concluded by the judgment of reversal.

As was said in *Clark* v. *Keith*, 106 U. S. 464, "that question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit. This rule was distinctly stated in *Supervisors* v. *Kennicott*, 94 U. S. 498, where numerous authorities are cited, beginning as early as *Himely* v. *Rose*, 5 Cranch, 313."

The judgments of the Supreme Court of Appeals and of the Circuit Court of Henrico County, Virginia, are therefore reversed, and the cause is remanded to the said Circuit Court, with instructions to take further proceedings in accordance with law, and in conformity with this opinion.

ROYALL *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Argued January 7, 8, 1886.—Decided February 1, 1886.

An assessment made by a statute of Virginia a condition precedent to obtaining a license for pursuing a business or profession within the State, is a tax, debt, or demand within the meaning of the act of that State of March 30,

Statement of Facts.

1871, making coupons on the bonds of the State receivable for "taxes, debts, dues and demands due the State."

The "separate revenue license," which persons authorized and licensed to practise as attorneys at law in the courts of Virginia are required by the statutes of that State to obtain before practising, is a tax laid for revenue, and not an exaction for purposes of regulation.

When a statute of a State imposes license taxes for purposes of revenue upon persons pursuing lawful occupations and professions within the State, and a State officer charged with the duty of issuing licenses thereunder, acting in obedience to a statute of the State which is in conflict with the Constitution of the United States, refuses to issue such a license to a person who has duly tendered the amount required by law to be paid for it, the person tendering the payment, if otherwise qualified to pursue the occupation, is not required to proceed by mandamus to compel the issue of the license, and to await the result of those proceedings before entering upon the pursuit or occupation.

After lawful tender to the proper State officer of the requisite amount of coupons (receivable by the terms of the act of the State of Virginia of March 30, 1871, in payment of taxes, debts, dues, and demands due the State) for a "separate revenue license," by a person otherwise duly authorized and licensed to practise as an attorney at law, and after refusal by that officer to receive the same or to issue the "separate revenue license," the person so making the tender may at once enter upon the practice of his profession; and any law of the State subjecting him to criminal proceedings therefor is in conflict with the Constitution of the United States.

The plaintiff in error was convicted, in the Hustings Court of the City of Richmond, of the misdemeanor under the laws of Virginia of practising law as a lawyer without having first obtained a license so to do from the commissioner of the revenue.

To the information the plaintiff in error filed the following plea:

"And for a plea in this behalf the said William L. Royall comes and says that he is an attorney-at-law, duly licensed and qualified to practise law in the courts of the State of Virginia, under the laws of said State, and that he has been such for more than five years; that on the 1st day of May, 1884, he paid to Samuel C. Greenhow, who is the treasurer of the city of Richmond, Virginia, twenty-five dollars and seventy-five cents, and received from him and the commissioner of the revenue a revenue license as a lawyer for one year from that date; that he has not practised his profession as a lawyer in

the courts of said State between the 1st day of May, 1885, and the 11th day of July, 1885; that on the 11th day of July, 1885, he tendered to Seaton G. Tinsley, who is the deputy for Samuel C. Greenhow, one coupon for fifteen dollars and ten dollars in United States Treasury notes, in payment of his license tax as an attorney-at-law for the ensuing year, and seventy-five cents in silver coin for the fee of the commissioner of the revenue; that said coupon was cut from a bond issued by the State of Virginia under the provisions of an act of the General Assembly, approved March 30, 1871, entitled 'An act to provide for the funding and payment of the public debt;' that it was overdue and past maturity, and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, demands, and dues due to the said State; that when he made said tender he demanded of said Greenhow a certificate in writing stating that he had deposited with him said coupon and money, but the said Greenhow, by his said deputy, refused to receive said coupon and money for any purpose whatever, and refused to give him said certificate or any other certificate; that he refused to receive said coupon and money, because an act of the General Assembly of the State of Virginia, approved February 7th, 1884, forbade him to receive said license tax in coupons, and because the 112th section of an act of the General Assembly of said State, approved March 15th, 1884, provides that all license taxes shall be paid in current money of the United States, and not in coupons; that thereupon the defendant made the affidavit hereto attached, marked 'A,' and presented it to R. B. Munford, who is the commissioner of the revenue for the city of Richmond, and demanded of him a revenue license as an attorney at-law, and at the same time he presented to the said Munford the paper hereto attached, marked 'B,' and at the same time he offered to pay the said Munford any and all fees that he was entitled to receive before issuing said license, but the said Munford refused to issue to defendant a license as an attorney-at-law; that thereafter defendant accepted the employment of a client who was being prosecuted for a misdemeanor in this honorable court, and assisted in his defence, and thus practised his profession as a

lawyer without a revenue license, but said professional act was done after defendant had made the efforts hereinbefore described to obtain a revenue license, and this he is ready to verify."

The affidavit referred to in the plea set forth the facts of the tender, and the paper marked "B" was the usual form of an application for a revenue license.

To this plea the Commonwealth filed a general demurrer, which was sustained by the court, on the ground that the defendant had no right to practise his profession as an attorney-at-law after the tender of the coupons and money, as described in the plea, without first having obtained a license therefor. The defendant then pleaded not guilty, and a trial was had, resulting in a verdict finding the defendant guilty and assessing his fine at $30.

During the progress of the trial a bill of exceptions was duly taken, as follows:

"Be it remembered that on the trial of this cause the same was submitted to the jury upon the following agreed statement of facts, to wit:

"'It is admitted as evidence in the case of the *Commonwealth* v. *Royall* that said Royall did not practise his profession as attorney-at-law between May 1, 1885, and July 11, 1885, and that on the latter day he tendered to the treasurer of the city of Richmond a coupon issued by the State of Virginia under the provisions of the act of March 30, 1871, for the sum of $15.00 and $10.75, lawful money of the United States, in payment of his license tax for the ensuing year, and demanded his license of the proper officer; that said coupon was receivable in payment of all taxes, debts, and demands due said State; that said tender was refused; that thereupon the defendant practised his profession as an attorney after said tender, but not before, without revenue license, but the said defendant has for more than five years been duly licensed to practise law under the laws of Virginia. It is further agreed that the license tax on the defendant as an attorney-at-law is twenty-five dollars ($25).'

"Thereupon the defendant moved the court to instruct the jury as follows:

"'If the jury believe from the evidence that the defendant did not practise his profession of attorney-at-law between the 1st day of May, 1885, and the 11th day of July, 1885, and that on the 11th day of July, 1885, he tendered to the treasurer of the city of Richmond a coupon for $15.00, issued by the State of Virginia under the provisions of the act of assembly approved March 30, 1871, which coupon, by provisions of said act, was receivable for all taxes, debts, and demands due said State, and ten dollars and seventy-five cents, in lawful money of the United States, in payment of his license tax, which said tax is $25, and 75 cents commissioner's fee, for the then ensuing year, and that said tender was refused by said treasurer, then they are instructed they must find the defendant not guilty.'

"Which instructions the court refused to give. To the court's action in refusing which instructions the defendant excepts, and tenders this his first bill of exceptions, and prays that this his bill of exceptions be signed, sealed, and made a part of the record; which is accordingly done."

Judgment was entered on the verdict for the payment of the fine, and execution awarded. The record contained the following:

"And, at the instance of the defendant, the court certifies that in the record and at the trial of this cause there was drawn in question the validity of section 86 of chapter 34 of the Code of Virginia of 1873, and an act of the General Assembly of said State, approved February 7, 1884, entitled 'An act to regulate the granting of licenses for the exercise of any privilege,' and the 112th section of an act of the General Assembly of said State, approved March 15, 1884, entitled 'An act to provide for the assessment of taxes on persons, property, and incomes,' &c., upon the ground that, so far as they undertake to inflict punishment upon the defendant for practising his profession as an attorney-at-law without a license, after having tendered the State's tax-receivable coupons in payment of his license tax, they are repugnant to section 10 of article I. of the Constitution of the United States.

"But the court being of opinion that the defendant had no right to practise the profession of an attorney-at-law without

a license after he had tendered payment of his license tax in coupons, decided and gave judgment that said section of said code and said acts of the General Assembly are not repugnant to section 10 of article I. of the Constitution of the United States in that behalf, and it decided and gave judgment in favor of the validity of said section of said code and said act of assembly."

The Supreme Court of Appeals denied a petition praying for an allowance of a writ of error, and to reverse that judgment this writ of error was prosecuted.

This case was argued with *Barry* v. *Edmunds*, *ante*, 550; *Chaffin* v. *Taylor*, *ante*, 567; and *Sands* v. *Edmunds*, *post*, 585.

Mr. William L. Royall and *Mr. Daniel H. Chamberlain* for plaintiff in error.

Mr. R. A. Ayres and *Mr. Walter R. Staples* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts as reported above he continued:

The Virginia Code of 1873, Title 12, ch. xxxiv, § 60, provides that "no person shall, without a license authorized by law, practice as an attorney at law;" and § 61, that "every attorney at law, in addition to being licensed, sworn and admitted to prosecute or defend actions or other proceedings in the courts of this commonwealth, on the retainer of clients, shall obtain a revenue license, and no person shall act as attorney-at-law, or practise law in the courts of this commonwealth, without a separate revenue license." This revenue license, it will be observed, is different from and in addition to the license to practise law, given only to such as on examination, as to their character and acquirements, are found to be duly qualified therefor. The amount of this revenue license was fixed by an act of March 15, 1884, at $15 for those who had been licensed to practice for less than five years, and at $25 for all others. Section 86 of ch. 34 of the Virginia Code of 1873 provides that

"any person who shall engage in or exercise any business, employment or profession, without a license, if a license be required by law, or shall in any manner violate the license or revenue laws of the State, if no specific fine is imposed for such violation, shall pay a fine of not less than thirty dollars nor more than one thousand dollars."

The act of February 7, 1884, Acts of Virginia, 1883–'84, 120, enacts that no application for a license to do any business, or to follow any profession, trade or calling in that State, shall be made, and if made shall not be considered, except upon compliance with its provisions, which, among other things, require that the amount of the assessment prescribed by law as a condition precedent shall accompany the application, in gold or silver coin, United States Treasury notes or national bank notes.

Section 112 of the act of March 15, 1884, Acts of Virginia, 1883–'84, 603, also provides that "applications for licenses shall be made, and all taxes assessed by chapter one of this act shall be paid in lawful money of the United States, in the mode and subject to the provisions of an act to regulate the granting of licenses, approved the seventh day of February, eighteen hundred and eighty-four," &c.

By the terms of the act of March 30, 1871, the coupons tendered in this case were made receivable for "all taxes, debts, dues, and demands due the State," and this stipulation, as has been repeatedly decided by the Court of Appeals of Virginia and by this court, constituted a contract between the coupon-holder and the State of Virginia, the obligation of which the State is forbidden to impair by the Constitution of the United States, and any law of the State which would have that effect if enforced, is thereby annulled and made void. To this point are the cases of *Antoni* v. *Wright*, 22 Grattan, 833; *Wise* v. *Rogers*, 24 Grattan, 169, and *Clarke* v. *Tyler*, 30 Grattan, 134, in the Court of Appeals of Virginia; and in this court the cases of *Hartman* v. *Greenhow*, 102 U. S. 672; *Antoni* v. *Greenhow*, 107 U. S. 769, and *Poindexter* v. *Greenhow*, 114 U. S. 270. In *Hartman* v. *Greenhow*, *ubi supra*, it was shown that the consideration for this stipulation was a surrender by

its creditors of one-third of their claim against the State. In *Antoni* v. *Greenhow*, 107 U. S. 769, 775, it was said: "The right of the coupon-holder is to have his coupon received for taxes when offered;" and, "Any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders." p. 771. In *Poindexter* v. *Greenhow*, 114 U. S. 270, 281, no point in which was reopened in the argument of this cause, it was said: "It is well settled by many decisions of this court that for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action and making every subsequent step illegal and void;" a proposition founded on the authority of *Woodruff* v. *Trapnall*, 10 How. 190; *United States* v. *Lee*, 106 U. S. 196; *Bennett* v. *Hunter*, 9 Wall. 326; *Tacey* v. *Irwin*, 18 Wall. 549; *Atwood* v. *Weems*, 99 U. S. 183; and *Hills* v. *Exchange Bank*, 105 U. S. 319.

That charges, or, as they are called in the statutes, assessments made by law as conditions precedent to obtaining licenses for pursuing a business or profession, are included within the meaning of the words, "taxes, debts, dues, and demands due the State," as used in the act of March 30, 1871, does not seem to admit of reasonable doubt. In *Clarke* v. *Tyler*, 30 Grattan, 134, it was adjudged by the Court of Appeals of Virginia that a fine imposed for a violation of law could be discharged under this provision in coupons in lieu of money. So that upon the authority of that case the very fine imposed by the Hustings Court of Richmond upon the plaintiff in error for practising law without a revenue license may lawfully be paid and discharged in the very coupons which were tendered in payment of the license itself and refused. Surely such an anomaly cannot be justified or admitted. The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the State which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation

tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the State, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort, and convenience. In the latter class of cases the exactions may be either fees or fines, as they are proportioned to the expense of regulation, or laid as a burden upon and a discouragement to the business, and not taxes which are levied for the purpose of raising public revenue by means of a contribution either from the person or the property or the occupation of all citizens in like circumstances. It was, therefore, in the character of a tax that the payments were required and made for licenses issued under the internal revenue acts of the United States. *McGuire* v. *The Commonwealth*, 3 Wall. 387. Speaking of them in the *License Tax Cases*, 5 Wall. 462, 471, Chief-Justice Chase said: "The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax," &c., and that "this construction is warranted by the practice of the government from its organization. . . . They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected. . . . But, as we have already said, these licenses give no authority. They are mere receipts for taxes." The license under the laws of Virginia, required from the plaintiff in error, cannot be distinguished from those of the class just referred to, issued under the internal revenue laws of the United States.

We are referred to the case of *Sights* v. *Yarnalls*, 12 Grat. 292, as defining a license under the laws of Virginia in a different sense. We think, on the contrary, that it is not only consistent with the view we have taken, but strongly in corroboration of it. In that case, the amount assessed as a condition of the license is expressly designated to be a tax. It was an exaction made by the municipal government of the city of Wheeling, under a law which expressly authorized it, in reference to houses of entertainment, to grant or refuse licenses, and the case was one of that class. The language of the city char-

ter was: "They shall further have authority to regulate the manner in which such houses or places shall be kept, and to levy and collect taxes thereon, in addition to any tax which is or shall be payable on the same to the State."

The law of Virginia, however, on this point was definitely settled in accordance with the view we have here taken, in the case of *Ould* v. *City of Richmond*, 23 Grat. 464, followed by *Humphreys* v. *City of Norfolk*, 25 Grat. 97, and *The Western Union Telegraph Co.* v. *City of Richmond*, 26 Grat. 1.

In the case of *Humphreys* v. *The City of Norfolk*, *ubi supra*, the Supreme Court of Appeals of Virginia, referring to the previous case of *Ould* v. *City of Richmond*, said: "The objection was made in that case that a power to license involves in its exercise the power to prohibit without such license; and that such power vested in a municipal corporation is incompatible with the rights of attorneys conferred by their general license to practice in any and every part of the State. This objection did not prevail. Judge Anderson, upon this point, speaking for the entire court, conceded that the city authorities could not prohibit attorneys at law, already licensed, from practicing their profession within the city limits. The exercise of the vocation was, however, a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the State and by municipal corporations. The power to impose a license tax upon the profession is included in the general power of taxation given by the sixty-ninth section of the charter, and is not taken away by subsequent limitations." "The principles settled by that case," continued the court, "are decisive of this. In neither case is the attempt made to prohibit the exercise of the business or vocation. The license required by the corporation is merely a mode of assessing the tax; if it be reasonable and just, it matters but little by what name it is called. The power to impose fines and penalties for a failure to pay the tax required is not only an incident to the power of taxation, but is expressly conferred by statute."

That the party complying with the statutory conditions is entitled as of right to the license, is conclusive that the pay-

ment is a tax laid for revenue and not an exaction for purposes of regulation. *Mayor &c.* v. *Second Avenue Railroad Co.*, 32 N. Y. 261; *State* v. *Hoboken*, 33 N. J. L. (4 Vroom), 280; 2 Dillon Municipal Corporations, 766, ch. XIX., § 768. The occupation, which is the subject of the license, is lawful in itself, and is only prohibited for the purpose of the license; that is to say, prohibited in order to compel the taking out a license, and the license is required only as a convenient method of assessing and collecting the tax. Cooley on Taxation, 407. Such a license fee was held to be a tax by this court in the cases of *Brown* v. *Maryland*, 12 Wheat. 419; *Ward* v. *Maryland*, 12 Wall. 418, and *Welton* v. *Missouri*, 91 U. S. 275. We think it entirely clear, both from the nature of the case and upon authority, that the payments demandable by the State for the license applied for by the plaintiff in error are taxes within the meaning of the act of March 30, 1871, in discharge of which coupons were receivable by its terms, and that the plaintiff in error must be regarded, after making the tender alleged, in the same situation in law as if he had tendered gold or silver coin or other lawful money of the United States.

Admitting this, it is still contended, on behalf of the Commonwealth, that it was unlawful for the plaintiff in error to practice his profession without a license, and that his remedy was against the officers to compel them to issue it. It is doubtless true, as a general rule, that where the officer, whose duty it is to issue a license, refuses to do so, and that duty is merely ministerial, and the applicant has complied with all the conditions that entitle him to it, the remedy by *mandamus* would be appropriate to compel the officer to issue it. That rule would apply to cases where the refusal of the officer was wilful and contrary to the statute under which he was commissioned to act. But here the case is different. The action of the officer is based on the authority of an act of the General Assembly of the State, which, although it may be null and void, because unconstitutional, as against the applicant, gives the color of official character to the conduct of the officer in his refusal; and, although at the election of the aggrieved party the officer might be subjected to the compulsory process

of *mandamus* to compel the performance of an official duty, nevertheless the applicant, who has done everything on his part required by the law, cannot be regarded as violating the law if, without the formality of a license wrongfully withheld from him, he pursues the business of his calling, which is not unlawful in itself, and which, under the circumstances, he has a constitutional right to prosecute. As to the plaintiff in error, the act of the General Assembly of the State of Virginia forbidding payment of his license tax in its coupons, receivable for that tax by a contract protected by the Constitution of the United States, is unconstitutional, and its unconstitutionality infects and nullifies the antecedent legislation of the State, of which it becomes a part, when applied, as in this case, to enforce an unconstitutional enactment against a party, not only without fault, but seeking merely to exercise a right secured to him by the Constitution. It is no answer to the objection of unconstitutionality, as was said in *Poindexter* v. *Greenhow*, *ubi supra*, "that the statute, whose application in the particular case is sought to be restrained, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States, and the law, under the authority of which this is attempted, must on that account and in his case be regarded as null and void.

As the sum demanded for the license is a tax, the provision for the punishment of one who persues his profession without a

license is a part of the revenue system of the State, and is a means merely of enforcing payment of the tax itself, or of a penalty for not paying it. It is legally equivalent to a civil action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information. The present case, therefore, stands precisely, so far as the constitutional questions arising in it are affected, as if it were a civil action, in which the Commonwealth of Virginia was plaintiff, seeking to recover the amount due on account of the tax and penalty. In that aspect no one would doubt that it would be a perfect defence that the defendant had previously paid the demand, or, what we have held to be legally equivalent, had tendered the amount in the coupons of the State, receivable in payment by an irrepealable contract, but which the appointed authorities of the State had wrongfully refused to receive. Such, as we conceive it, is the present case. The State of Virginia has sued the defendant for the recovery of a tax which he offered to pay, when it became due, in its own coupons, which by the law of its contract were receivable in satisfaction of the demand. Certainly the State cannot be permitted to recover against its own contract from the other contracting party, as to whom the only default alleged is that he has performed the contract on his part.

The judgments of the Supreme Court of Appeals of Virginia, and of the Hustings Court of the City of Richmond, Virginia, are accordingly reversed, and the cause is remanded to said Hustings Court, with instructions to take further proceedings therein in accordance with law and in conformity with this opinion.

SANDS *v.* EDMUNDS.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Argued January 7, 8, 1886.—Decided February 1, 1886.

After lawful tender to the proper State officer of the requisite amount of coupons (receivable by the terms of the act of the State of Virginia of March 30, 1871, in payment of taxes, debts, dues and demands due the State), for a "separate revenue license" by a person otherwise duly authorized and licensed to practice as an attorney-at-law, and after refusal by that officer to receive the same, or to issue the "separate revenue license," the person so making the tender may, by mandamus, compel the officer to receive the coupons, and to deliver them to the proper official for identification and verification according to the terms of the act of that State of January 14, 1882.

The plaintiff in error filed in the Circuit Court of Fauquier County a petition for a *mandamus* against the treasurer of that county, as follows:

"The petition of Wm. H. Sands respectfully represents that he is an attorney-at-law, regularly and duly licensed to practice law in the courts of the State of Virginia according to the laws of said State.

"That on the 8th day of September, 1885, he tendered to E. G. Edmunds, who is the treasurer of the county of Fauquier, and the officer whose duty it is to collect all license taxes due said State in said county, in payment of his license tax as an attorney-at-law for the ensuing year, fifteen dollars in lawful money of the United States and seventy-five cents in like money for the commission of the revenue's fee, in compliance with the provisions of the acts of assembly, approved February 7th, 1884, entitled 'An act to regulate the granting of licenses for the exercise of any privilege.'

"That, at the same time, he tendered to the said treasurer a certain coupon for fifteen dollars, which coupon was cut from a bond issued by the State of Virginia under the provisions of an act of her General Assembly, approved March 30, 1871, entitled 'An act to provide for the funding and payment of the public debt.'

"That said coupon was overdue and past maturity, and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due said state.

"That, at the same time, he demanded the said treasurer should receive said coupon along with said lawful money for the purpose of identification and verification, in manner and form as required by an act of the General Assembly of the State of Virginia, approved January 14, 1882, entitled 'An act to prevent fraud upon the Commonwealth and holders of her securities in the collection of her revenues.'

"That the said treasurer received said lawful money tendered by your petitioner, and gave him the certificate provided for in said act of February 7, 1884, but he refused to receive said coupon as demanded by your petitioner, and he refused to receive it for any purpose whatever. Your petitioner claims that he had the right to have said treasurer receive said coupon and deliver the same to the judge of the county court of Fauquier, and that it was your petitioner's right to prove said coupon before a jury in said court and thereupon to have his said money returned to him, and that said treasurer did your petitioner a great wrong and injury when he refused to receive said coupon.

"That he refused to receive same because said act of February 7, 1884, requires all license taxes to be paid in money only and not in coupons, and because the 112th section of an act of the General Assembly of Virginia, approved March 15, 1884, entitled 'An act to provide for the assessment of taxes on persons, property, incomes, &c.,' requires all license taxes to be paid in money only, and not in coupons.

"That both of said acts in this particular are repugnant to section 10 of article 1 of the Constitution of the United States, and therefore null and void. That your petitioner has not been licensed to practice law so long as five years.

"Your petitioner therefore prays that a *mandamus nisi* may be issued commanding the said E. G. Edmunds, treasurer aforesaid, to show cause why a peremptory *mandamus* shall not issue commanding him to receive said coupon, and deliver

it to the judge of the County Court for identification and verification, according to the terms and provisions of said act of January 14, 1882."

The prayer for the writ was denied by the Circuit Court of Fauquier County, and on application to the Supreme Court of Appeals of Virginia that judgment was affirmed by a refusal to allow an appeal. To reverse that judgment this writ of error was prosecuted.

This case was argued with *Barry* v. *Edmunds*, *ante*, 550; *Chaffin* v. *Taylor*, *ante*, 567; and *Royall* v. *Virginia*, *ante*, 572.

Mr. William L. Royall and *Mr. Daniel H. Chamberlain* for plaintiff in error.

Mr. R. A. Ayres and *Mr. Walter R. Staples* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts as above reported, he continued:

The right of the plaintiff in error to pay his license tax as a lawyer in coupons, receivable for taxes, as described in his petition, is affirmed by the opinion and judgment in the case of *Royall* v. *The State of Virginia*, just decided, *ante*, 572. His remedy to have them received for verification and to recover back the money paid for his license, is secured to him by the terms of the act of January 14, 1882, which, for such purposes, was upheld by this court as a valid enactment in *Antoni* v. *Greenhow*, 107 U. S. 769.

On the authority of these decisions

The judgments of the Supreme Court of Appeals of Virginia and of the Circuit Court of Fauquier County, Virginia, are reversed, and the cause is remanded to said Circuit Court, with instructions to take further proceedings according to law and in conformity with this opinion.

HARTOG *v.* MEMORY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted December 4, 1885.—Decided February 1, 1886.

When the jurisdiction of a Circuit Court of the United States over the parties by reason of citizenship appears on the face of the record, and no issue is joined respecting it, evidence not pertinent to the issues made by the pleadings cannot be introduced solely for the purpose of making out a case for dismissal by reason of the absence of the proper citizenship.

When a Circuit Court of the United States is led to suspect from any cause that its jurisdiction has been imposed upon, collusively or otherwise, it may protect itself against fraud or imposition by an inquiry made of its own motion in such manner as it may direct; and by such further action thereafter as justice may require.

The evidence on which a Circuit Court acts in dismissing a suit for want of jurisdiction must not only be pertinent either to the issue made by the parties, or to the inquiry instituted by the court, but it must also appear of record, if either party desires to invoke the appellate jurisdiction of this court for the review of the order of dismissal.

This was a writ of error brought under § 5 of the act of March 3, 1875, ch. 137, 18 Stat. 370, for the review of an order dismissing a suit begun in the Circuit Court. The record showed that on the 19th of September, 1884, William Hartog sued Henry Memory in an action of assumpsit for a breach of a contract to deliver property sold. In the declaration Hartog was described as a citizen of the Kingdom of Holland, and Memory as a citizen of Illinois. On the 8th of October Memory filed three pleas: 1, general issue; 2, statute of limitations of Illinois; and, 3, limitation laws of Holland, where the cause of action accrued. On the 8th of November Hartog obtained a commission for the taking of testimony in Holland, and Memory was ruled to file cross-interrogatories by the following Monday. On the 9th of May, 1885, Memory withdrew his plea of limitation by the laws of Holland, and Hartog filed a replication to the plea of the statute of limitations of Illinois. The case was on the same day tried with a jury. On the trial

the plaintiff introduced "evidence to sustain the issues on his behalf, which evidence also showed that said plaintiff was a subject of the King of Holland, and also showed that said defendant had been doing business in the city of Chicago for several years.

"And thereupon said defendant offered himself as a witness to maintain the issues on his behalf in said cause, and during the progress of his examination he was asked by his counsel the following questions, and gave the following answers:

'Q. Are you a citizen of the United States, Mr. Memory?

'A. No, sir.

'Q. Of what dominion or kingdom are you a citizen?

'A. I am a citizen of Great Britain, sir.'

"And thereupon said plaintiff, by his counsel, cross-examined said Memory as follows:

'Q. How long have you resided and done business in Chicago?

'A. About from eight to ten years, I suppose.

'Q. Where did you do business before that?

'A. I did business for a short time in New York.'

"It also appeared that defendant was in Holland twice in 1879, and that the alleged contract was entered into there.

"Which was all the evidence introduced by either party on the question of citizenship or residence."

The jury, on the 11th of May, brought in a verdict against Memory for $2497. A motion for new trial was then entered. On the 1st of June, before judgment on the verdict, the defendant filed the following motion:

"And now comes the defendant, by his attorney, and it appearing that the defendant is not a citizen of the United States, or of any State, but a citizen and subject of Great Britain, and that all the parties to this suit are aliens, and that the court has no jurisdiction in this cause, the said defendant moves that this case be dismissed for want of jurisdiction in this court."

This motion was granted, and the suit dismissed June 10. 23 Fed. Rep. 835. To reverse that order this writ of error was brought.

Mr. Julius Rosenthal and *Mr. A. M. Pence* for plaintiff in error.

Mr. E. B. Sherman for defendant in error.

Mr. Chief-Justice Waite delivered the opinion of the court. After stating the facts in the language reported above, he continued:

It was well settled before the act of 1875 that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction. *Farmington* v. *Pillsbury*, 114 U. S. 138, 143, and cases there cited. In its general scope this rule has not been altered by the act of 1875, but before that act was passed it had been held that the rule prevented the courts from taking notice of colorable assignments or transfers to create cases for the jurisdiction of the courts of the United States in the absence of a plea in abatement or to the jurisdiction, and, as that act "opened wide the door for frauds upon the jurisdiction of the court by collusive transfers so as to make colorable parties and create cases cognizable by the courts of the United States," we held in *Williams* v. *Nottawa*, 104 U. S. 209, 211, that the statute changed the rule so far as to allow the court at any time, without plea and without motion, to "stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered."

Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the

issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party.

If in the course of a trial it appears by evidence, which is admissible under the pleadings, and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit.

In *Williams* v. *Nottawa* the record showed that one of the issues to be tried was whether Williams, the plaintiff, was the real holder and owner of the bonds sued on, and the evidence showing the collusion, for which we ordered the suit to be dismissed, was all material and pertinent to that issue. And in *Farmington* v. *Pillsbury*, cited above, one of the defences was that Pillsbury, the plaintiff, was not the *bona fide* holder of the coupons in suit, but that they were placed in his hands for the purpose of being sued on in the courts of the United States. The case came here on special findings applicable to that issue, and what we then said was in answer to the question certified on those findings.

Beyond this, no doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.

But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. *Barry* v. *Edmunds*, *ante*, 550. And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an oppor-

tunity to be heard upon the motion, and to meet it by appropriate evidence.

Here the citizenship of both the plaintiff and the defendant, as it was in good faith understood by the plaintiff to be, was stated in the declaration, and it was such as if truly stated gave the court jurisdiction. The defendant pleaded to the merits. He alone knew of the mistake as to his citizenship, and purposely omitted to make it known at the time. Under the issues joined the question of citizenship did not and could not arise. If a judgment had been rendered on the verdict Memory would have been bound by it, notwithstanding both he and Hartog were aliens. The record would have estopped him from denying the jurisdiction of the court. The testimony about his citizenship was irrelevant and wholly immaterial. It did not in any manner relate to the merits of the case. It apparently came out incidentally without attracting the attention of the court at the time. The defendant suffered it to pass without special notice until after the verdict against him. He then moved for a new trial, not, so far as the record discloses, because of any errors at the trial, but, as we must presume, for the purpose of laying the foundation for his motion to dismiss; and the case appears to have been dismissed by the court solely upon the defendant's motion and the irrelevant testimony given at the trial, and without affording the plaintiff an opportunity to rebut or control that testimony.

Under these circumstances, as there is nothing else in the case to justify the dismissal of the suit, we are of opinion that

The order dismissing the suit is erroneous, and must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SHEPARD & Others *v.* CARRIGAN.

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

Argued January 20, 21, 1886.—Decided February 1, 1886.

When an applicant for a patent is compelled by the rejection of his application at the patent office, to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping the element which he was compelled to include in order to secure the patent.

The patent granted to Helen M. MacDonald, September 29, 1874, for an improvement in dress protectors, must be construed to include a fluted or plaited band or border as one of the essential elements of the invention, and is not infringed by the manufacture or sale of skirt protectors which have neither plaited nor fluted bands or boarders.

This was a suit in equity to restrain an alleged infringement of letters patent. The facts are stated in the opinion of the court.

Mr. Edward N. Dickerson for appellants.

Mr. F. P. Fish and *Mr. B. F. Butler* for appellee.

Mr. Justice Woods delivered the opinion of the court.

This was a suit to restrain the infringement of letters patent for an "improvement in dress protectors," granted to Helen M. Macdonald, the intestate of the defendant in error, dated September 29, 1874, upon an application filed May 10, 1873.

The specification of the patent described the invention as follows:

"My invention relates to protectors for the lower edge of dresses and other garments, and consists of a band or strip of fluted or plaited fabric, either water-proof itself, or covered or bound with any water-proof material.

"In the drawing Fig. 1 represents a view of a detached portion of the dress protector, and Fig. 2 represents the protector as applied to the bottom of a dress skirt.

"A is the plaited or fluted band, which is water-proof or bound with water-proof material, and *a* is a heading to which it may be secured for better attachment to the garment.

"Heretofore skirt protectors have been made of a plaited or fluted strip of 'wiggan' or other fabric stiffened with starch, which, upon becoming wet, gets limp, loses its shape, and absorbs the dirt, besides being objectionable on account of the harsh scraping noise it makes upon the pavement.

"By my improvement these objections are overcome. The water-proof protector preserves the lower edge of the dress from all moisture on the ground, retains its rigidity and proper shape, giving a graceful hang to the skirt, and can easily be cleaned."

Both the figures referred to in the specification represented skirt protectors made with plaited or fluted bands.

The claim was as follows:

"As a new article of manufacture, a skirt facing or protector, having a fluted or plaited border, bound with or composed of enameled cloth or water-proof material, substantially as and for the purpose set forth."

On November 9, 1874, the patentee filed in the Patent Office, a disclaimer by which she struck out from her claim the words "facing or," leaving the claim to cover only a skirt protector.

The answer of the defendants denied infringement and denied that Macdonald was the first and original inventor of the improvement described in her patent.

Upon final hearing, the Circuit Court found the issues for the plaintiff, and entered a decree in her favor against the defendants for profits and damages, and restrained the latter from selling, to be used, protectors embracing said patented improvement, or any substantial part thereof. From this decree the defendants appealed. After the appeal Macdonald died, and Carrigan, who had been appointed her administrator, was made appellee in her stead.

The evidence shows that skirt protectors are made isolated and are sold as distinct articles of manufacture, and not as a part of the dress to which they are to be attached. They are kept in shops for sale singly or by the dozen, and the purchasers

use them by sewing them on the inside of the trains of long dresses near the lower edge. They can be easily detached when worn out and new ones substituted. It is admitted that the defendants sell skirt protectors made under the patent issued to Theodore D. Day, March 23, 1875, for an "improvement in skirt protectors." The improvement of Day is that described in the specification of his patent:

"I use a strip of India-rubber that is made with longitudinal ribs, of sufficient size to withstand the wear to which it is subjected, and between these ribs there is a groove that makes the strip light and flexible, and the web of rubber between the ribs receives a line of stitching, by which the protector strip is united to a strip of rubber cloth, muslin, or other suitable material that is to be attached to the inside of the dress at or near the lower edge."

The skirt protectors made under this patent are not made with a fluted or plaited band or border. The defendants insist that, by reason of this fact, they are essentially different from the improvement described in the Macdonald patent, and therefore do not infringe that patent. On the other hand, the plaintiff insists that the fluted or plaited border mentioned in the Macdonald patent is a matter of descriptive form merely, and not an essential part of the invention covered by the patent; and that the use of skirt protectors without a fluted or plaited border, but in other respects substantially like the protectors described in the Macdonald patent, is an infringement of that patent. Upon this issue we think the defendants are right.

It appears from the file-wrapper and contents in the matter of letters patent granted to Helen M. Macdonald, that, in the first application for her patent, dated May 6, 1873, the specification described her patent as follows:

"My invention consists of a strip of enamelled muslin from two to four inches wide, which may be covered with any dress material, such as silk, cashmere, alpaca, armure, or tamise cloth; it is then formed in pleats, and bound across the top (like samples), said pleats being held in place by one row of machine stitching through the centre. It is then ready to be sewed in the dress skirt.

"My invention protects the dress from being cut or damaged by contact with earth or brick or concrete pavements and sidewalks, said invention being impervious to moisture; it also protects the skirt from being soiled or damaged by mud or dampness of street crossings, sidewalks, &c.

"It also forms a very neat trimming, and improves the hanging of the skirt."

On May 10, 1873, Macdonald, for some reason which does not appear, withdrew this specification and substituted the following:

"My invention consists in protecting the lower edge of dresses and other garments by affixing thereto a portion of water-proofed material, or in water-proofing the material itself; and I claim as my invention the use of water-proofed material, in whatsoever form it now exists or may hereafter exist, for the purpose of protecting the lower edge of all garments from wear and soiling, either from friction or moisture, and refer to the enclosed samples as substantially representing my invention." In this specification all reference to plaits or plaiting is omitted.

The application with the substituted specification was rejected by the Patent Office on August 9, 1873, and the applicant was referred to the patent issued to James A. McKee, January 10, 1865, which covered neither a plaited nor fluted band or border as one of its elements. Upon re-examination her application was, on September 9, again rejected.

On October 9, 1873, after the second rejection, Macdonald filed an amended specification, in which she described her invention and stated her claim as follows:

"My invention consists in protecting the lower edge of dresses and other garments by affixing thereto a portion of water-proofed or enamelled material, or in water-proofing the material itself; and I claim as a new article of manufacture a skirt facing or protector, having a plaited or fluted border bound with or composed of enamelled cloth or other water-proof material, substantially as and for the purpose set forth."

On October 30 she was informed by the Patent Office that her application was adjudged to interfere with the pending ap-

plication, among others, of M. Herbert Chase, and that "the subject-matter involved in the interference" was "a skirt protector having a fluted or plaited border." The skirt protector of Chase referred to in the notice of interference was a plaited strip of India-rubber. Macdonald prevailed over Chase in the matter of the interference between their two applications, and received the patent for her invention, which is the patent involved in this suit.

This patent, it will be observed, covers a skirt protector merely, without including any means or method for attaching it to the dress, the purchaser being left to fasten the protector to the dress in her own way.

It is shown by the evidence in the record that for several years prior to the earliest date assigned by Macdonald for the discovery of her device, in fact as far back as 1857, strips of enamelled cloth without fluting or plaiting had been sewed on the bottom of the skirts of ladies' dresses, so as to project below the lower edges, with a view of protecting the inside surface and lower edge.

This fact, and the file-wrapper and contents of which we have stated the substance, make it clear that the claim and specification of the Macdonald patent must be construed to include, as their language requires, a fluted or plaited band or border as one of the essential elements of the invention. Without this element the patent would not have been issued. The Patent Office decided that without it the invention had been anticipated. Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Leggett* v. *Avery*, 101 U. S. 256; *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U. S. 222, 228; *Fay* v. *Cordesman*, 109 U. S. 408; *Mahn* v. *Harwood*, 112 U. S. 354, 359; *Cartridge Co.* v. *Cartridge Co.*, 112 U. S. 624, 644; *Sargent* v. *Hall Safe & Lock Co.*, 114 U. S. 63.

In the case of *Fay* v. *Cordesman*, *ubi supra*, it was said by Mr. Justice Blatchford, who delivered the judgment: "The

claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." So in *Sargent* v. *Hall Safe & Lock Co.*, *ubi supra*, the same Justice said: "In patents for combinations of mechanism, limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers." These authorities are in point and decisive of the present case.

If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application he is bound by it. If dissatisfied with the decision rejecting his application, he should pursue his remedy by appeal. Under the circumstances of this case, the inventor could not even get a reissue based on the broader claim which she had abandoned. *Leggett* v. *Avery*, *ubi supra*. Much less can she, in a suit brought to restrain its infringement, enlarge her patent by argument, so as to cover elements not falling within its terms, and which she had explicitly abandoned.

As the skirt protectors sold by the defendants have neither plaited nor fluted bands or borders, we are of opinion, in accordance with the views expressed, that they do not infringe the patent of the plaintiff.

The decree of the Circuit Court must be reversed, and the cause remanded, with directions to dismiss the bill.

MING & Another *v.* WOOLFOLK.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Submitted January 15, 1886.—Decided February 1, 1886.

In order to maintain an action for deceit, it is not only necessary to establish the telling of an untruth, knowing it to be such, with intent to induce the person to whom it is told to alter his condition, but also that he did alter his condition in consequence, and suffered damage thereby: and if it appear affirmatively that although he altered his condition after hearing the untruth, he was not induced to do it in consequence thereof, but did it independently, the action fails.

On the facts proved in this case the plaintiff has no cause of action founded on contract.

The facts are stated in the opinion of the court.

Mr. M. F. Morris and *Mr. L. M. Saunders* for plaintiffs in error.

Mr. Woolfolk, defendant in error, for himself.

Mr. Justice Woods delivered the opinion of the court.

The plaintiffs in error were the plaintiffs in the court below. They brought this suit against the defendant in error in the District Court for the County of Lewis and Clarke, in Montana Territory, and in their petition stated their case substantially as follows:

On September 16, 1874, the defendant made and delivered to the plaintiffs his contract in writing, of which the following is a copy:

"Helena, *September* 16, 1874.

"Whereas John Kinna and John H. Ming have this day joined with me in borrowing the sum of $2572.10 twenty-five hundred and seventy-two and $\frac{10}{100}$ dollars, for the purpose of paying R. S. Hale the balance of eight thousand dollars due him under private agreement with said Ming, Kinna, and Woolfolk, in order for their release from certain notes executed by them to said Hale, as security for the Park Ditch Company;

and whereas the Park Ditch Company has pledged the note of William Chessman to it, and its claim against Felix Poznainsky, and any other demands due it to the extent of repaying to the said Ming, Kinna, and Woolfolk the sum of $2572.10, this day borrowed; now, therefore, the said Woolfolk does hereby agree that if he shall collect any of the above amounts, or shall from any resources whatever of the Park Ditch Company receive any other sums, after deducting all costs, charges, and expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six and seven hundred dollars, until said notes shall be fully paid, said payments to be made by the said Woolfolk after his return from the East next spring and as soon thereafter as the amounts shall be received; but the said Woolfolk does not assume to pay said note only to the extent that he shall receive such amounts from the resources of the Park Ditch Company as aforesaid.

"A. M. Woolfolk."

The petition further averred that Woolfolk, in order to induce the plaintiffs to join him in borrowing the money and executing the note therefor, so as to accomplish the release of all three from their liability to Hale, represented to them that the Park Ditch Company had passed a resolution, in conformity with the recitals in the contract above set forth, by which it had pledged the Chessman note and the claim against Poznainsky, and all of its resources, including all of its receipts for water sold and to be sold by it, sufficient to pay the said sum of $2572.10, and that, relying on this representation, they joined in the borrowing of said money and the execution of the note therefor; that the Park Ditch Company had never passed such resolution; that the plaintiffs had each paid out of his own funds the one-third of said note for borrowed money, and they had also paid the sum of $445.50, being the two-thirds of the note mentioned in the contract which Hale had given for taxes; that no part of said sums of money had been repaid to the plaintiffs, and the same were due to them, with interest.

The petition further alleged that about May 1, 1875, the de-

fendant took the control and management of the affairs of the Park Ditch Company, and between that date and September 1st following received on the Chessman note and the claim against Poznainsky about $3000, and from sales of water and other resources of the Park Ditch Company more than $3500, and he should have applied a sufficient part of these sums to the reimbursement of the plaintiffs for the moneys paid out by them as aforesaid, amounting in all to the sum of $2255.64, but that he had refused so to do. The plaintiffs, therefore, prayed judgment against the defendant for the last mentioned sum, with interest.

The defendant, in his answer, admitted the making of the contract set out in the declaration, but denied that there was any valuable consideration therefor; denied that he had stated to the plaintiffs that the Park Ditch Company had passed the resolution mentioned in the petition; denied that on May 1, 1875, or at any other time during that year, he took possession of the Park Ditch or the control or management of the Park Ditch Company; denied that he ever collected any sum whatever on the Chessman note or the Poznainsky claim, or ever received at any time after the execution of said contract, from sales of water or any other resources of the Park Ditch Company, the sum of $3500, or any other sum, after deducting costs, charges, and expenses. Upon the issues thus raised the case was tried.

After the plaintiffs had introduced their evidence and rested, the defendant moved the court for non-suit. The court granted the motion, and rendered judgment for the defendant for costs. The plaintiffs thereupon took the case by appeal to the Supreme Court of the Territory of Montana, which affirmed the judgment of the District Court. By the present writ of error the plaintiffs seek the reversal of the judgment of the Supreme Court of Montana.

It appears from the record that the Park Ditch Company was a corporation organized under the laws of the Territory of Montana; that on September 16, 1874, the date of the contract set out in the petition, it was insolvent, and that the plaintiffs and the defendant were jointly liable as its sureties to one R. S.

Hale for a balance of between $11,000 and $12,000, for which they held no indemnity, and that Hale, the creditor, offered to release them from this liability on the payment to him of the sum of $2572.10, to pay which they borrowed the said money and gave the note mentioned in the petition. Both the plaintiffs were examined as witnesses. Ming testified that the water rents which had been pledged, as he supposed, for the indemnity of the plaintiffs, were the rents for the season of 1875, and that the water did not begin to run until about the middle of May, and that in May, 1875, there was a contest between R. S. Hale and the Park Ditch Company over these receipts, and that Hale brought an action to recover them, and asked for the appointment of a receiver. Both Ming and Kinna testified that they would have paid said sum of $2572.10 to Hale to be released from the larger obligation, even if no representations had been made to them by the defendant, to the effect that the Park Ditch Company had passed a resolution pledging its assets for their indemnity; that they were not induced by the said representations of the defendant to relinquish any security which they held—in fact they held none of any value. In short, to put the case as the plaintiffs themselves by their own testimony put it, they together with the defendant jointly borrowed $2572.10, which they paid to Hale, who in consideration thereof released them from a liability to him as sureties of the insolvent Park Ditch Company of about $12,000, and they would have paid the money whether the Park Ditch Company had pledged its assets for their indemnity or not, and the borrowing of the money subjected them to no loss, but was greatly to their advantage.

So far, therefore, as the case made by the declaration is to be considered as an action to recover damages for a deceit practised by the defendant, it amounts to this, that the defendant, by his false representations, induced the plaintiffs to do something which they would have done anyhow, and by which they sustained no loss, but on the contrary were greatly advantaged. "The requisites to sustain an action for deceit," says Baron Parke, in *Watson* v. *Poulson*, 15 Jurist, 1111, are "the telling of an untruth, knowing it to be an untruth, with intent

to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage." See also *Pasley* v. *Freeman*, 3 T. R. 51; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Levy* v. *Langridge*, 4 M. & W. 337; *Brown* v. *Castles*, 11 Cush. 348; *Tryon* v. *Whitmarsh*, 1 Met. (Mass.) 1. Considered, therefore, as an action for a deceit it is plain that the case must fail; for, conceding the alleged representation to have been made by the defendant and to have been false, the plaintiffs were not induced thereby to change their condition, and, moreover, have suffered no damage.

The plaintiffs' counsel say, however, that the action is to be considered as based on the contract by which the defendant agreed to apply the assets of the Park Ditch Company which came to his hands, after deducting all costs, charges, and expenses, to the reimbursement of the plaintiffs for the money borrowed by them and paid to Hale. Considered as an action on the contract, the suit must fail for want of evidence to support it. It is averred in the petition, and not denied in the answer, that the Park Ditch Company never pledged the assets and resources mentioned in the contract for the reimbursement of the plaintiffs, and nothing in the record shows that such pledge was made. The defendant in his answer denied that, after the making of the contract, he ever received any money from the assets of the Park Ditch Company, or for water rents.

It is clearly shown by the evidence, and the contrary is not now asserted by the plaintiffs, that no money whatever was paid to the defendant on the Chessman note or on the Poznainsky claim. The plaintiffs insist, however, that the defendant received the water rents of the Park Ditch Company in the year 1875 to the amount of about $3500 over and above costs, charges, and expenses. But upon a careful reading of the record we are unable to find any evidence to support this contention. The only testimony upon this point is the minutes of the meetings of the board of trustees of the Park Ditch Company offered in evidence by the plaintiffs. These minutes show that R. S. Hale had, in a suit brought by him against the Park Ditch Company, seized the net receipts for water sales of the company, and that on May 24, 1875, the board of trustees as-

signed said net proceeds to A. J. Davis, W. C. Gillette, and Samuel Schwab, who had become the sureties of the company in the suit, to secure them against loss by reason of their suretyship. They further show that on October 20, 1875, a resolution was adopted by the board of trustees, by which, after reciting that, whereas R. S. Hale had proposed to dismiss his said action against the company for the proceeds of water sales for the year A. D. 1875, amounting to the sum of $3450, on the following conditions, viz: that A. M. Woolfolk should cause to be dismissed all proceedings involving the payment of certain water notes executed by the Park Ditch Company and held by him, amounting to the sum of about $8000, and should deliver said notes to Hale to be cancelled, and that Woolfolk should cause to be dismissed by T. P. Newton all appeals involving the right to the possession of the Park Ditch, and arbitrate the value of the Tucker Extension belonging to Woolfolk, and that Woolfolk should sell said extension to Hale at such appraised value, and sell and dispose of all other property belonging to Woolfolk and connected with said ditch; and whereas Woolfolk had at his own expense defended the right of the company to said receipts, and had furnished all necessary bonds for the company, and besides giving his own professional services, had employed and paid counsel to defend said suit; it was resolved that the company did thereby promise and agree with Woolfolk that if he would accede to the terms of Hale, the company would for this and the considerations aforesaid relinquish to him one-half the amount of said receipts, to wit, $1725, provided Woolfolk should accept the same as full reimbursement and satisfaction for all his charges against said company by reason of the premises aforesaid. The minutes further stated that "Woolfolk being present accepted."

This was the only evidence offered by the plaintiffs tending to show any receipt by the defendant of the water rents of the Park Ditch Company for 1875. If the proposition contained in the resolution was carried out, of which there is no evidence in the record, it can hardly be contended that Woolfolk might not receive and appropriate to his own use the $1725 mentioned

in the resolution without violating his contract with the plaintiffs. After the water rents for 1875 had been attached in the suit brought by Hale and had been pledged by the Park Ditch Company to its sureties in that suit, and Woolfolk, to aid the company in compromising the case, had released a claim of $8000 against it, and all claims for professional services rendered in the suit by himself and other counsel whom he had employed, and all claim for the moneys expended by him in the defence of the suit, and had consented to the other exactions imposed by Hale, it can hardly be said that the $1725, the gross sum received by Woolfolk, if in fact he ever received it, was the net proceeds of the water rents, "after deducting all costs, charges, and expenses." It does not appear by the evidence that there were any net proceeds of the water rents: on the contrary it appears there were not.

It needs no argument to show that the contract sued on was not meant to bind the defendant to pay over to the plaintiffs money obtained under the circumstances set out in the resolutions of the board of trustees. There is no other evidence to show the receipt of money by the defendant from the assets or resources of the Park Ditch Company. The case of the plaintiffs must, therefore, fail for want of any evidence to show a breach of the contract made by the defendant with them. Their suit is without support. The record fails to show any plausible ground for bringing it in the first instance or for suing out the present writ of error.

Judgment affirmed.

LIEBKE & Another *v.* THOMAS.

ERROR TO THE ST. LOUIS COURT OF APPEALS IN THE STATE OF MISSOURI.

Submitted January 8, 1886.—Decided February 1, 1886.

Notice given to the holder and owner of an accommodation note, under § 17 of the act of June 22, 1874, of composition proceedings in bankruptcy by or against the payee and indorser for whose accommodation the note was given,

is notice of the original bankruptcy proceedings to the accommodation maker, and notice that the payee may be discharged thereby.

A lawful composition with creditors under § 17 of the act of June 22, 1874, and its performance by the party, has the effect of a discharge in bankruptcy.

This was an action by the maker of an accommodation note against the payee for whose accommodation it was made. Judgment for plaintiff below, which this writ of error was sued out to review.

Mr. G. M. Stewart for plaintiffs in error.

Mr. Upton M. Young and *Mr. Alexander Young* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the St. Louis Court of Appeals in the State of Missouri.

The defendant in error brought his action in the Circuit Court for the City of St. Louis against the plaintiffs in error, Liebke and Schrage. His petition alleged that on the 8th day of August, 1877, he executed and delivered to defendants, who were partners in trade, his promissory note, payable to their order, for the sum of $500, in three months after date. That the defendants sold said note to the Mullanphy Bank of St. Louis, to which plaintiff, on the 14th day of November, paid the amount of it, less a small sum credited on it as paid by defendants. The sum paid by plaintiff when he took it up from the bank was $435. He alleges that the note was made and delivered to defendants for their use and accommodation, and it was agreed that they would take care of and pay the same when it became due, and hold plaintiff harmless in regard to it.

He further alleges that defendants have failed and refused to pay him any part of said $435, and still refuse to do so, wherefore he prays judgment for the $435, with interest and costs.

The answer of defendants sets up an adjudication of bankruptcy against them October 13, 1877, a composition in bankruptcy under the act of Congress, duly agreed upon at a

meeting of the creditors, and confirmed by the court, in which compliance with the requirements of the law as to such composition is fully set out, and they plead this and the payment of the composition note in bar of the plaintiff's action.

A general denial was made for replication, and the case was tried by the court without a jury. The Circuit Court gave judgment for plaintiff, and, on appeal to the St. Louis Court of Appeals, this judgment was affirmed.

That court, in its opinion, found in 9 Missouri App. 424, bases its decision mainly on the proposition that Thomas, the present plaintiff, was entitled to notice of the composition meeting, and had no such notice.

The facts in the case are, that the composition proceedings took place before or about the time of the maturity of the note. The note was then the property of the Mullanphy Bank. This bank had notice of these proceedings, accepted the composition note of defendants for thirty per cent. of the amount of the debt, according to the terms of the composition, and received the money paid on that note. We think the bank was the owner of the note, the party entitled to be dealt with in the composition proceedings, to take part in them, and receive the money paid under them. All this it did.

Mr. Thomas must be held in law to have had notice of the original bankruptcy proceedings, and that the defendants might be discharged under those proceedings. If he preferred to take part in them rather than entrust the claim to the bank, he could have paid the note and set up his claim as provided in § 5070 of the Revised Statutes. He did not do this, but permitted the bank to represent that debt, which, as owner of it, it had a right to do, and to receive the composition money. Mr. Thomas has not been hurt by this; for there is no reason to believe that he would have successfully opposed the composition or received anything more under it than the bank did. It can hardly be held that Mr. Thomas stood in any better condition than a person liable for the bankrupt as bail, security, guarantee, or otherwise, who has not paid the debt. § 5070 Revised Statutes.

It is of the essence of the bankrupt law that when the bank-

rupt has complied with all the conditions of the statute and surrendered his property he should be released from all his debts, except those of a fiduciary character or founded in fraud, of which this is not one. And the case of *Wilmot* v. *Mudge*, 103 U. S. 217, decides that though no written discharge be granted, a lawful composition and its performance by the party has the same effect. That case holds that § 17 of the act of 1874, which governs this case, is a part of the bankrupt law, and the proceedings under it discharge all debts which can be discharged under the law, as to creditors "whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed."

As evidence that it is the *holder* of the promissory note who is to be named in the schedule as one having the right to appear at the composition meeting, the statute 18 Stat. 182, § 17, says: "Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt."

As the statute requires that the composition resolution to be valid "must be passed by a majority in number and three-fourths in value of the creditors of the debtor," the above mode of identifying the creditor and the amount of his debt shows that it is not indispensable that every person contingently interested in a debt of the bankrupt should have notice or take part in the composition proceedings.

It is argued that the liability of defendants to Thomas is not on the note, but on their promise to pay it at maturity. We cannot take this view of it. The note is the essential part of the transaction, and without its payment by Thomas he had no cause of action against defendants. They were both parties to the note and both liable on it to the bank who held it when it became due. Which was principal and which security could be

shown as between themselves by parol, and their liability to or for each other grew out of that transaction.

As parties to it the defendants brought it into bankruptcy that its holder might share in their assets or in the composition, and that they might then be discharged from any obligation on account of it.

The case is strikingly similar to that of *Hatch* v. *Hatch*, 28 Law Times, N. S. 506, Exch. Ch., in which a composition under the English bankrupt law was held to discharge the debt.

The judgment of the St. Louis Court of Appeals is reversed, and the case remanded to that court for further proceedings in accordance with this opinion.

Liebke v. *Thomas.* In error to the Supreme Court of Missouri. The same judgment is to be entered in case No. 635 of this court's docket, between the same parties, on a writ of error to the Supreme Court of Missouri, according to a stipulation consolidating the two cases for hearing in this court.

JONES & Another *v.* SIMPSON.

SAME *v.* HOISINGTON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Submitted December 10, 1885.—Decided February 1, 1886.

A sale of personal property made by the vendor with intent to defraud his creditors, but for valuable consideration paid to him by the vendee, followed by actual and continued change of possession, is valid against the vendor's creditors, unless it also appears that the vendee acted in bad faith. This rule prevails in Kansas.

In the trial of an action by the vendee of personal property against an officer seizing it on a writ of attachment issued at the suit of a creditor of the vendor to recover damages for the seizure, declarations of the vendor made after delivery of the property to the vendee, but on the same day and fairly

forming part of the *res gestæ*, are admissible to show intent to defraud the vendor's creditors by the sale, if it is also shown by independent evidence that the vendee shared the intent to defraud with the vendor.

When at the trial of such an action it is proved that the vendor made the sale with fraudulent intent to hinder and delay his creditors, the burden is thrown upon the vendee to prove payment of a sufficient consideration; but this being established, the burden is then upon the creditors attacking the sale to show bad faith in the vendee.

The facts which make the case are stated in the opinion of the court.

Mr. J. G. Mohler for plaintiffs in error.

Mr. Reginald Fendall for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

These actions—one against the United States marshal for the District of Kansas, and the other against the sheriff of one of the counties of that State—were brought to recover damages for an alleged wrongful seizure and conversion, by those officers, of certain goods and chattels which plaintiffs in error, who were plaintiffs below, claimed to have purchased, prior to such seizure, from G. & M. Goldsmith. The seizure, in each case, was made in virtue of attachments sued out by creditors of said vendors. The defence is, that the property was liable to seizure as the property of the defendants in the attachments. Whether it was so liable depends upon the inquiry whether the sale to the plaintiffs passed a good title as against the creditors of the vendors. The defendants insist that it was made with the fraudulent purpose, on the part of the vendors, of cheating, hindering, and delaying their creditors, and that the vendees either intended by their purchase to aid in accomplishing that result, or, at and before their purchase, were chargeable in law with notice of the fraud designed by the vendors.

It is unnecessary to set out all the facts which, according to the bill of exceptions, the evidence tended to establish. For the purpose of indicating the grounds upon which the case will be determined, it need only be said that while there was

evidence tending to show the payment by plaintiffs of the fair value of the property, its actual delivery to them at the time of the sale, and their continued possession of it until seized under these attachments, there was, also, evidence tending to prove that the circumstances attending the transaction were so unusual and suspicious as to suggest to business men, of ordinary prudence, the purpose of the vendors to hinder or defraud their creditors. And from all the facts the jury might reasonably have concluded that the plaintiffs were willing, by purchasing the property, to aid the vendors in defeating any efforts of their creditors, by the ordinary process of the law, to obtain satisfaction of their demands. The correctness of this interpretation of the conduct of the parties to the sale is sustained by the admissions and declarations of the vendors, made so nearly contemporaneous with the delivery of the property that they may be said to have sprung out of the very transaction in virtue of which the plaintiffs claim title.

It is, however, contended that the admissions of the vendors, after the sale and delivery of the property, not in the presence of the vendees, were not competent evidence against the latter. We had occasion, at the present term, in *Winchester & Partridge Manufacturing Co.* v. *Creary*, *ante*, 161, to consider this question in a somewhat different aspect. In holding in that case that the court erred in admitting the declarations of a vendor in evidence against the vendee of personal property, which had been delivered before any suit by attaching creditors, it was said: "After the sale, their [the vendors'] interest in the property was gone. Having become strangers to the title their admissions are no more binding on the vendee than the admissions of others. It is against all principle that their declarations, made after they had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee." But it was also said that such admissions or declarations would be competent against the vendee, if it were shown by independent evidence that the vendor and vendee were engaged in a common purpose to defraud the creditors of the vendor, and the admissions had such relation to the execution of such purpose as fairly to constitute a part of the *res gestæ*.

These conditions seem to be fully met in the present case; for the facts which the evidence tended to establish, apart from the admissions and declarations of the vendors, indicate collusion between them and their vendees for the purpose of delaying the creditors of the former, and that such admissions and declarations, though not precisely concurrent in time with the sale, were made in the course of the same day, and were plainly in furtherance of the common design to delay the creditors of the vendors. Upon these grounds we think that those admissions and declarations of the vendors were admissible against the plaintiffs. There were other objections by plaintiffs to the admission of evidence, but they need not be specially noticed.

At the trial the plaintiffs asked the court to instruct the jury, that if they believed from the evidence "that the goods in controversy were sold and delivered to Jones & Weil before any attachment was made or issued, that they took possession of the goods after the sale, that the change of possession was actual and visible, such a change as to indicate to persons who had previously done business at the store where the goods were that Max S. & Gus. Goldsmith had no longer possession or control of the goods, that the sale was for an approximate price, and for a valuable consideration paid by plaintiffs to Goldsmiths, the jury will find for the plaintiffs." This instruction was properly refused; for, the facts stated in it did not entitle the plaintiffs to a verdict, if the evidence showed either that their purchase was not in good faith, or was made with knowledge at the time of such facts and circumstances as reasonably put them upon inquiry as to the purpose of the vendors to hinder and delay their creditors. And the same criticism may be made upon the instruction asked by the plaintiffs to the effect that, "if Goldsmith had purchased the goods on time, and those debts were not due for the goods, the goods were the absolute property of the Goldsmiths, and they had a lawful right to sell and dispose of any and all of the goods in their possession without any regard to their creditors; and if they did so sell the goods to Jones & Weil before their debts were due, and plaintiffs took possession of them, the title of the goods passed to Jones & Weil, and they were not, after such sale

and delivery, liable to attachment for the debts of Goldsmith, and, if so attached, Jones & Weil could either replevy the goods or treat such seizure as a sale and sue for the value of the goods."

The record contains numerous instructions given to the jury, at the request of the defendants, and to the granting of which the plaintiffs excepted. We perceive no defect in any of them except the last one, which is in these words: "If the jury believe that Gus. and Max S. Goldsmith sold the goods to the plaintiffs, with the intention to hinder, delay, or defraud their creditors, then the plaintiffs, before they can recover, must show, by a preponderance of the evidence, that they bought the goods, for a good and valuable consideration, and that they acted in good faith in making said purchase. It is not sufficient that they paid a valuable consideration, even should you find that to be a fact. If plaintiff did not act in good faith in making the purchase, it is void, although they paid a full consideration."

This instruction was clearly erroneous. It is unwarranted either by the laws of Kansas or by the principles of the common law. By the second section of the statute of Kansas for the prevention of frauds and perjuries, it is provided that "every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution made or obtained with intent to hinder, delay or defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect." And by the third section of the same act it is further provided, that "every sale or conveyance of personal property, unaccompanied by an actual and continued change of possession, shall be deemed void, as against purchasers without notice, and existing or subsequent creditors, until it is shown that such sale was made in good faith and upon a sufficient consideration." Act of October 31, 1868, 1 Dassler's Kansas Stat., ch. 43, p. 441; Compiled Laws of Kansas, 1879, ch. 43. If the second section embraces such a sale of goods and chattels as the one here involved, it

is not to be supposed that the legislature intended, in every case, to deprive the vendee of personal property, who buys in good faith and for a valuable consideration, of the benefit of his purchase simply because the vendor sold with the intent to hinder, delay, or defraud his creditors; for, the third section protects such a purchaser, even where there has not been an actual and continued change of possession, upon his showing that he bought in good faith and upon sufficient consideration. The necessary implication from the language of that section is that where the sale is followed by an actual and continued change of possession the vendee is not obliged, in order to maintain his right of possession, to prove both the payment of a sufficient consideration and the exercise of good faith upon his part. His title, where such possession is shown, will be protected, unless it is successfully impeached by some one who has the right to question its validity. The party who asserts that the title did not pass as against him must make such proof as will establish that proposition. If he does not, the presumption which the law indulges that the vendee has rightfully acquired possession will control the determination of the issue. Upon its appearing that the vendor—possession having been delivered—made the sale with the fraudulent intent to hinder or delay his creditors, the utmost which the creditors could claim is that the burden of proof is upon the vendee, as between him and existing creditors, to show, by competent proof, that he paid a sufficient consideration for the property. But such payment being shown, the vendee is entitled to a verdict and judgment,—however fraudulent may have been the intent of the vendor—unless it appears affirmatively, from all the circumstances, that he purchased in bad faith. And such bad faith may exist where the vendee purchases with knowledge of the fraudulent intent of the vendor, or under such circumstances as should put him on inquiry as to the object for which the vendor sells.

There can be no doubt that these principles are in accordance with the settled course of decision in the highest court of Kansas. In the recent case of *Baughman, Sheriff*, v. *Penn*, 6 Pacific Reporter, 890, which was an action of replevin to recover personal property, which had been seized as the property

of Howard Bros., who were defendants in certain attachment suits, but which property the plaintiffs in those suits claimed to have purchased from the debtors prior to the attachments being issued, that court said: "A further objection is made to the direction given by the court, 'that fraud is never presumed, but must be established by evidence.' Of the correctness of this proposition, or of its application to the case, there should be no question; but counsel seemed to argue that the burden of proof was upon the plaintiff to show that he did not participate in the fraud now conceded to have been intended by the Howard Bros. Fraud is not so lightly imputed. While certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof. And the burden rested upon the creditors of Howard Bros., who assailed the good faith of Penn in this transaction, to show, by either direct or circumstantial evidence, that the transaction was fraudulent as to Penn. As the trial court stated, 'the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same.'" See also *Wilson* v. *Fuller*, 9 Kansas, 176, 187; *Diefendorf* v. *Oliver*, 8 Kansas, 297; *Wolfley* v. *Rising*, 8 Kansas, 297; *Prewit* v. *Wilson*, 103 U. S. 22, 24; *Stewart* v. *Thomas*, 15 Gray, 171; *Elliott* v. *Stoddard*, 98 Mass. 145; *Hatch* v. *Bayley*, 12 Cush. 27, 30; *Cooke* v. *Cooke*, 43 Maryland 522, 533.

There was, as we have seen, evidence tending to show that plaintiffs paid a sufficient consideration for the property, and that there was such a change of possession as is required by the statute. And as the jury were erroneously instructed that they must find for the defendants, unless the plaintiffs showed, by a preponderance of evidence, both the payment of a good and valuable consideration and good faith in the transaction,

The judgments must, for that error, be reversed, and the cases remanded for a new trial.

Syllabus.

BOYD *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued December 11, 14, 1885.—Decided February 1, 1886.

The 5th section of the act of June 22, 1874, entitled "An Act to amend the customs revenue laws," &c., which section authorizes a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney to be taken as confessed: *Held*, To be unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the Fourth and Fifth Amendments of the Constitution.

Where proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the 12th section of said act: *Held*, That an order of the court made under said 5th section, requiring the claimants of the goods to produce a certain invoice in court for the inspection of the government attorney, and to be offered in evidence by him, was an unconstitutional exercise of authority, and that the inspection of the invoice by the attorney, and its admission in evidence, were erroneous and unconstitutional proceedings.

It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.

It is equivalent to a compulsory production of papers, to make the non-production of them a confession of the allegations which it is pretended they will prove.

A proceeding to forfeit a person's goods for an offence against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case" within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself."

The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty or forfeiture, is equally within the prohibition of the Fifth Amendment.

Both amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the Fifth Amendment, namely, compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an "unreasonable search and seizure" within the Fourth Amendment.

Search and seizure of a man's private papers to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property, is totally different from the search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law.

Constitutional provisions for the security of person and property should be liberally construed.

This was an information against thirty-five cases of polished plate glass. The facts which make the case are stated in the opinion of the court. Judgment in favor of the United States. The claimants sued out this writ of error.

Mr. Edwin B. Smith for plaintiff in error. *Mr. Stephen G. Clarke* was with him on the brief.

Mr. Solicitor-General for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an information filed by the District Attorney of the United States in the District Court for the Southern District of New York, in July, 1884, in a cause of seizure and forfeiture of property, against thirty-five cases of plate glass, seized by the collector as forfeited to the United States, under § 12 of the "Act to amend the customs revenue laws, and to repeal moieties," passed June 22, 1874. 18 Stat. 186.

It is declared by that section that any owner, importer, consignee, &c., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offence be fined in any sum not exceeding $5000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported

into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in twenty-nine cases previously imported. To do this the district attorney offered in evidence an order made by the District Judge under § 5 of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants is unconstitutional and void.

The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the thirty-five cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the Circuit Court, and the decision of that court is now here for review.

As the question raised upon the order for the production by the claimants of the invoice of the twenty-nine cases of glass, and the proceedings had thereon, is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen, we will set forth the order at large. After the title of the court and term, it reads as follows, to wit:

"The United States of America
against
E. A. B., 1–35, Thirty-five Cases of Plate Glass.

"Whereas the attorney of the United States for the South-

ern District of New York has filed in this court a written motion in the above-entitled action, showing that said action is a suit or proceeding other than criminal, arising under the customs revenue laws of the United States, and not for penalties, now pending undetermined in this court, and that in his belief a certain invoice or paper belonging to and under the control of the claimants herein will tend to prove certain allegations set forth in said written motion, hereto annexed, made by him on behalf of the United States in said action, to wit, the invoice from the Union Plate Glass Company or its agents, covering the twenty-nine cases of plate glass marked G. H. B., imported from Liverpool, England, into the port of New York in the vessel Baltic, and entered by E. A. Boyd & Sons at the office of the collector of customs of the port and collection district aforesaid on April 7th, 1884, on entry No. 47,108:

"Now, therefore, by virtue of the power in the said court vested by section 5 of the act of June 22, 1874, entitled 'An act to amend the customs-revenue laws and to repeal moieties,' it is ordered that a notice under the seal of this court, and signed by the clerk thereof, be issued to the claimants, requiring them to produce the invoice or paper aforesaid before this court in the court-rooms thereof in the United States post-office and court-house building in the city of New York on October 16th, 1884, at eleven o'clock a. m., and thereafter at such other times as the court shall appoint, and that said United States attorney and his assistants and such persons as he shall designate shall be allowed before the court, and under its direction and in the presence of the attorneys for the claimants, if they shall attend, to make examination of said invoice or paper and to take copies thereof; but the claimants or their agents or attorneys shall have, subject to the order of the court, the custody of such invoice or paper, except pending such examination."

The 5th section of the act of June 22, 1874, under which this order was made, is in the following words, to wit:

"In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any

business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant, or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." 18 Stat. 187.

This section was passed in lieu of the 2d section of the act of March 2, 1867, entitled "An act to regulate the Disposition of the Proceeds of Fines, Penalties, and Forfeitures incurred under the Laws relating to the Customs and for other Purposes," 14 Stat. 547, which section of said last-mentioned statute authorized the district judge, on complaint and affidavit that any fraud on the revenue had been committed by any person interested or engaged in the importation of merchandise, to issue his warrant to the marshal to enter any premises where any invoices, books, or papers were deposited relating to such merchandise, and take possession of such books and papers and

produce them before said judge, to be subject to his order, and allowed to be examined by the collector, and to be retained as long as the judge should deem necessary. This law being in force at the time of the revision, was incorporated into §§ 3091, 3092, 3093 of the Revised Statutes.

The section last recited was passed in lieu of the 7th section of the act of March 3, 1863, entitled "An act to prevent and punish Frauds upon the Revenue, to provide for the more certain and speedy Collection of Claims in Favor of the United States, and for other Purposes." 12 Stat. 737. The 7th section of this act was in substance the same as the 2d section of the act of 1867, except that the warrant was to be directed to the collector instead of the marshal. It was the first legislation of the kind that ever appeared on the statute book of the United States, and, as seen from its date, was adopted at a period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence.

The clauses of the Constitution, to which it is contended that these laws are repugnant, are the Fourth and Fifth Amendments. The Fourth declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Article, amongst other things, declares that no person "shall be compelled in any criminal case to be a witness against himself."

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tan-

tamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "*unreasonable* search and seizure" within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that, *consuetudo est optimus interpres legum;* and another maxim that, *contemporanea expositio est optima et fortissima in lege.* But we do not find any long usage, or any contemporary construction of the Constitution, which would justify any of the acts of Congress now under consideration. As before stated, the act of 1863 was the first act in this country, and, we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the

search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued * did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cœlo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past;† and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law

* *Note by the Court.*—13 & 14 Car. 2, c. 11, § 5.

† *Note by the Court.*—12 Car. 2, c. 19; 13 & 14 Car. 2, c. 11; 6 & 7 W. & M., c. 1; 6 Geo. 1, c. 21; 26 Geo. 3, c. 59; 29 Geo. 3, c. 68, § 153; &c.; and see the article "Excise, &c.," in Burn's Justice, and Williams's Justice, *passim*, and Evans's Statutes, vol. 2, p. 221, sub-pages 176, 190, 225, 361, 431, 447.

to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments.

But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to

recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." * This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general

* *Note by the Court.*—Cooley's Constitutional Limitations, 301–303, (5th ed. 368, 369). A very full and interesting account of this discussion will be found in the works of John Adams, vol. 2, Appendix A, pp. 523–525; vol. 10, pp. 183, 233, 244, 256, &c., and in Quincy's Reports, pp. 469–482; and see *Paxton's Case*, do. 51–57, which was argued in November of the same year (1761). An elaborate history of the writs of assistance is given in the Appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libellous. By authority of the secretary's warrant Wilkes's house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1000 against Wood, one of the party who made the search, and £4000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick* v. *Carrington and Three Other King's Messengers*, reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, &c., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.*

As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds

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* *Note by the Court*.—See May's Constitutional History of England, vol. 3, (American ed., vol. 2) chap. 11 ; Broom's Constitutional Law, 558 ; Cox's Institutions of the English Government, 437.

of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment.

After describing the power claimed by the Secretary of State for issuing general search warrants, and the manner in which they were executed, Lord Camden says: "Such is the power, and, therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; they are his

dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. . . .

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all these precautions would have been long

since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing."

Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

After a few further observations, his Lordship concluded thus: "I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void." *

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* *Note by the Court.*—See further as to searches and seizures, Story on the Constitution, §§ 1901, 1902, and notes; Cooley's Constitutional Limitations, 299, (5th ed. 365); Sedgwick on Stat. and Const. Law, 2d Ed. 498; Wharton Com. on Amer. Law, § 560; *Robinson* v. *Richardson,* 13 Gray, 454.

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the 5th section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

The views of the first Congress on the question of compelling

a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The 15th section of that act introduced a great improvement in the law of procedure. The substance of it is found in § 724 of the Revised Statutes, and the section as originally enacted is as follows, to wit:

"All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery;* and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default." *

The restriction of this proceeding to "cases and under circumstances where they [the parties] might be compelled to produce the same [books or writings] by the ordinary rules of proceeding in chancery," shows the wisdom of the Congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property.† And any compulsory discovery by extorting the party's oath, or compelling the production of his

* *Note by the Court.*—Sixty-two years later a similar act was passed in England, viz., the act of 14 and 15 Vict., c. 99, § 6. See Pollock on Power of Courts to compel production of Documents, 5.

† *Note by the Court.*—See Pollock on Production of Documents, 27; 77 Law. Lib 12 [8].

private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

It is proper to observe that when the objectionable features of the acts of 1863 and 1867 were brought to the attention of Congress, it passed an act to obviate them. By the act of February 25, 1868, 15 Stat. 37, entitled "An act for the Protection in certain Cases of Persons making Disclosures as Parties, or testifying as Witnesses," the substance of which is incorporated in § 860 of the Revised Statutes, it was enacted "that no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness."

This act abrogated and repealed the most objectionable part of the act of 1867 (which was then in force) and deprived the government officers of the convenient method afforded by it for getting evidence in suits of forfeiture; and this is probably the reason why the 5th section of the act of 1874 was afterwards passed. No doubt it was supposed that in this new form, couched as it was in almost the language of the 15th section of the old judiciary act, except leaving out the restriction to cases in which the court of chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained; and that the law, though very speciously worded, is still obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth.

It has been thought by some respectable members of the profession that the two acts, that of 1868 and that of 1874, as being in *pari materia*, might be construed together so as to restrict

the operation of the latter to cases other than those of forfeiture; and that such a construction of the two acts would obviate the necessity of declaring the act of 1874 unconstitutional. But as the act of 1874 was intended as a revisory act on the subject of revenue frauds and prosecutions therefor, and as it expressly repeals the 2d section of the act of 1867, but does not repeal the act of 1868, and expressly excepts criminal suits and proceedings, and does not except suits for penalties and forfeitures, it would hardly be admissible to consider the act of 1868 as having any influence over the construction of the act of 1874. For the purposes of this discussion we must regard the 5th section of the latter act as independent of the act of 1868.

Reverting then to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that

proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture as declared in the 12th section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding $5000 nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants —that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *The United States*, *ante*, 436; in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is com-

pelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the Circuit and District Courts sustaining the constitutionality of the law under consideration, as well as the prior laws of 1863 and 1867. The principal of these are *Stockwell* v. *United States*, 3 Clifford, 284; *In re Platt and Boyd*, 7 Ben. 261; *United States* v. *Hughes*, 12 Blatchford, 553; *United States* v. *Mason*, 6 Bissell, 350; *United States* v. *Three Tons of Coal*, 6 Bissell, 379; *United States* v. *Distillery No. Twenty-eight*, 6 Bissell, 483. The first and leading case was that of *Stockwell* v. *United States*, decided by Mr. Justice Clifford and Judge Shepley, the law under discussion being that of 1867. Justice Clifford delivered the opinion, and relied principally upon the collection statutes, which authorized the seizure of goods liable to duty, as being a contemporaneous

exposition of the amendments, and as furnishing precedents of analogous laws to that complained of. As we have already considered the bearing of these laws on the subject of discussion, it is unnecessary to say anything more in relation to them. The learned justice seemed to think that the power to institute such searches and seizures as the act of 1867 authorized, was necessary to the efficient collection of the revenue, and that no greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing a search for the imported goods; and he concluded that, guarded as the new provision is, it is scarcely possible that the citizen can have any just ground of complaint. It seems to us that these considerations fail to meet the most serious objections to the validity of the law. The other cases followed that of *Stockwell* v. *United States* as a precedent, with more or less independent discussion of the subject. The case of *Platt and Boyd*, decided in the District Court for the Southern District of New York, was also under the act of 1867, and the opinion in that case is quite an elaborate one; but, of course, the previous decision of the Circuit Court in the Stockwell case had a governing influence on the District Court. The other cases referred to were under the 5th section of the act of 1874. The case of *United States* v. *Hughes* came up, first, before Judge Blatchford in the District Court in 1875. 8 Ben. 29. It was an action of debt to recover a penalty under the customs act, and the judge held that the 5th section of the act of 1874, in its application to suits for penalties incurred before the passage of the act, was an *ex post facto* law, and therefore, as to them, was unconstitutional and void; but he granted an order *pro forma* to produce the books and papers required, in order that the objection might come up on the offer to give them in evidence. They were produced in obedience to the order, and offered in evidence by the district attorney, but were not admitted. The district attorney then served upon one of the defendants a subpœna *duces tecum*, requiring him to produce the books and papers; and this being declined, he moved for an order to compel him to produce them; but the Court refused to make such order. The books and

papers referred to had been seized under the act of 1867, but were returned to the defendants under a stipulation to produce them on the trial. The defendants relied not only on the unconstitutionality of the laws, but on the act of 1868, before referred to, which prohibited evidence obtained from a party by a judicial proceeding from being used against him in any prosecution for a crime, penalty, or forfeiture. Judgment being rendered for the defendant, the case was carried to the Circuit Court by writ of error, and, in that court, Mr. Justice Hunt held that the act of 1868 referred only to personal testimony or discovery obtained from a party or witness, and not to books or papers wrested from him; and, as to the constitutionality of the law, he merely referred to the case of Stockwell, and the judgment of the District Court was reversed. In view of what has been already said, we think it unnecessary to make any special observations on this decision. In *United States* v. *Mason*, Judge Blodgett took the distinction that, in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the act of 1874 to testify or furnish evidence against themselves, because the suit is not against them, but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself. In the words of a great judge, "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." *

The only remaining case decided in the United States courts

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* *Note by the Court.*—Vaughan, C.J., in *Sheppard* v. *Gosnold*, Vaugh. 159, 172, approved by Ch. Baron Parker in *Mitchell qui tam* v. *Torup*, Parker, 227, 236.

to which we shall advert is that of *United States* v. *Distillery No. Twenty-eight.* In that case Judge Gresham adds to the view of Judge Blodgett, in *United States* v. *Mason*, the further suggestion, that as in a proceeding *in rem* the owner is not a party, he might be compelled by a subpœna *duces tecum* to produce his books and papers like any other witness; and that the warrant or notice for search and seizure, under the act of 1874, does nothing more. But we cannot say that we are any better satisfied with this supposed solution of the difficulty. The assumption that the owner may be cited as a witness in a proceeding to forfeit his property seems to us gratuitous. It begs the question at issue. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture. *Queen* v. *Newell*, Parker, 269; 1 Greenleaf on Evid., §§ 451–453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defence; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence.

We find nothing in the decisions to change our views in relation to the principal question at issue.

We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that

The judgment of the Circuit Court should be reversed, and the cause remanded, with directions to award a new trial.

Mr. Justice Miller, with whom was the Chief Justice, concurring:

I concur in the judgment of the court, reversing that of the Circuit Court, and in so much of the opinion of this court as

holds the 5th section of the act of 1874 void as applicable to the present case.

I am of opinion that this is a criminal case within the meaning of that clause of the Fifth Amendment to the Constitution of the United States which declares that no person "shall be compelled in any criminal case to be a witness against himself."

And I am quite satisfied that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is in effect a subpœna *duces tecum*, and, though the penalty for the witness's failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear.

But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effects of that party.

There is in fact no search and no seizure authorized by the statute. No order can be made by the court under it which requires or permits anything more than service of notice on a party to the suit. That there may be no mistake as to the effect of the statute and the power to be exercised under it, I give the section here *verbatim:*

"SEC. 5. That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the Government, whenever, in his belief, any business book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is

pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper, in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant, by the United States marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." 18 Stat. 187.

Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court, and, when produced, the United States attorney is permitted, under the direction of the court, to make examination in presence of the claimant, and may offer in evidence such entries in the books, invoices, or papers as relate to the issue. The act is careful to say that "the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

The Fourth Amendment says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

The things here forbidden are two—search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.

But what search does this statute authorize? If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses language carefully framed to forbid any seizure under it, as I have already pointed out.

While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing.

This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.

I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute.

I am requested to say that the Chief Justice concurs in this opinion.

Statement of Facts.

NORTHERN PACIFIC RAILROAD COMPANY *v.* HERBERT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Argued December 4, 8, 9, 1885.—Decided February 1, 1886.

When the allowance of a challenge to a juror for cause is assigned as error, it should appear that it was not peremptory if peremptory challenges are allowed.

An allowance of a challenge to a juror for cause and the selection of another competent and unbiased juror in his place, works no prejudice to the other party.

It is not error that the court below, after motion to set aside a verdict as excessive, ordered that the motion should be granted unless the plaintiff should at once remit the amount deemed by the court to be in excess, but in that case the motion should be denied and judgment entered for the remainder.

An employer is not liable for injuries to his servant caused by the negligence of a fellow-servant in a common employment; but this exemption does not extend to injuries caused by the carelessness or neglect of another person in the master's service in an employment not common to that in which the person injured is engaged, and upon a subject in regard to which the person injured has a right to look for care and diligence on the part of the other person as the representative of the common master.

If no one is appointed by a railway company to look after the condition of its cars, and see that the machinery and appliances used to move and to stop them are kept in repair and in good working order, it is liable for the injuries caused thereby. If one is appointed by it charged with that duty, and the injuries result from his negligence in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company.

A statute which enacts that "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed in the same general business" does not apply to losses suffered by an employé in consequence of the negligence of another person, employed by the same employer in another and not in the same general business.

A statute which provides that "there is no common law in any case where the law is declared by the codes" does not take from the court the duty of referring to the common law in order to determine the meaning of a term used in the codes, when they fail to define it.

The Northern Pacific Railroad Company is a corporation created under the laws of Congress to construct a railroad and

a telegraph line from Lake Superior to Puget Sound. In 1879, it had constructed and was operating the road from Duluth, in Minnesota, to Bismarck, in Dakota. On the 24th of October of that year, the plaintiff in the court below, the defendant in error here, was a brakeman in its yard at Bismarck, where its cars were switched upon different tracks and its trains were made up for the road. It was his duty, among other things, to set and to loosen the brakes of the cars whenever necessary, and whenever ordered to do so by the yard-master. At the time mentioned, he was ordered to stop, with the brakes, two cars, which had been switched upon a track in the yard. In obedience to this order he went upon the rear car and attempted to set the brake attached to it, but the brake was so badly broken and out of order that it could not be made to work. As soon as he discovered this he stepped on the forward car in order to stop it. The brake on that car was a "step-brake," and in order to work it he was obliged to place his foot on the step attached to the car below the top, and this brought his foot and leg between the two cars. This brake was also out of order, and while attempting to set it, his foot being upon the step, the car struck another car on the track, and was suddenly stopped. The draw-bar and bumper of the rear car had been pulled out, and for want of them the two cars, when the forward one was suddenly stopped, came violently together, crushing his leg, so that amputation became necessary. To recover damages for the injury sustained he brought this action against the company, alleging that it was its duty to provide good and safe cars, and machinery, and apparatus of a like character for braking and handling them, and also to make rules and regulations for switching and handling them in the yard, and for notifying employés of the condition of defective and broken cars, so that they might not be subjected to unnecessary danger; but that it neglected its duty in these particulars, and thereby, without his fault, he was injured as stated.

In its answer the company admitted the allegations as to the employment of the plaintiff and the injuries he had received, but set up that it was his duty to know, and that he did know the condition of each of the cars, and that he carelessly put his

leg between them when setting the brake of the forward car, and thus, through his own fault, suffered the injury of which he complains.

There was a verdict in favor of the plaintiff for $25,000. A motion for a new trial was made on various grounds; among others, that the damages were excessive. The court ordered that a new trial be granted unless he remitted $15,000 of the verdict, and in case he did so that the motion be denied. He remitted the amount, and judgment was entered in his favor for the balance, and costs of suit, which the Supreme Court of the Territory affirmed. The defendant then sued out this writ of error.

For the reversal of the judgment several errors of the court below are assigned; but, so far as they are deemed material, they may be reduced to four: 1, in sustaining a challenge to a juror; 2, in denying a new trial on condition that the plaintiff should remit a part of the sum awarded by the verdict; 3, in refusing to dismiss the suit at the close of the plaintiff's case; 4, in refusing to charge that the plaintiff should have taken notice of the defects in the cars, and that he was guilty of such negligence in that respect as to deprive him of a right to recover.

Mr. W. P. Clough for plaintiff in error (*Mr. George Gray* was with him on the brief) as to the challenge, cited *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370: as to the general question of liability, *Hough* v. *Railway Co.*, 100 U. S. 213; *Besel* v. *New York Central & Hudson River Railroad Co.*, 70 N. Y. 171; *King* v. *Boston & Worcester Railroad Co.*, 9 Cush. 112; *Gilshannon* v. *Stony Brook Railroad Co.*, 10 Cush. 228; *Gilman* v. *Eastern Railroad Co.*, 10 Allen, 233; *Holden* v. *Fitchburgh Railroad Co.*, 129 Mass. 268; *Walker* v. *Boston & Maine Railroad Co.*, 128 Mass. 8; *Lanning* v. *New York Central Railroad Co.*, 49 N. Y. 521: that the exception in the Dakota code did not apply, *Yeaton* v. *Boston & Lowell Railroad Co.*, 135 Mass. 418; *Gibson* v. *Northern Central Railway Co.*, 29 N. Y. Supreme Ct. (22

Hun) 289; *McCosker* v. *Long Island Railroad Co.*, 84 N. Y. 77; *Flannagan* v. *Chicago & Northwestern Railway Co.*, 50 Wisc. 462; *Brick* v. *Rochester, New York & Pennsylvania Railroad Co.*, 98 N. Y. 211.

Mr. Thomas Wilson for defendant in error cited as to the challenge, that it was without prejudice, *Heaston* v. *Cincinnati & Fort Wayne Railroad Co.*, 16 Ind. 275, 279; *Atchison Topeka & Santa Fé Railroad Co.* v. *Franklin*, 23 Kansas, 74; *Carpenter* v. *Dame*, 10 Ind. 125, 130; *Morrison* v. *Lovejoy*, 6 Minn. 319, 350; *United States* v. *Cornell*, 2 Mason, 91, 104, 105; *Hollis* v. *State*, 8 Tex. App. 620; *Grissom* v. *State*, 8 Tex. App. 386; *McKinney* v. *State*, 8 Tex. App. 626; *State* v. *Lawler*, 9 N. W. Rep. 698; *Sullings* v. *Shakespeare*, 9 N. W. Rep. 451; *Atlas Mining Co.* v. *Johnston*, 23 Mich. 36; *Mimms* v. *State*, 16 Ohio St. 221, 228–9; *Erwin* v. *State*, 29 Ohio St. 186; *State* v. *Elliott*, 45 Iowa, 486; *Barnes* v. *Newton*, 46 Iowa, 567; *West* v. *Forrest*, 22 Missouri, 344; *Herbert* v. *Northern Pacific Railroad Co.*, 13 N. W. Rep. 349; *Sutton* v. *Fox*, 55 Wisc. 531, 540: to the proposition that the duty of maintaining machinery in proper repair for the protection of employés operating it, devolves upon the master, and he is liable for injuries resulting from a failure to perform such duty; that even if not expressed, this is implied in the contract between the parties; and that the statute of Dakota made no change in this rule, *Hough* v. *Railway Co.*, 100 U. S. 213; *Wabash Railway Co.* v. *McDaniels*, 107 U. S. 454; *Chicago & Milwaukee Railroad Co.* v. *Ross*, 112 U. S. 377: to maintain that the rule that the master is not liable to one servant for the negligence of a fellow-servant does not exempt the master from liability for his own negligence, *Fuller* v. *Jewett*, 80 N. Y. 46; *Ford* v. *Fitchburg Railroad Co.*, 110 Mass. 240, 261; *Bessex* v. *C. & N. W. Railway Co.*, 45 Wisc. 477, 481; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420, 426; *Drymala* v. *Thompson*, 26 Minn. 40; *Wedgwood* v. *C. & N. W. Railway Co.*, 41 Wisc. 478; *Toledo, Peoria & Warsaw Railroad Co.* v. *Conroy*, 68 Ill. 560: that it was competent for the court to deny a new trial on condition that plaintiff should remit part of the verdict, *Diblin* v. *Murphy*, 3

Sand. 19; *Collins* v. *Albany & Schenectady Railroad Co.*, 12 Barb. 492; *Blunt* v. *Little*, 3 Mason, 102, 107; *Kinsey* v. *Wallace*, 36 Cal. 462, 480, 481; *Murray* v. *Hudson River Railroad Co.*, 47 Barb. 196, 205; *Doyle* v. *Dixon*, 97 Mass. 208, 213; *Hayden* v. *Florence Sewing Machine Co.*, 54 N. Y. 221; *Belknap* v. *Boston & Maine Railroad Co.*, 49 N. H. 358; *Collins* v. *City of Council Bluffs*, 35 Iowa, 432; *Union Rolling Mill Co.* v. *Gillen*, 100 Ill. 52.

Mr. Justice Field delivered the opinion of the court. After stating the facts as above reported, he continued:

1. As to the challenge to a juror. It appears that one Weaver, summoned as a juror, testified that he was a lumber dealer, and that the company gave him a place on its right of way for a lumber yard, without rent, and also that he had heard the accident to the plaintiff spoken of and explained. It was not shown, however, that he had any actual bias for or against either party, or any belief or opinion touching the merits of the case. He was, nevertheless, challenged, and the allowance of the challenge constitutes the first error assigned. It does not appear whether the challenge was for cause or was peremptory. Under the statute of Dakota each party is entitled to three peremptory challenges. It is for the party asserting error to show it; it will not be assumed. But if we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand. *United States* v. *Cornell*, 2 Mason, 104; *Heaston* v. *Cincinnati & Fort Wayne Railroad Co.*, 16 Ind. 275, 279; *Atchison, Topeka & Santa Fé Railroad Co.* v. *Franklin*, 23 Kansas, 74; *Carpenter* v. *Dame*, 10 Ind. 125, 130; *Morrison* v. *Lovejoy*, 6 Minn. 349, 350.

2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission

of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. *Hayden* v. *The Florence Sewing Machine Co.*, 54 N. Y. 221, 225; *Doyle* v. *Dixon*, 97 Mass. 208, 213; *Blunt* v. *Little*, 3 Mason, 102, 107.

3. The dismissal of the suit at the close of the plaintiff's case was moved on the ground that the plaintiff had failed to establish a cause of action; and in support of this position it is contended that the plaintiff was a fellow-servant of the officer or agent of the company, who was charged with the duty of keeping the cars in order, and, therefore, could not recover against the company for injuries suffered by reason of the latter's negligence, and that this exemption from liability is declared by the statute of Dakota.

The general doctrine as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow-servant in a common employment, is well settled. When several persons are thus employed there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: "He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." *Chicago & Milwaukee Railroad Co.* v. *Ross*, 112 U. S. 377, 383.

It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means, by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such

liability. The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character, that it can hardly be considered as any longer open to serious question. It was substantially declared in the recent case of *Hough* v. *Railway Co.*, 100 U. S. 213, 218, where we said that, notwithstanding a railroad corporation may be controlled by competent, watchful and prudent directors, and care and caution are exercised in the selection of subordinates at the head of the several branches of its service, its obligation still remains to provide and maintain in a suitable condition the machinery and apparatus to be used by its employés; and that it "cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation." In that case the engine of the railroad, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the boiler was forced out, thus permitting hot water and steam to escape, which so scalded the engineer as to cause his death. The engine was thrown from the track because the cow-catcher or pilot was defective; and the whistle was forced out because it was insecurely fastened. These defects were owing to the negligence of the company's master-mechanic and the foreman of the round-house, to whom was committed the exclusive management of the motive power of the company, with control over all the engineers employed. In an action by the widow and child of the deceased the company set up as a defense that, if the alleged defects existed, which it denied, they were owing to the negligence of those servants, for which the company was not liable. The court held that the company was not thereby exonerated from liability.

In *Flike* v. *Boston & Albany Railroad Co.*, 53 N. Y. 549, it

was held by the Court of Appeals of New York that a corporation is liable to an employé for negligence or want of proper care in respect of such acts and duties as it was required to perform as master or principal, without regard to the rank or title of the agent entrusted with their performance, and that as to such acts the agent occupies the place of the corporation, and that the latter is deemed to be present and consequently liable for the manner in which they are performed. There it appeared that the accident, which caused the injury complained of, was in consequence of an insufficient number of brakemen on the cars of the company. The fact that the company had an agent, whose business it was to make up the trains, to hire and station the brakemen, and to prepare and despatch the trains, did not relieve it from liability.

In *Corcoran* v. *Holbrook*, 59 N. Y., 517, it appeared that the defendants operated a cotton mill, to the management of which they gave no personal attention, but entrusted it to a general agent with full power. In the mill was an elevator used by the employés, which became out of repair and unsafe, of which the agent had notice. He neglected to have it repaired and an employé was injured by its fall. The court held that the defendants were liable, that the general agent was not a mere fellow-servant, but occupied the place of the owners, and that they could not, by delegating their authority to another and absenting themselves, escape from liability for the non-performance of duties they owed to their employés. "As to acts," said the court, "which a master or principal is bound as such to perform towards his employés, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed."

In *Fuller* v. *Jewett*, 80 N. Y. 46, an engineer on the Erie Railway was killed by the explosion of the boiler of a locomotive, caused by its defective condition. To the action brought by his administratrix, it was contended that the negligence of the mechanics in not keeping the boiler in a safe condition was the negligence of his co-employés in the service of the company, for which it was not responsible. But the court

affirmed the principle of the decisions already cited, and held that an act or duty which the master, as such, is bound to perform for the safety and protection of his employés cannot be delegated so as to relieve him from liability to a servant injured by its omission or its negligent performance, whether the nonfeasance or misfeasance be that of a superior or inferior officer, agent, or servant, to whom the doing of the act or the performance of the duty has been committed. "In either case, in respect to such act or duty," said the court, "the servant who undertakes or omits to perform it is the representative of the master and not a mere co-servant with the one who sustains the injury." *Pantzar* v. *Tilly Foster Iron Co.*, 99 N. Y. 368, decided the present year by that court, is to the same effect.

In *Ford* v. *Fitchburg Railroad*, 110 Mass. 240, which was a similar action for injuries caused by the explosion of an engine boiler out of repair, the same defence was made, that the want of repair was owing to the negligence of a fellow-servant in the department of repairs, but the court said, that "the agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may." And the court held that there was no error in a refusal to instruct the jury that the corporation was not liable unless the plaintiff proved that the president, directors or superintendent, either personally knew, or by the exercise of reasonable care in the performance of their duties might have known, of the existence of the defect in the engine which caused the explosion, or that the persons employed to have charge of the engine and keep it in repair were incompetent; observing that "the question was not whether the officers named knew, or might have known, of the defect or of the incompetency of those who had charge of the repairs, but

whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use."

In *Shanny* v. *Androscoggin Mills*, 66 Maine, 420, the action was by an employé of the defendants for injuries to her hand caused by insufficient and defective covering to machinery and gearing, which she was employed to clean. On the trial the defendants contended, among other things, that if the defective covering was owing to the negligence of a fellow-servant, whose duty it was to repair it, they were not liable. But the court said, "that the person whose duty it was to keep the machinery in order, so far as that duty goes, was not, in any legal sense, the fellow-servant of the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result. The one can properly be said to begin only when the other ends. The two persons may, indeed, work under the same master and receive their pay from the same source; but this is not sufficient. They must be at the time engaged in a common purpose or employed in the same general business. We do not now refer to the different grades of services about which there is considerable conflict of opinion, but of the different employment. In the repair of the machinery the servant represented the master in the performance of his part of the contract, and, therefore, in the language of the instructions, his negligence in that respect is the 'omission of the master or employer in contemplation of law.'"

Numerous decisions from other courts to the same purport might be added. *Bessex* v. *Chicago & Northwestern Railway Co.*, 45 Wisc. 477, 481; *Wedgwood* v. *Chicago & Northwestern Railway Co.*, 41 Wisc. 478; *Toledo, Peoria & Warsaw Railroad Co.* v. *Conroy*, 68 Ill. 560; *Drymala* v. *Thompson*, 26 Minn. 40. The doctrine laid down in them is specially applicable when the employer is a common carrier of passengers and property, and steam is the motive power, inasmuch as any

defect in the machinery may be followed by serious disasters. The same considerations which render him responsible in such cases for the safe transportation of passengers and property should also impose upon him an equal responsibility to his employés, so far as their safety depends upon the character and condition of the machinery and appliances used in the transportation. Where the employé is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer.

According to the authorities cited there can be no question as to the liability of the railroad company to the plaintiff for the injuries he sustained. If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move, and to stop them, were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence, and imposed a liability upon it, unless, as contended, it was relieved therefrom by the statute of Dakota. Section 1130 of the Civil Code of that Territory is in these words:

"Co-employés.—An employer is not bound to idemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé."

The next section, 1131, is as follows:

"Employer's Negligence.—An employer must in all cases

indemnify his employé for losses caused by the former's want of ordinary care."

We do not consider that the first of these sections changes the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow-servant in the same general business, or identifies the business of providing safe machinery and keeping it in repair with the business of handling and moving it. The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it. They are, as stated in the case decided by the Supreme Court of Massachusetts, from which we have cited above, separate and independent departments of service, though the same person may, by turns, render service in each. The person engaged in the former represents the employer, and in that business is not a fellow-servant with one engaged in the latter. The words "same general business" in the section have reference to the general business of the department of service in which the employé is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management. If any other construction were adopted there would, under the section, be no such thing as separate departments of service in the business of railroad companies; for whatever would tend to aid in the transportation of persons and property would come under the designation of its general business. The same section is in the civil code of California, and our construction of it accords with that of the Supreme Court of the State. In *Beeson* v. *The Green Mountain Gold Mining Company*, 57 Cal. 20, the defendant, a corporation engaged in quartz mining, appointed a superintendent to supervise and manage its mining operations, with authority to employ and discharge laborers at the mine. One of the laborers thus engaged lost his life in a fire, which originated from a defective pipe put up by a tinner under the supervision of the superintendent, and connected with the engine used to raise ore and take water from the mine. It did not appear that the deceased knew or had reason to know of the defect. In an action by his widow for damages in consequence of his death, it was

held, against the contention of the company, that the superintendent was not a fellow-employé of the deceased in the sense intended by the section; that, for the purposes of managing the business and determining what machinery should be used and how placed, he was the representative of the company, and that the deceased was not bound to know whether a defect existed in the machinery and appliances not within his view, but had a right to rely upon the implied engagement of the company that the pipe was properly placed and constructed. It was also held that the tinner in performing his share of the work was not a fellow-servant of the deceased; that as his work was done under the direction and supervision of the superintendent, it was the same as if done by the superintendent in person.

We do not perceive that the provision of the sixth section of the Civil Code of Dakota, that in the Territory "there is no common law in any case where the law is declared by the codes," at all affects the question before us. There cannot be two rules of law on the same subject contradicting each other. Therefore, where the code declares the law there can be no occasion to look further; but where the code is silent the common law prevails. What constitutes the "same general business" is not defined by the code, but may be explained by adjudged cases. The declaration by the code of a general rule, which is conformable to existing law, does not prevent the courts from looking to those cases for explanation any more than it prevents them from looking into the dictionary for the meaning of words.

Section 1131 of the Dakota code expresses the general law, as we have stated it to be, that an employer is responsible for injuries to his employés caused by his own want of ordinary care. His selection of defective machinery, which is to be moved by steam power, is of itself evidence of a want of ordinary care, and allowing it to remain out of repair, when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence. Here, the cars had been defective for years. The brakes were all worn out, and their condition had been called to the attention of the yard-

master, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either brakes or cars. Under these circumstances it cannot be said that the company exercised, through its officer or agent charged with that duty, ordinary care to keep the cars and brakes in good condition, and, therefore, under the provisions of this section, it is bound to indemnify the plaintiff.

4. As to the alleged negligence of the plaintiff only a few words need be said. Of course, he was bound to exercise care to avoid injuries to himself. If he had known, or might have known by ordinary attention, the condition of the brakes and cars when he mounted the cars, and thus exposed himself to danger—in other words, if he did not use his senses as men generally use theirs to keep from harm—he cannot complain of the injury which he suffered. He had been employed in the yard only one day before the accident occurred, and it does not appear that the defects in the brakes or cars were brought to his notice, though there was some evidence that statements as to their defective condition were made in his presence and hearing. He testifies that he saw no defect in either of them, and was not apprised of any. The defect in the brakes was not patent to the eye; it could be known only from an attempt to set them, or by information from others. He had a right, therefore, to assume, without such information, that they were in a condition in which it was safe to mount the cars to set them, when ordered by the yard-master.

It was contended in the court below that the plaintiff might have inferred, from the manner in which the cars were attached, that there was a defect in them. The manner of their attachment showed nothing as to the condition of the brakes; and the court left the question of his negligence to the jury. It instructed them that if, from the unusual appearance of the car upon which he was engaged, as, for instance, its being attached to the next car by chains, or if from any statements of the yard-master or car-repairer, he had reason to believe that the car in question was defective or had been broken, he was

bound to take care not to expose his person to injuries which a broken and defective car might cause; and, further, that if they found from the evidence that the company was guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect the injury was received, still, if he failed to exercise that prudence, care, and caution which prudent men, under similar circumstances, would ordinarily exercise, and he thereby contributed approximately to the injury, he was not entitled to recover.

The verdict of the jury, upon these instructions and others of the same general purport, negatived any imputation of negligence on his part. We see, therefore, no error on the trial, and the judgment below must be

Affirmed.

Mr. Justice Harlan concurring.

I concur in the opinion just delivered by Mr. Justice Field, and will add a few suggestions in support of the conclusion reached by the court.

It is contended, on behalf of the railroad company, that if it used ordinary care in the *selection* of the employé to whose negligence the plaintiff's injuries are attributed, it is protected from liability by section 1130 of the Dakota code, even if such culpable employé had superior or controlling authority over the injured employé, and even if the injuries were caused by the defective condition of the appliances and machinery provided by the company through its agents for the use of the employé so injured. For—it is argued—the words "the same general business" in that section embrace every branch or department of the common employer's business, and no distinction is therein made between employés in respect of grades or the nature of the particular service rendered by them. Even if that were admitted to be a proper construction of section 1130, standing by itself, the inquiry still arises as to the object of section 1131, which declares that the employer "must, *in all cases*, indemnify his employé for losses caused by the *former's* want of ordinary care." The latter section was plainly intended to cover cases not provided for in the preceding sec-

tion. If one section applies to corporations, the other equally applies to them. The two sections must be construed together. And so construed, it is manifest that, while the statute establishes the rule that the employer is not bound to indemnify his employé "for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person, employed by the same employer in the same general business," it, also, with equal distinctness, declares two exceptions to that rule: 1. Where the employer has neglected to use ordinary care in the selection of the employé whose negligence caused the losses in question. 2. Where the losses were caused by the employer's own want of ordinary care. The latter exception is as explicitly declared as is the former, and cannot be ignored or nullified by construction.

What case is more distinctly within section 1131 than one where a railroad company fails to appoint some one to provide and maintain machinery and appliances safe and suitable for use by its employés, or where its agent or employé, appointed to that duty, does not exercise ordinary care in its discharge? Such an agent or employé is, of necessity, the representative of the corporation, and his want of ordinary care, in respect of such matters, is negligence upon the part of the corporation itself. It cannot, in reference to those matters, whatever it may be permitted to do in reference to other matters connected with its business, "interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent." That is clearly shown in the opinion of the court. Between an agent, charged with the performance of the company's duty to provide and maintain safe and suitable appliances and machinery, and the employés who use them, the relation of fellow-servants does not exist. The want of ordinary care upon his part, is, in the language of section 1131, and according to the weight of judicial authority, a want of ordinary care upon the part of the corporation itself. This case, therefore, comes within that section.

Mr. Justice Blatchford, with whom concurred Mr. Justice

BRADLEY, MR. JUSTICE MATTHEWS, and MR. JUSTICE GRAY, dissenting.

MR. JUSTICE BRADLEY, MR. JUSTICE MATTHEWS, MR. JUSTICE GRAY and myself are unable to concur in the judgment of the court in this case.

The Civil Code of Dakota (sections 6 and 2129), provides as follows:

"Sec. 6. In this Territory there is no common law, in any case where the law is declared by the Codes."

"Sec. 2129. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. This Code establishes the law of this Territory respecting the subjects to which it relates; and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

The rules of the common law are, therefore, not applicable, in Dakota, in any case where the statute law is declared in the Civil Code, on the subject, and that statute law is not to be construed strictly, but liberally, with a view to effect its objects and to promote justice.

Now, what is the statute law of Dakota on the subject involved in this case? It is found in sections 1129, 1130 and 1131 of the Civil Code, as follows:

"Sec. 1129. An employer must indemnify his employé, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employé, at the time of obeying such directions, believed them to be unlawful.

"Sec. 1130. An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.

"Sec. 1131. An employer must, in all cases, indemnify his employé for losses caused by the former's want of ordinary care."

These provisions are very clear. The language used in sec-

tion 1130, "another person employed by the same employer in the same general business," indicates that, in the view of the three sections of the Code in question, a co-employé is another person employed with the employé, by the same employer, in the same general business. Therefore, wherever the word "employé" is used in any one of the three sections, it means a person who may be such a co-employé.

By section 1129, the railroad company is not bound to indemnify Herbert, except as prescribed in section 1130, for what he necessarily expended or lost by discharging the duty he did, in reference to the freight cars. What is prescribed in section 1130 is this: The company is not bound to indemnify Herbert for what he so lost in consequence of the negligence of his co-employés in the same general business, unless the company neglected ordinary care in the selection of such co-employés. No want of care in such selection is alleged, and the action is sought to be maintained, and the verdict for the plaintiff may have been rendered, not on the neglect of the corporation itself to provide and maintain suitable cars, brakes, draw-bars, and bumpers, but on the neglect of inferior employés of the corporation to keep them in repair. This is clearly shown by the refusal of the Court to instruct the jury, as requested by the defendant, that the plaintiff could not recover by "reason of any acts of negligence on the part of any other persons employed by the defendant in the same general business with the plaintiff," and that "this would include the yard-master and car-repairer;" and by the fact, that, on the contrary, it instructed them, that "the negligence of those entrusted by the corporation with the power and duty of procuring or keeping in repair such machinery is, in law, the negligence of the corporation."

It is sought to destroy the application of sections 1129 and 1130 to this case, by invoking the rule set forth in section 1131, that "an employer must, in all cases, indemnify his employé for losses caused by the former's want of ordinary care," and by saying, that, in this case, the company did not exercise ordinary care, because the co-employés of Herbert were guilty of the negligence which caused his injury. But that is the very

case provided for by section 1130; and the doctrine of the court comes to this, in Dakota, that even though a railroad corporation, acting by its board of directors, exercises ordinary care in the selection of its employés, and provides adequate and competent machinery, outfit and appliances, and prescribes proper rules and regulations for their use, and has no knowledge or notice of any defects in them, and no circumstances exist sufficient to charge it with such knowledge or notice, it is guilty of want of ordinary care, within section 1131, towards an employé who is injured by the negligence of his co-employés in the same general business, by the mere fact of the happening of such injury through such negligence, although section 1130 distinctly declares, that, in such a case, the employer shall not be liable to the injured employé.

It is a rule for the construction of statutory provisions, especially those embraced in the same statute, that all must be construed so that all shall have effect, if possible. There is ample scope for the application of section 1131, by limiting it to cases not embraced within section 1130. Otherwise, no force is given to section 1130.

The failure to give proper effect to section 1130 is the more marked, because, with one exception, the only authorities cited in the opinion of the court, to sustain its views, are cases decided where the common law prevails, and not where such statutory provisions as those in Dakota exist—provisions which declare that the common law is abrogated as to the subject-matter of the controversy in this suit.

Sections 4, 1969, 1970, and 1971, of the Civil Code of California, are the same, respectively, as sections 2129, 1129, 1130, and 1131, of the Civil Code of Dakota. But there is nothing in the case of *Beeson* v. *Green Mountain Gold Mining Co.*, 57 Cal. 20, cited in the opinion of the majority of the court, which sanctions the view that the yard-master or the car-repairer in the present case was not "a person employed in the same general business" with Herbert, within the meaning of such a statute.

Considering the case to be governed by the local statute, we express no opinion upon the question whether the instructions given to the jury accorded with the rules of the common law.

PRESTON *v.* MANARD & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted January 6, 1886.—Decided March 1, 1886.

A hose-reel, mounted upon a wheeled carriage, supporting a fountain standard, and provided with a foot or brace to sustain it in an upright position, and with a nozzle-holder, being in common use; a patent for a combination of these elements with "a reel of large diameter to allow the water to flow through the hose when partially wound thereon" is void for want of invention.

This was a bill in equity for the infringement of letters patent granted October 10, 1876, and reissued February 22, 1882, for an improved fountain hose-carriage.

The specification of the original patent, after describing the apparatus as consisting of a standard mounted upon an axle, to which are applied two wheels and a foot so contrived that, when the device rests upon the tripod formed by the wheels and the foot, the standard will assume an upright position to serve as a suitable fountain-standard; and the standard, for this purpose, having at its upper end a nozzle-holding contrivance, and at a suitable height from the ground a collar turning loosely upon it, to which is affixed the spindle of the hose-reel; a set screw through one of the hubs of the reel, entering a groove in the spindle, and serving to hold the reel from slipping off, and also, by applying more or less friction, as a means of locking the reel from turning, or as a brake to prevent its turning too freely; on the face of the outer four arms of the reel, clasps which serve as a means not only for holding the nozzle, when desired, but also for holding the butt of the hose when it is all reeled in, or an intermediate part when the butt is connected with the hydrant; two handles near the top of the standard to afford a grasp in wheeling the apparatus about from place to place, and another handle projecting to the rear from the collar, to serve as a hold for the hand in shifting about and adjusting; proceeded as follows:

"In operation, the butt of the hose may be attached to the

hydrant, and the body of the hose being upon the reel, the standard and reel may be wheeled along to the place desired, paying out hose as it goes. More or less hose may be thus paid out, and the nozzle being poised to its work, it may remain in operation for a time in a fixed position or at rest; or the apparatus may be moved about from place to place and the hose taken up or paid out to suit, while the water is playing as well as when shut off. The reel being supported at a considerable height from the ground renders it possible to employ a reel of a sufficient diameter so that the water will freely flow through the portion of the hose wound thereon. It will be seen, therefore, that the apparatus may be used as a lawn fountain or sprinkler, and moved from place to place without touching the hose with the hands, thus avoiding the dirt and wet; and also that the hose may be taken up or paid out from the standard itself as it is moved about, which is a better way than having the standard at one place and the reel at another, or than having no reel, because the work may be all attended to at the standard, and no more hose left on the ground than is absolutely necessary. With a view to this method of using the apparatus, a peculiar feature of the reel consists in the fact that the hose is wound upon four separate points or bars. This, in connection with the large diameter of the reel, facilitates the discharge of the water. To make this clear it is necessary to understand that each bar is liable to make a dent upon the inner side of the hose. This dent the water passing through will straighten out; but the effort to straighten the dent will cause a tendency of the hose to rise at this point, and in the part of the hose between the bars to recurve or bend toward the centre of the reel. Now, if a solid drum is employed, or a reel composed of a large number of bars, this rising and recurving tendency is resisted by the intermediate points or bars, and the dent or flattening or compression resists the water and will not straighten out. By sufficiently loosening the set-screw, so that it will clear the groove in the spindle, the reel may be taken entirely off from the standard, and the latter in such case may be used as a plain reelless fountain-standard."

The first claim in the original patent was as follows:

"1. The hose-reel, mounted upon a wheeled carriage, which is provided with a foot or brace, by means of which it may be sustained in an upright vertical position, whereby the device becomes capable of use, both as a hose-carriage and as a fountain-standard, substantially as specified."

A former suit, brought March 29, 1880, by the plaintiff against the defendants, under the original patent, was heard upon pleadings and proofs, and dismissed by the court on January 6, 1882, for want of novelty. On January 21, 1882, the plaintiff applied to the Patent Office for a reissue, which was granted on February 22, 1882, with a specification exactly like that in the original patent, but with different claims, the first and only material one of which was in these words:

"1. The combined hose-carriage and fountain-standard, consisting in the combination of the following elements, viz.: A wheeled carriage provided with a foot or brace, by means of which it may be sustained in an upright vertical position, a nozzle-holding device, and a reel of large diameter to allow the water to flow through the hose when partially wound thereon, substantially as specified."

The present bill was filed April 13, 1882. By the evidence taken in the cause, it appeared that a fountain-standard and hose-reel, mounted upon a wheeled carriage, provided with a foot or brace to sustain it in an upright position, and with a nozzle-holder, were known and used in combination with each other before the plaintiff's alleged invention. This bill also was dismissed, and the plaintiff appealed to this court.

Mr. John W. Munday for appellant.

Mr. J. F. Farnsworth and *Mr. C. M. Brazee* for appellees.

Mr. Justice Gray delivered the opinion of the court. After stating the facts as above reported, he continued:

It is unnecessary to consider the difference between the claim in the reissue and the claim in the original patent, because, assuming the reissue not to be invalidated thereby, yet it sets forth no patentable invention.

The hose-reel, the standard, the brace, the nozzle-holder, and their use in combination, being all old, the description of the hose-reel, in the specification and claim, as "a reel of large diameter to allow the water to pass through the hose when partially wound thereon," is not sufficient to sustain the patent.

The requisite diameter of the reel, and its proportion to the size of the hose, are not defined in the specification, but are left to be ascertained by experiment, or from general knowledge. If the patentee had discovered anything new in the size or proportions of the reel, requisite to allow the water to flow through the hose, he should have described it with such precision as to enable others to construct the apparatus. The fact that water will flow through a hose wound on a reel, if the diameter of the reel is large enough, and the curves or angles are not too abrupt, is a matter of common knowledge, which no one can appropriate to his own use, to the exclusion of the public. In any view of the case, the specification describes nothing that the patentee is entitled to claim, but only what every one has a right to use without his assistance. *Guidet* v. *Brooklyn*, 105 U. S. 550; *Flood* v. *Hicks*, 2 Bissell, 169; *S. C.*, 4 Fisher Pat. Cas. 156; *The King* v. *Wheeler*, 2 B. & Ald. 345, 354; *Macnamara* v. *Hulse*, Car. & M. 471, 477; *Kay* v. *Marshall*, 7 Scott, 548; *S. C.*, 5 Bing. N. C. 492; 1 Beavan, 535; 8 Cl. & Fin. 245; West H. L. 682; 2 Webster Pat. Cas. 34, 68, 75, 77, 82, 84.

To sustain this patent would be to deprive the public of the right to arrange and use a well known apparatus in the only way in which its purpose can be beneficially accomplished.

Decree affirmed.

Statement of Facts.

VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY *v.* DENNIS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Argued January 20, 1886.—Decided March 1, 1886.

A provision in a charter granted by a State to a railroad company, by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State," does not exempt the road, fixtures and appurtenances from taxation before such completion of the road.

The omission of taxing officers to assess certain property cannot control the duty imposed by law upon their successors, or the power of the legislature to tax the property, or the legal construction of a statute under which its exemption from taxation is claimed.

The original suit was brought by the sheriff, and *ex officio* collector of taxes, of the parish of Madison in the State of Louisiana, to recover the amount of taxes assessed, under general laws of the State, in 1877 and 1878 to the Vicksburg, Shreveport and Texas Railroad Company, and in 1880 to the Vicksburg, Shreveport and Pacific Railroad Company, upon thirty-four miles of railroad, with fixtures and appurtenances, in that parish.

The Vicksburg, Shreveport and Texas Railroad Company was incorporated on April 28, 1853, by a statute of Louisiana, to construct and maintain a railroad from a point in the parish of Madison on the Mississippi River opposite Vicksburg, westward by way of Monroe and Shreveport, to the line of the State of Texas.

Section 2 of that statute was as follows: "The capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State."

The eastern part of the railroad, from Vicksburg to Monroe,

about seventy-five miles, was completed before January 1, 1861; and the western part, from Shreveport to the Texas line, about twenty-five miles, was completed before January 1, 1862; leaving the central part, from Monroe to Shreveport, about one hundred miles, uncompleted. The further construction of the road was prevented and suspended during the civil war, and much of the track, bridges, stations and workshops was destroyed by the hostile armies.

Soon after the return of peace, a holder of four out of a large number of bonds secured by a mortgage executed by the corporation on September 1, 1857, of its railroad, property and franchises, commenced a suit in a court of the State of Louisiana, and obtained a decree for the sale of the whole mortgaged property, and it was sold under that decree.

Upon a suit afterwards brought by a very large number of the bondholders, in behalf of all, in the Circuit Court of the United States, that sale was, by a decree of this court at October term, 1874, annulled as fraudulent and illegal, and the railroad, property and franchises ordered to be sold for the benefit of the bondholders and other creditors of the corporation. *Jackson* v. *Ludeling*, 21 Wall. 616.

On December 1, 1879, they were sold pursuant to this decree, and purchased by a committee of the bondholders, who on the next day organized themselves with their associates into a corporation under the general statute of Louisiana of March 8, 1877, by the name of the Vicksburg, Shreveport and Pacific Railroad Company, and now claimed to be entitled under this statute to all the rights, powers, privileges and immunities of the Vicksburg, Shreveport and Texas Railroad Company, including its exemption from taxation.

In 1881 and 1882 the new corporation made contracts for the completion of the railroad between Monroe and Shreveport, and began to complete it; but it has not yet been completed.

The Supreme Court of Louisiana held, that the provision of the statute of 1853, exempting the railroad, fixtures and appurtenances "from taxation for ten years after the completion of said road," did not relieve the old corporation from taxation before the road was completed; and therefore gave judgment

for the plaintiff, without determining whether the new corporation had succeeded to the rights of the old one in this respect. 34 La. Ann. 954.

A writ of error was sued out by the defendant, and allowed by the Chief Justice of that court, because there was drawn in question the validity of a statute of, or an authority exercised under, the State, on the ground of its being repugnant to the Constitution of the United States, as impairing the obligation of contracts, and the decision was in favor of its validity.

Mr. Edgar M. Johnson for plaintiff in error. *Mr. George Hoadly*, and *Mr. Edward Colston* were with him on the brief.

Mr. Thomas O. Benton for defendant in error. *Mr. John S. Young* was with him on the brief.

Mr. Justice Gray delivered the opinion of the court. After stating the facts as above reported, he continued:

In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract (although in the form of a statute) as well as whether its obligation has been impaired. *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244, 256, 257, and cases cited; *Wright* v. *Nagle*, 101 U. S. 791, 794. But the construction given by the Supreme Court of Louisiana to the contract relied on in the present case accords not only with its own decision in the earlier case of *Baton Rouge Railroad* v. *Kirkland*, 33 La. Ann. 622, but with the principles often affirmed by this court.

In the leading case of *Providence Bank* v. *Billings*, 4 Pet. 514, Chief-Justice Marshall, speaking of a partial release of the power of taxation by a State in a charter to a corporation, said: "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished; that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it

does not appear." "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." 4 Pet. 561–563.

In *Philadelphia & Wilmington Railroad* v. *Maryland*, 10 How. 376, Chief-Justice Taney said: "This court on several occasions has held, that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 393.

In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed, in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;" that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt;" that "nothing can be taken against the State by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the State;" that a State "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 446; *Gilman* v. *Sheboygan*, 2 Black, 510, 513; *Delaware Railroad Tax*, 18 Wall. 206, 225, 226; *Hoge* v. *Railroad Co.* 99 U. S. 348, 355; *Southwestern Railroad* v. *Wright*, 116 U. S. 231, 236; *Erie Railway* v. *Pennsylvania*, 21 Wall. 492, 499; *Memphis Gaslight Co.* v. *Shelby Taxing District*, 109 U. S. 398, 401; *Tucker* v. *Ferguson*, 22 Wall. 527, 575; *West Wisconsin Railway* v. *Supervisors*, 93 U. S. 595, 597;

Memphis & Little Rock Railroad v. *Railroad Commissioners*, 112 U. S. 609, 617, 618.

It is argued in support of this writ of error, that as the exemption from taxation of the capital stock was unqualified and perpetual, and began at the very moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after the completion of the road; and that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion and while its earnings were little or nothing.

On the other hand, it is argued that the consideration of the exemption from taxation, as of all the franchises and privileges granted by the State to the corporation, was the undertaking of the corporation to prosecute to completion within a reasonable time the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the State had never allowed a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the Supreme Court of Louisiana in *State* v. *Morgan*, 28 La. Ann. 482, 491, and in the case at bar, 34 La. Ann. 954, 958.

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous.

In their natural and their legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. If the legislature

had intended to limit the end only, and not the beginning, of the exemption, its purpose could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter.

To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to insert by construction what is not to be found in the language of the contract; to presume an intention, which the legislature has not manifested in clear and unmistakable terms, to surrender the taxing power; and to go against the uniform current of the decisions of this court upon the subject, as shown by the cases above referred to.

The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed.

In the case of *Morgan* v. *Louisiana*, 93 U. S. 217, affirming the decision in 28 La. Ann. 482, neither this court nor the Supreme Court of Louisiana expressed any opinion upon the question now before us, because both courts held that, the sale of the railroad in that case having taken place before the passage of the statute of 1877, whatever rights were conferred by a similar clause of exemption had not passed to the purchasers.

Judgment affirmed.

Mr. Justice Field, with whom concurred The Chief Justice, Mr. Justice Miller, and Mr. Justice Bradley, dissenting.

I am obliged to dissent from the judgment in this case. I agree with the majority of the court in all that is said in the opinion as to the construction of statutes, which are alleged to exempt from the taxing power of the State property within its jurisdiction. Where there is a reasonable doubt as to their construction, whether or not they create the exemption, it should be solved in favor of the State. But here it does not seem to me there can be any such doubt. The statute in ques-

tion declares that the capital stock of the company "shall be exempt from taxation, and its roads, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation, for ten years after the completion of said road within the State." This exemption was designed to aid the road, and was, therefore, much more needed during its construction than when completed. It seems like a perversion of the purpose of the statute to hold that it intended to impede by its burden the progress of the desired work, and relieve it of the burden only when finished. The enterprise is to be nursed, according to the majority of the court, not in its infancy, but when successfully carried out and needs no support.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE MILLER and MR. JUSTICE BRADLEY concur with me in this dissent.

HIGGINS & Another *v.* McCREA.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Submitted January 8, 1886.—Decided March 1, 1886.

The rules of a Board of Trade were part of the contract sued on, and authorized plaintiff, who was a member of the board and, as a commission merchant, had bought produce for future delivery on account of defendant, to offset and settle such trade by other trades made by plaintiff, and to substitute some other person for the one from whom he purchased the property. Acting under this rule plaintiff released the seller from his contract, and, having many similar transactions in his business, proposed to himself to substitute in the place of the contract with the seller, the agreement of such other contractor as might be available for the purpose at the time of settlement, but designated no particular contractor or contract: *Held*, (1) That it was a question of law for the court whether this was a substitution within the meaning of the rule: (2) That an instruction to the jury upon these facts that there had been no valid substitution of other contracts for those which were cancelled and plaintiff could not recover was correct.

In Ohio the validity in law of a counter-claim by defendant depends upon the allegations respecting it, without regard to allegations and admissions of the

pleadings on the other side in regard to plaintiff's cause of action, and if defendant avers that the counter-claim is founded upon a transaction which the law forbids and makes a crime, it cannot be maintained, even if plaintiff, in setting forth his cause of action founded on the same thing, avers the transaction to be legal.

The plaintiffs in error were the plaintiffs in the Circuit Court. They brought this action to recover $31,644.31, and interest, for moneys paid by them, as they alleged, in executing the orders of the defendant for the purchase, in May, 1883, of certain lots of pork and lard in the Exchange of the Chicago Board of Trade, to be delivered in the following August. The petition averred that the plaintiffs were commission merchants and members of said Board of Trade, that the transactions out of which the suit arose were governed by the rules of the board, and that the defendant had knowledge of said rules.

The petition then averred, as a first cause of action, that on May 19, 1883, the plaintiffs purchased on the order of defendant, and as his brokers and agents, and for his account, 1,000 barrels of pork and 1,000 tierces of lard, to be delivered in August next, on such day as the vendor might elect. That on August 1, 1883, the property was tendered and payment demanded of the plaintiffs, and, in accordance with the defendant's instructions, and the terms and conditions of their agency, the plaintiffs received the pork and lard, and paid therefor $58,553.34, the price thereof, and $56 for inspection charges thereon; all which the plaintiffs were bound and compelled to do by the terms of the contract and the rules and regulations of the Board of Trade, which constituted a part of the contract of agency between the parties, and of the contract of purchase; that on the same day notice was given to the defendant that the pork and lard had been received and paid for; that he failed to give directions for the disposition of the property, and failed to pay therefor, and plaintiffs thereupon sold the same in the Exchange of the Board of Trade and according to its rules, and received therefor, and credited to the account of the defendant, $42,615.97; that they had previously received from the defendant on that account the sum of $6,631.66, and that the balance due from him and unpaid on account of that

transaction was $9,361.71, with interest from the date of sale.

For a second cause of action the plaintiffs set up transactions in all respects similar to those alleged in the first, namely, their purchase on May 22, 1883, for defendant, on his order, of 2,000 barrels of pork and 2,000 tierces of lard, deliverable in August following; the delivery of the produce on August 1, and the payment therefor by the plaintiffs; its subsequent sale by them at a loss of $21,832.60. By a third count the plaintiffs claimed $450 for commissions in said transactions.

The petition then averred that there was due to the plaintiffs from the defendant, by reason of the premises, the sum already stated, for which they demanded judgment.

The defendant, in an amended answer, averred that the plaintiffs were engaged in carrying on, for themselves and others, gambling transactions in pork, lard, and other commodities on the Chicago Board of Trade; that, being solicited by the plaintiffs, and being desirous himself to gamble and speculate on the prices of pork and lard, he engaged with the plaintiffs in such gambling transactions; that, on May 19, 1883, he directed the plaintiffs to deal for him in pork and lard options to the amounts specified in the plaintiffs' petition; that the plaintiffs did, on or about the 19th of May, 1883, enter into contracts in their own name, but, as they now claim, upon account of this defendant, with certain named persons and firms, to wit, G. C. Eldridge & Company and others; that they did not contract for the actual delivery of any pork or lard whatever, but the pretended purchases were mere options, and that it was the understanding of all the parties to said transactions that no pork or lard should be delivered on the contracts, and that the same should be settled upon the differences between the contract and the market price.

The answer further averred that soon after the making of the contracts the plaintiffs disposed of the same for their own benefit, converted the proceeds to their own use, and released the parties with whom they had made said contracts, and that at no time after June 16, 1883, did the plaintiffs hold any contracts whatever for the account of defendant, but falsely re-

ported to him that they were carrying said contracts for his benefit, and required him, from time to time, to pay, and he did pay, into their hands large sums of money, amounting in the aggregate, with a balance already in their hands due to the defendant, to $19,895, and that in the latter part of June, 1883, the defendant gave the plaintiffs notice that he would no longer participate in said gambling transactions, and that he repudiated the same. The answer also denied that any pork or lard was actually delivered to the plaintiffs on said contracts or that they paid any money thereon for account of defendant, and pleaded in bar the statute of the State of Illinois, which declares option contracts to be illegal and void.

By way of counter-claim the defendant, in his answer, demanded judgment against the plaintiffs for his said advances, amounting in all to $19,895, and averred that this money was paid by him to the plaintiffs to promote and carry on said gambling transactions; that said transactions, being the purchase of option contracts, were forbidden by the statute of Illinois, and were illegal and void; that the said sum was so lost by the defendant to the plaintiffs in the said gambling transactions and option contracts as set forth. The reply of the plaintiffs put in issue the new matter set up in the answer and counter-claim of the defendant.

The issues made by the pleadings were tried by a jury. The bill of exceptions stated that the plaintiffs first offered in evidence section 6 of Rule 26 of the Chicago Board of Trade, which was as follows:

"In case any member of the association, acting as a commission merchant, shall have made purchases or sales by order and for account of another, whether the party for whom any such purchase or sale was made shall be a member of the Board of Trade or otherwise, and it shall subsequently appear that such trades may be offset and settled by other trades made by said commission merchant, he shall be deemed authorized to make such offset and settlement, and to substitute some person or persons for the one from or to whom he may have purchased or sold the property originally: *Provided*, That in case of such substitution the member or firm making the same shall be held

to guarantee to his or their principal the ultimate fulfillment of all the contracts made for account of such principal which have been so transferred, and shall be held liable to such principal for all damages or loss resulting from such substitution."

Frederick F. Gilbert, one of the plaintiffs, was put on the stand as a witness in their behalf, and testified in substance as follows: The plaintiffs actually bought the property mentioned in the petition in pursuance of orders received from the defendant; none of the transactions were made with an understanding that the property was not to be delivered, and the property was delivered to the plaintiffs on the 1st of August, and was received and paid for by them; they notified the defendant of such receipt, and that, unless he took the property and reimbursed the plaintiffs for their advances, the same would be sold for his account; the defendant gave no orders, and consequently the property was sold by the plaintiffs on the Board of Trade and the proceeds of sale credited to his account. The witness produced the checks given to Geo. W. Higgins and others, of whom the property was bought, and stated that these checks were given in payment for defendant's account; that the difference between the purchase and selling price, and the consequent loss to the plaintiffs, was the sum mentioned in their petition.

The plaintiffs having rested, the deposition of the said Frederick F. Gilbert, taken by the defendant, was offered by him in evidence, in which the witness testified in substance as follows:

Neither Eldridge & Co. nor any other parties with whom the plaintiffs made contracts for the defendant, delivered any pork or lard for him on August 1, or at any time. During the latter part of the month of May and the month of June the plaintiffs cancelled all the contracts they had made for the defendant with Eldridge & Co., and others, for pork and lard, and released them from the performance thereof, but gave the defendant no notice of these facts. The contracts were cancelled by offsetting them with contracts they had made with other parties for the sale of pork and lard, and this was done for the advantage of the plaintiffs and to facilitate their business transactions. When the contracts for the defendant were made with Eldridge & Co. and others, they were entered upon the books of

the plaintiffs, and the books showed that the contracts were made for account of the defendant. But after the contracts made for the defendant were cancelled by the process of offsetting them against other contracts, no contracts were substituted for them by any mark or sign upon the books of the plaintiffs. The substituted contracts were afterwards cancelled by the process of offsetting them against other contracts, and this process was continued as the convenience of the plaintiffs required, but none of the substituted contracts were at any time specially assigned to the defendant on the books of the plaintiffs. The plaintiffs, however, took care to have on hand contracts for the sale of pork and lard equal in quantity to their contracts for the purchase of the same commodities, and it was their purpose and practice to apply the first produce delivered on contracts of sale to the oldest contract of purchase, but the plaintiffs could not tell what produce would be applied to a contract of purchase until it was delivered. There was no special lot in reserve for any one customer. The plaintiffs had the produce coming in. "They aggregated their books and balanced every few days to see whether they had stuff enough coming to fill their contracts." When the produce was delivered to them it was common property, like wheat put in an elevator. Out of 7000 barrels of pork delivered to the plaintiffs on August 1, they applied a sufficient quantity to satisfy the defendant's contracts of purchase. "It did not matter who it came from first, whatever came there first it was reserved for" the defendant. The plaintiffs received and paid for no lard on defendant's account on August 1, or at any other time.

After the cancellation of the contracts made for the defendant by the plaintiffs the latter were the only persons to whom the defendant could look for the pork and lard mentioned in the cancelled contracts. He could hold no one else liable to him for the delivery of the produce.

The pork delivered to plaintiffs on August 1 was delivered, not on contracts made in behalf of defendant, but made for other persons, and all the checks for money paid by the plaintiffs on August 1 were on contracts of purchases made in behalf of other persons and not for the defendant.

The witness further testified that on May 19, 1883, there was standing to the credit of defendant on the books of plaintiffs $1895, and that after that date the defendant paid them on the transactions set out in the petition the additional sum of $18,000.

The deposition of Edward M. Higgins, the other plaintiff, taken in behalf of the defendant, was also introduced in evidence by the latter. So far as it went it was in substance the same as the deposition of Gilbert.

There was conflicting evidence upon the question whether the defendant at the time of the transactions out of which the suit arose knew what were the rules and customs of the Board of Trade.

The defendant, as a witness in his own behalf, testified in regard to his transactions with the plaintiffs as follows:

"I always knew it was gambling. I never bought any property for future delivery and received it, or expected to. I never bought any property, or any pork or lard, or an option, for future delivery and received it. I never intended to receive it. I never intended to receive this or any portion of it. I had no use for it; all I wanted was the difference, if it went my way."

The foregoing is the substance of the evidence necessary to be stated to show the bearing of the charge of the court to the jury.

The bill of exceptions then proceeded to state, that the court, having explained to the jury what would and what would not constitute a gambling contract, said, among other things not excepted to:

"It is legitimate for the parties to make a contract for the delivery of property at some future period, provided they mean a real and *bona fide* contract, and the law recognizes the obligation and will enforce it. If the contract is void for the reason heretofore stated, the plaintiff cannot recover anything, nor could the defendant recover on his cross-action. The law in that contingency would leave the parties in the situation that they have placed themselves in, and no recovery could be had by either plaintiffs or defendant. But if you should be of

opinion that, although the defendant entertained the opinion that it was a gambling transaction, the plaintiffs did not participate in that view of the question, but contemplated and intended an actual purchase, and an actual sale, the contract would be binding between the parties, and it will become your duty to go further and make an additional finding.

"Assuming that this contract was valid and enforcible, the defendant says that he is not bound, for the reason that after the purchases were made by these plaintiffs as his agents, and for his account, they cancelled the contracts and released the vendors therefrom, and that they did that without authority from him, and without his knowledge or his subsequent ratification. Upon that state of facts, if found to be true, the plaintiffs could not recover anything; that cancellation of the contracts and release of the vendors would have absolved the defendant from any obligation to pay the plaintiff for the property so purchased by them for his account. But the plaintiffs in reply say that the Board of Trade has certain rules and regulations, which the court has permitted to be offered in evidence to you, and that under and in accordance with these rules they had a right to cancel these contracts and substitute others in place of them; that these rules were known to and understood by the defendant, and that he, with that knowledge, acquiesced in the cancellation of the contracts, and the alleged substitution of others in the place of those cancelled.

"For present purposes, and without expressing any opinion upon this proposition, the court instructs you that you may, for the purposes of this case, assume that the defendant did know and did consent that these plaintiffs might act under the 6th section of the 26th rule, and that such knowledge and acquiescence of his authorized the plaintiffs to cancel the first contracts and substitute others in their place. But the court instructs you that, assuming plaintiff's contention in this regard to be true, and assuming that the plaintiffs themselves have told the truth in this case, there has been no valid substitution of other contracts for those that were cancelled, and that the plaintiffs cannot, therefore, for that reason, upon their own testimony, recover anything in this action.

"If you find upon that question the original contract to have been valid, and that the defendant is excused or absolved from liability because of this attempted substitution, which the court instructs you was not made in accordance with said rule, then and in that case the defendant will be entitled to recover upon his cross-action against the plaintiffs for all the money which he advanced in pursuance of these contracts."

To the last two paragraphs of the charge the plaintiffs excepted.

The jury returned a verdict in favor of the defendant, and against the plaintiffs, upon the cause of action set forth in their petition, and in favor of the defendant and against the plaintiffs upon the counter-claim set forth in defendant's answer, for the sum of $22,662.42. In accordance with the verdict the court rendered judgment. To reverse that judgment the plaintiffs brought this writ of error.

Mr. C. C. Bonney and *Mr. Francis J. Wing* for plaintiffs in error.

Mr. Stevenson Burke and *Mr. William B. Sanders* for defendant in error.

Mr. Justice Woods delivered the opinion of the court. After stating the facts as above reported, he continued:

It is not disputed that if the transactions out of which this suit arose were of the character described in the counter-claim and testimony of the defendant, they fell under the ban of section 130 of chapter 38 of the Revised Statutes of Illinois of 1885, page 405, which was in force when the transactions took place. That section, so far as applicable to this case, was as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, . . . shall be fined not less than $10 nor more than $1000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

The errors assigned by the plaintiffs relate exclusively to the charge of the court and the rendering of judgment in accordance with the verdict of the jury.

The first complaint made against the charge is that the court withdrew from the jury the question of fact whether the plaintiffs had or had not complied with the rules of the Board of Trade in reference to the substitution of other contracts for those made by them for the defendant, and which they subsequently offset and settled, and charged the jury that certain substitutions of contracts alleged by the plaintiffs to have been made by them were not as matter of law made in accordance with the rules of the Board of Trade.

We think there was no error in the charge of the court complained of. The rule of the Board of Trade upon this subject (sec. 6, rule 26) provides that where purchases or sales shall have been made by a commission merchant, a member of the board, by order or for account of another person, and it shall subsequently appear that such "trades" may be offset and settled by other "trades" made by the same commission merchant, he shall be "authorized to make such offset and settlement and to substitute some person or persons for the one from or to whom he may have purchased or sold the property originally."

The meaning of this rule is plain, namely, that when a commission merchant having made a contract for his principal with a third person, assumes to offset or cancel the contract, he shall substitute therefor another equivalent contract with some other person who shall be bound to his principal for its performance.

It is well settled, as a general rule, that a written contract made by a factor in his own name for the purchase or sale of goods for his principal will bind the principal, and he may sue and be sued thereon exactly as if he were named in it, for it is treated as the contract of the principal as well as of the agent. *Higgins* v. *Senior*, 8 M. & W. 834; *Huntington* v. *Knox*, 7 Cush. 371; *Taintor* v. *Prendergast*, 3 Hill, 72; *Ford* v. *Williams*, 21 How. 287.

The rule of the Board of Trade provided, as has been seen,

that where the commission merchant has substituted one contract for another he shall guarantee to his principal the performance of the substituted contract.

It follows that upon the original contracts made by the plaintiffs for the defendant, the latter, upon their breach, had a right of action against the parties with whom the contracts were made. The purpose of the rule was, therefore, plain, namely, to provide that when contracts were cancelled and others substituted, the commission merchant, as well as the party bound in the substituted contract to sell or buy, should be liable to the other party for its performance. The rule, therefore, does not authorize the commission merchant to release the party to the original contract unless he provides some one else to assume the obligation, or, as the rule states it, "substitute some person or persons for the one from or to whom he may have purchased or sold the property originally."

The only evidence in the case in regard to the cancellation of the original contracts made by the plaintiffs for the defendant and the substitution of other contracts was the testimony of the plaintiffs themselves. They do not contradict each other, and there is no contradiction or impeachment of their testimony on this point in the record. These witnesses make it clear that, after the contracts made by them for the defendant had been offset against others, and thereby cancelled, no other contracts were substituted in their place which the defendant could have enforced. In fact there was no substitution. No contracts were designated to take the place of those cancelled. All that the plaintiffs say on this point is, that it was their purpose to apply the first produce delivered in August on contracts of sale, first to the oldest contract of purchase, and it was uncertain on what contract the first delivery would be made until the delivery actually took place. If there was any substitution of other contracts for the cancelled ones it was only in the mental operations of the plaintiffs, to which no outward expression whatever was given. The plaintiffs admit in their evidence that after the original contracts made for the defendant were offset and released they alone were bound to the defendant, and that there were no other persons against whom

the defendant could have maintained an action. It is plain, therefore, that upon their own showing the plaintiffs did not make the substitution required by sec. 6 of rule 26 of the Board of Trade.

The facts of the case being shown and not disputed, the question whether there had been a valid substitution of contracts under the rule referred to was a question of law. It depended on the construction of the rule, which it was the duty of the court to interpret. *Levy* v. *Gadsby*, 3 Cranch, 180; *Walker* v. *Bank of Washington*, 3 How. 62; *Goddard* v. *Foster*, 17 Wall. 123.

When, therefore, the Circuit Court said to the jury, that, assuming that the plaintiffs themselves have told the truth in this case, there has been no valid substitution of other contracts for those that were cancelled it was merely applying the rule of the Board of Trade as it construed it to the plaintiffs' own version of the facts, and, in so doing, discharged its own duty without invading the province of the jury. It is quite clear, also, from what has been said, that the construction put on the rule by the Circuit Court was correct. We do not see how the rule could have been differently construed. The case, as shown by the testimony, was this: The plaintiffs had been employed by the defendant as his agents to make contracts in his behalf for the purchase of pork and lard. They made contracts under this authority and almost immediately cancelled them, and substituted no other contracts which the defendant could have enforced. There is nothing in the record to show that the plaintiffs were liable to the defendant upon the original contracts made by them for the latter, and there were no substituted contracts on which either the plaintiffs or other persons were liable. The defendant, therefore, on August 1, 1883, had no contract on which he could have demanded the delivery of a pound of pork or lard, or have sustained an action against any one for failure to deliver. The money which the plaintiffs seek to recover in this suit was not, therefore, paid out for the use of the defendant, and an action therefor cannot be maintained against him.

The court would, therefore, have been justified in charging

the jury, that, upon the plaintiffs' own testimony, they were not entitled to a verdict against the defendant upon the cause of action set out in their petition. *Pleasants* v. *Fant*, 22 Wall. 116; *Griggs* v. *Houston*, 104 U. S. 553; *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 U. S. 478. We are of opinion, therefore, that the charge of the Circuit Court, so far as it related to the right of the plaintiffs to recover, was not open to any of the objections urged against it by the plaintiffs.

The next objection made to the charge has reference to that instruction in which the court said: "If you find the original contract to have been valid, and that the defendant is excused or absolved from liability because of the attempted substitutions, which the court instructs you were not made in accordance with said rule, then, and in that case, the defendant will be entitled to recover upon the cross-action against the plaintiffs for all the money which he advanced in pursuance of these contracts." This part of the charge was specifically pointed out by an exception taken by the plaintiffs, to the effect that it allows the defendant to recover, notwithstanding his confession of record that the transactions in which he was engaged with the plaintiffs were gambling transactions, and allows him to recover what he admits were advances made for the purpose of carrying on the business of gambling. We think, therefore, that the record fairly presents the question whether this instruction was right. The Ohio Code of Civil Procedure requires that a cause of action set up as a counter-claim in the answer of the defendant "must be one . . . arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Sec. 94. The counter-claim pleaded by the defendant was within the terms of this section.

A counter-claim under the Ohio Code is regarded as a cross-action. When it has been set up in an answer the plaintiff will not be allowed to dismiss his suit without the defendant's consent, *Wiswell* v. *First Congregational Church*, 14 Ohio St. 31; and it must state facts recognized by courts of law or equity as constituting a cause of action, *Hill* v. *Butler*, 6 Ohio St. 207. If a plaintiff dismiss his action against the defendant,

or fail to appear, that will not prevent the defendant from prosecuting the counter-claim set up in the suit to final judgment againt the plaintiff. Code of Procedure, § 373. Rev. Stat. 1880, § 5315.

The court may at any time before the final submission of the cause allow a counter-claim set up in the answer to be withdrawn, and on motion of either party an action on the same shall be docketed and proceeded in as in like cases after process served. Code of Procedure, § 119.

The defendant's counter-claim is, therefore, to be tested by the same rule as if it had been the basis of an independent action, and the question is whether under any circumstances the defendant should have been allowed upon the pleadings and evidence to recover a judgment thereon. The instruction of the court now under review directed the jury, if they found the original contract to have been valid, but the defendant not liable thereon, because the substitution was not made as required by the rules of the Board of Trade, that the defendant was entitled to recover the money advanced by him to the plaintiffs. The verdict of the jury for the defendant on his counter-claim must have been based on a finding that the original contracts were valid and not gambling contracts, and the question is therefore whether the instruction was right, and, if not, whether the error was cured by the verdict of the jury.

We think the charge objected to was erroneous. The cross-action of the defendant, as an independent suit, it is clear, could not have been maintained. His case, as stated by himself in his answer and counter-claim, was that the money was advanced by him to carry on a gambling transaction, that with his concurrence the money so advanced was used in such gambling transactions, and that by the statutes of Illinois, where the contracts were made, they were treated as gaming contracts and declared illegal and void, and the making of them a criminal offence. The counter-claim thus stated was supported by the testimony of the defendant himself, given upon the trial. There was no statute of Illinois to authorize the recovery of money paid on such contracts. The cross-

action, therefore, of the defendant, stated in his pleading and supported by his own deposition, was not one on which any recovery could be had. *Armstrong* v. *Toler*, 12 Wheat. 258; *Brown* v. *Tarkington*, 3 Wall. 377; *Davidson* v. *Lanier*, 4 Wall. 447; *Hanauer* v. *Doane*, 12 Wall. 342. The court was bound to take judicial notice of the fact that the dealings recited in the counter-claim were forbidden by law, and of its own motion should have directed a verdict against the defendant thereon. *Oscanyan* v. *Arms Company*, 103 U. S. 251. If the defendant had withdrawn his counter-claim and docketed it as a separate suit against the plaintiffs, as permitted to do by the code, it needs no discussion to show that his action must have failed. His rights are not changed by the fact that the two causes go on *pari passu*, and are tried at the same time. We do not see on what ground a party, who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offence by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate.

In the present case the plaintiffs alleged and insisted that their transactions with the defendant were carried on with no unlawful purpose. On the other hand, the defendant alleged and insisted that in the same transactions he intended to violate the law. We see no reason why in such a case the plaintiffs might not, if they had not cancelled the contracts, recover the money paid by them for the defendant, while at the same time the defendant could not recover the money advanced to the plaintiffs for what he intended to be an unlawful purpose.

In *Holman* v. *Johnson*, Cowper, 341, 343, it was said by Lord Mansfield that "the objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the

plaintiff, by accident, if I may so say. The principle of public policy is this *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiffs' own stating, or otherwise, the cause of action appear to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for when both are *equally* in fault *potior est conditio defendentis.*"

If, therefore, the defendant intended to embark his money in an illegal and criminal venture, we do not see how his case is helped by the fact that the purpose of the plaintiffs was to invest the money so advanced in what they understood to be a lawful and innocent transaction.

The paragraphs of the charge of the court excepted to amounted in substance to this, that if the plaintiffs, in making the contracts for the defendant, contemplated and intended an actual purchase and an actual sale, but the defendant did not, but, on the contrary, meant to engage in a gambling venture, the contract would, nevertheless, be binding on both parties, and if the plaintiffs cancelled the contracts, the defendant, notwithstanding his intention to violate the laws, could recover from the plaintiffs the money advanced by him to carry out his unlawful purpose. We think this charge was erroneous. Upon the case made by his counter-claim, the defendant was not entitled to recover, and the fact that the plaintiffs were innocent of any unlawful purpose did not enure to the benefit of the defendant, who confessed that the money which he sought to recover had been paid by him to promote an illegal and criminal venture.

Upon the pleadings the verdict of the jury cannot help the defendant's case. Section 5328 of the Revised Statutes of Ohio of 1880 provides "that when upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict

has been found against such party." It is clear that, upon the defendant's counter-claim, which showed that he had no valid cause of action against the plaintiffs, no valid judgment could be rendered against them. Notwithstanding the verdict, the judgment should have been against the defendant, and for the plaintiffs, upon the counter-claim of the former.

We are of opinion, therefore, that

The judgment in favor of the defendant on the cause of action alleged in the plaintiffs' petition should be affirmed, and the judgment in favor of the defendant, on the cause of action set up in his answer by way of counter-claim, should be reversed, and the cause remanded with directions to enter a judgment for the plaintiffs and against the defendant on the counter-claim of the latter.

REYNOLDS & Another *v.* IRON SILVER MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Submitted January 4, 1886.—Decided March 1, 1886.

In procuring a patent for a placer mine claim under § 2333 of the Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known, and pays $5 per acre for twenty-five feet on each side of his vein, and $2.50 per acre for the remainder of his placer claim.

Where no such vein or lode is known to exist, the patent for a placer claim shall carry all such veins or lodes within its boundaries which may be afterwards found to exist under its surface.

But where a vein or lode is *known to exist* under the surface included in such patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode.

The title remaining in the United States in the veins thus known to exist and not claimed or referred to in the patent, the patentee and his grantee have no right to dispossess any one in the peaceable possession of such veins, whether the latter have any title or not.

In such case the rule which applies to actions of ejectment, and to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title.

The facts which make the case are stated in the opinion of the court.

Mr. T. M. Patterson, *Mr. C. S. Thomas* and *Mr. R. S. Morrison* for plaintiffs in error.

Mr. G. G. Symes and *Mr. Hugh Butler* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court for the District of Colorado, which brings here for review a judgment of that court in an action to recover possession of a part of a vein or lode of mineral deposit.

The plaintiff below, the Iron Silver Mining Company, alleges that it was the owner of one hundred and ninety-three and $\frac{43}{100}$ acres of land, conveyed by the United States by patent to its grantors, and seeks to recover of defendants a part of the land thus patented. It is described in the petition as mining land and a mining claim. The patent under which plaintiff claims, which was introduced in evidence, purports to be for placer mines, and it takes two pages of printed matter to describe the courses, distances, and corners. As the law does not permit any one claim to cover more than twenty acres in locating placer mining claims, it is obvious that under the ruling of this court in *Smelting Co.* v. *Kemp*, 104 U. S. 636, a number of these claims, amounting at least to ten, have been consolidated into one patent, which was issued to Wells and Moyer, the patentees.

The defendants below asserted a right to the vein or deposit in which they were working under lode claims called the Crown Point and Pinnacle claims, which were older than that of plaintiff.

Defendants also set out another defence in the following language:

"That at the time of the survey, entry, and patenting of the said Wells and Moyer placer claim, a certain lode, vein, or deposit of quartz or other rock in place, carrying carbonates of lead and silver-bearing ore, and of great value, called the Pinnacle lode, and a certain lode, vein, or deposit, carrying like minerals of great value, were known and claimed to exist within the boundaries and underneath the surface of said placer claim, survey lot No. 281, and that the fact that such vein or veins were claimed to exist and did exist as aforesaid within said premises was known to the patentees of said claim at all the times hereinbefore mentioned, and that in the application for patent for said placer claim the said vein or veins so known to exist were not included, and were, in the patent issued upon such application, expressly excluded therefrom. And further, in the said patent it was expressly and in terms reserved, that the premises in and by such patent conveyed might, by the proprietor of any such vein or lode of quartz or other rock in place, bearing mineral or ore as aforesaid, be entered for the purpose of extracting and removing the ore from such lode, vein, or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the premises by such patent granted."

The case was tried by a jury, and a verdict rendered for plaintiff, under a charge from the court, which required such a verdict at their hands.

The case here must be decided on the correctness of the action of the court in giving that charge, and in refusing to give instructions asked by defendants.

The full charge of the court, which was duly excepted to, is as follows:

"The evidence tends to prove that the lode in controversy was known to Wells and Moyer, grantees of the United States, at the time they made application for the placer patent, under which plaintiff claims title; also that William H. Stevens, one of the grantees of Wells and Moyer, and a grantor of the plaintiff, knew of the existence of the lode at the time application

was made by Wells and Moyer for the placer patent, procured such application to be made with a view to acquiring title to himself and his associates to the territory described, and probably with a view and intention to acquire title to the lode now in dispute in this action. Assuming the placer patent to have been obtained with knowledge and intention on the part of the patentees, as stated, the question is, whether any right or interest in the lode in controversy was conveyed by the patent. That is a question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode, or an intention to claim the same according to local law and the acts of Congress. But here the defendants show no right or title in the lode at the place in controversy. They assume the right to follow the lode on its dip without the side line of the Pinnacle location, and under the Wells and Moyer placer location. To that it is essential that they have the top and apex of the lode within their location in the general direction of the location. A small segment of the top and apex of the lode is shown within the Crown Point location, but it extends not with the length of the location, but across it, so as to convert the side lines of the claim into the end lines, and to limit the direction in which it may be pursued to the space enclosed by those lines. The place in controversy is not within the side lines of either of defendants' locations, nor within the extensions of those lines. No other ground is perceived upon which defendants may assert title or right of possession to the place in controversy, and therefore they are to be regarded as naked intruders, and as to such intruders, the plaintiff's placer title may give a right of possession and recovery. The jury is advised to find for plaintiff, with the value of the ore removed from the placer ground by defendants."

This charge was delivered to the jury after a refusal to give any of the following instructions asked by defendants:

"1. A patent to a placer claim does not pass title to any vein or lode then known or claimed to exist.

"2. If the Pinnacle and Crown Point lodes, or their vein upon which it is alleged defendants have followed into the ground of the Wells and Moyer placer, were known at time of

issue of Wells and Moyer patent, then the vein was not granted in (or was excepted from) the Wells and Moyer patent, and the plaintiff is not entitled to recover.

"4. The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendants' title.

"5. If the jury believe from the evidence that the plaintiff's grantors, at the time of the locations and entry of the Wells and Moyer placer claim, knew or had reason to presume that underneath it was a deposit or vein of ore carrying precious metals in rock in place, then the same was specially excepted from the grant of their patent, and never was the property of the plaintiff or any of its grantors, having been excluded from the grant of the government; no trespass can be committed thereon as against the plaintiff, and they cannot recover, and if the vein upon which the trespass is alleged was the vein so known, then plaintiff cannot recover.

"6. It was not the intention of the federal government to permit owners of placer mining claims to obtain title to known lodes or veins of mineral ore by embracing the same in applications for patents to such placer claims unless specially designated as lode veins in such applications. The exceptions in a patent are to be construed most strongly against the patentees, and the exceptions include not only lodes known, but also those claimed to exist within the placer at the date of the patent; if, therefore, you believe from the evidence that the lode deposit within the boundaries of the Wells and Moyer placer claims was known, or upon valid and subsisting grounds was claimed to exist therein at time of application, entry, or date of patent, then whether it is the property of the defendants or of the government is immaterial, for in either event there has been no ousting or injury to the plaintiff as to its property, and you should find for the defendants."

The conflict in principle between the instructions asked and refused and those given by the court is marked and easily discerned, and presents the only question in the case.

Its primary form is presented by the fourth of the defendants' requests, namely, "that plaintiff must recover on the strength of his own title." This is the fundamental principle on which all actions of ejectment or actions to recover possession of real estate rest. Even where the plaintiff recovers on proof of priority of possession, it is because in the absence of any title in any one else this is evidence of a title in plaintiff. If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say until you show *some* title, you have no right to disturb me, it has not been pointed out to us.

The remainder of this fourth prayer was a further statement of the same rule as applied to the case in hand. "If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendants' title."

There is not in the record any pretence or claim of title in plaintiffs except that growing out of the placer patent to Wells and Moyer. If that gave no title to the vein in controversy plaintiffs had none. There is no assertion by them of prior possession, discovery, or claim to that vein, nor of any other right to it, than that it is found beneath the surface of this placer patent.

While the court refused to give this instruction, he did instruct the jury that the defendants were naked trespassers, and added that, "as to such intruders the plaintiff's placer title might give a right of possession and recovery." He had previously said that this would be a question of some difficulty in a case where defendants had shown some right or interest in the lode or an intention to claim the same according to local laws and the acts of Congress. If this made any difference in defendants' right as against the placer patent, then it appears to us that they did "show an intention to claim the *locus in quo* according to local laws and the acts of Congress," for they were working under the Crown Point and Pinnacle claims, which were legally established, and were pursuing the vein on which

these claims were located. But the court held that the evidence showed that they were pursuing it when it passed out of the end lines of the claim instead of the side lines. It would seem that such possession as this ought to be sufficient to enable them to put the plaintiff upon proof of its title.

It is fair, however, to say that the court in effect affirms the doctrine that the patent for a placer mine (this patent) gives title to a vein or lode under its surface, though known to the original claimant or patentee at the time of the assertion of the claim and issue of the patent, and not disclosed to the land officers, or mentioned in the patent, or in the original claim, as against one not having a superior title.

The court says the evidence tends to prove that the lode in controversy was known to Wells and Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff claims title, also that Stevens, a grantee of Wells and Moyer and grantor of plaintiff, knew of the existence of the lode at the time the application was made for the patent, and procured the application to be made, with the intention to acquire title to the lode now in dispute.

Yet, while the lode is not mentioned in the patent, the court held that for the purposes of this suit the title to it was conferred by that instrument.

It appears to us that such a proposition is opposed to the policy of the acts of Congress in the different rules which it applies to granting titles to placer mines, and to vein, lode, and fissure mines; to the express language of the statute; and to the reservations in the patent itself.

It is not necessary to go further than an examination of Chapter 6 of the Revised Statutes concerning the public lands to see this difference. An act of Congress of May 10, 1872, is the foundation of the existing system by which the citizen acquires right to the lands of the United States containing the precious metals, and its provisions are found in §§ 2318 to 2336 inclusive.

These sections, up to § 2328, relate mainly, if not exclusively, to mineral lodes or veins, and, among other things, they fix the amount or quantity of land which may be acquired under any

one claim, the maximum of which is 1500 feet along its length and 300 feet in width on each side of it, subject to further limitations under acts of the State legislatures, and the mining rules of the district. The price for this when a patent is sought is five dollars per acre, as measured by the surface lines of the patent, and these lines must necessarily conform to the course of the vein and not to Congressional surveys. The owner of one of these veins may follow it outside of the perpendicular extension of the side lines of the claim, but not outside of its end lines.

Placer claims, beginning with § 2329, are declared to include all other forms of mineral deposits, except veins of quartz or other rock in place, and may be entered on similar proceedings as those provided for vein or lode claims. The surveys for these shall conform as near as may be to Congressional surveys, and may include in each claim twenty acres of superficial area, but when the location cannot be made to conform to legal subdivision, it may be made as upon unsurveyed lands.

The most important part of the law in reference to the matter in hand is found in § 2333 of the Revised Statutes, which is as follows:

"SEC. 2333. Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode such as is described in section twenty-three hundred and twenty is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration

that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

These varying provisions of the act of Congress as regards the two classes of mineral deposits and their surroundings are founded on the well known difference in their character. The veins, loads or fissures mentioned in § 2320 are found in the surrounding rock, and are described and defined in the case of the *Iron Silver Mining Co.* v. *Cheesman and others*, recently decided in this court, *ante*, 529. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath. The one is only made available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface, and subjecting it to crushing, melting, and other processes by which the precious metal is separated from the ore of which it is a part. In the other, the more usual way is to take the soft earthy matter in which the particles of mineral are loosely mingled, and by filtration separate the one from the other. It is very clear that Congress considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit, and it accordingly, when a patent was asked, fixed the price of the former at $5 and of the latter at $2.50 per acre, as represented by the superficial area of the survey. It also for the same reason limited the quantity of the former, which any single claimant could obtain from the government in some cases, to less than half of what he could obtain of the latter.

This was not done, as suggested by counsel, in special regard to the revenue of the government from this source, but to prevent too much of this rich public mineral falling into the hands of one successful explorer, to the exclusion of others.

But experience had shown that both these classes of mineral deposits might be found within the same survey of superficial area; and section 2333 makes specific provision for such a

case. There was no difficulty in case of a patent for a lode or vein, for this necessarily must include both the surface by which it was measured, and the vein beneath it. But in the case of a placer mine whose deposits were superficial, there might be under it a vein of far more value than the twenty acres of surface mineral.

A man cognizant of the existence of such a vein, who could, if he established his right to it as a lode, secure only a limited part of it, if he could cover it with a placer claim, would thereby increase the quantity of this vein over what he could get by making a lode claim, in double the amount, and in some cases, regulated by State or local mining laws, he might quadruple it. Congress also had to deal with the possibility that a vein might be discovered under the surface of a placer claim after the claimant had received his patent.

What Congress did, and intended to do, in the presence of these suggestions, is, we think, very plain. It made provision for three distinct classes of cases:

1. When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact, and on payment of the sum required for a vein claim and twenty-five feet on each side of it, at $5 per acre, and $2.50 for the remainder of the placer claim, his patent shall cover both.

2. It enacted that where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof.

3. But in case where the applicant for the placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is *known to exist*, and it is not referred to or mentioned in the claim or patent, then the *application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.*

It is this latter class of cases to which the one before us belongs.

It may not be easy to define the words "*known to exist*" in

this act. Whether this knowledge must be traced to the applicant for the patent, or whether it is sufficient that it was generally known, and what kind of evidence is necessary to prove this knowledge, we need not here inquire. It is perhaps better that these questions should be decided as they arise. They do not arise here, because the court took all this kind of evidence from the jury on the ground that defendants were trespassers.

It said, in the charge, not only was there evidence that the vein was known to exist when the application was made by Wells and Moyer, but that *they* knew it, and that one of the parties in interest, Stevens, knew it, and procured the application to be made for the placer patent with the intent to secure this lode. There was here no question of sufficiency or character of the testimony as to the knowledge of the existence of this vein, but the jury was told that it was all immaterial because in any event the patent carried the lode as against the defendants.

The patent itself declares that it is subject to the following conditions:

1. That it is restricted to any lodes, veins, or other mineral-bearing quartz, which *are not claimed or known to exist* at the date of the patent.

2. That should any such vein or lode be claimed or known to exist within the described premises at the date of the patent, the same is expressly excluded from it.

It is said that this part of the patent is void because there was no law which authorized its insertion, and because it is in conflict with the rights of the claimant of a placer mine under the acts of Congress.

Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions but give expression to the intent of the statute.

We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in

clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as *were known* to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was *known to exist* at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent.

Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defence against one who has no title at all, and never had any.

The judgment of the Circuit Court is reversed, and the case remanded to that court, with instructions to set aside the verdict and grant a new trial.

Mr. Chief-Justice Waite dissenting.

I am unable to agree to this judgment. The facts briefly stated are these: The Mining Company holds title under a patent for a placer claim. Within the boundaries of this claim, as located on the surface and extended vertically downwards, is a vein or lode. The existence of this vein or lode was known when the patent under which the Mining Company holds was issued, but it had not then, nor has it now, been located as a vein or lode claim. Neither Reynolds nor Morrissey has any title to or claim upon the lode within the boundaries of the placer claim. They are mere intruders, having wrongfully, and without any authority of law, worked from an adjoining claim under the surface of the placer claim of the Mining Company and taken possession of the mineral in the lode. Under these circumstances it seems to me the Mining Company

Syllabus.

has the better right. The question is not whether the company owns the lode or vein, nor whether it has the right to take mineral therefrom, but whether as against a mere intruder it has the better right to the possession. By the express provision of Rev. Stat. § 2333 the patent, under which the company holds, gives it no right to the possession of any vein or lode *claim* within the boundaries of the placer patent, but as yet no such *claim* exists. There is a lode or vein, but no one has either claimed or attempted to claim it. Quite different questions would arise if Reynolds or Morrissey were attempting to locate a lode claim within the boundaries of the placer patent upon a lode known to exist when the patent was applied for. In my opinion the charge of the court was right, and the judgment should be affirmed.

WATERVILLE *v.* VAN SLYKE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Submitted January 25, 1886.—Decided March 1, 1886.

When a case is brought here from a Circuit Court for review, in which the matter in controversy is less than $5000, it will be dismissed, although accompanied by a certificate of division of opinion by the judges holding the court, unless that certificate presents a case proper for the consideration of this court.

Each question so certified must present a clear and distinct proposition of law to which the court can respond, and not a proposition of mixed law and facts.

While such a statement must accompany the certificate as to show that the question of law is applicable to the case, the point on which the judges differed must be a distinct question of law clearly stated.

This procedure is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the decision of the case arises, on which, differing in opinion, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate ; but where it is apparent that the whole case is presented to this court for decision, with all its propositions of fact and of law, the case will not be entertained. Such is this case, and it is accordingly dismissed.

The facts which make the case are stated in the opinion of the court.

Mr. W. W. Guthrie, and *Mr. E. Stillings* for plaintiff in error.

Mr. S. E. Brown for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court for the District of Kansas.

In that court there was a judgment against the plaintiff in error for the sum of $1282.06. The amount is too small to give this court jurisdiction on a writ of error to a Circuit Court. There is, however, a certificate of division of opinion between the circuit judge and the district judge sitting at the trial without a jury.

We have decided that under the act of 1872, a case may be brought to this court on a certificate of division, without regard to the amount in controversy. *Dow* v. *Johnson*, 100 U. S. 158. But that decision was based upon a valid certificate which presented *properly* questions material to the decision of the case. If this were not necessary to our jurisdiction, a form of certificate, which might present no question that this court can consider, might be used to require of it a review of other matters than those on which the court divided, though the amount in controversy is insignificant. It is, therefore, only where the certificate does present, in accordance with the statute, a division of opinion in such a manner and on such a question as to give this court jurisdiction that the amount in controversy can be disregarded as an element of jurisdiction.

As to the character of the certificate on which this court will act, the statute of 1872, and the Revised Statutes have made no change, and the decisions of this court, are full on that subject. The substance of these decisions, as applicable to the case before us, is, that each question so certified must contain a distinct proposition of law which this court can answer negatively or affirmatively, and that the whole case cannot be presented by a recital of the evidence and interrogatories so framed

as to require this court to decide the whole case on mixed propositions of law and fact.

In short, while such a statement of facts must accompany the certificate as to show that the question of law is applicable to the case, the *point* on which the judges differed must be a distinct question of law clearly stated.

In *Wilson* v. *Barnum*, 8 How. 258, 262, the court said: "This act has been in force for nearly half a century, . . . and in the multitude of questions which have been certified, this court has never taken jurisdiction of a question of fact. And in a question of law it requires the precise point to be stated, otherwise the case is remanded without an answer."

The same thing is said in *Brobst* v. *Brobst*, 4 Wall. 2, namely, that "it has been repeatedly determined that only questions of law upon distinct points in a cause can be brought to this court by certificate."

In the case of *United States* v. *Briggs*, 5 How. 208, 210, on a demurrer to indictment, the judges certified a division of opinion as to whether the demurrer was well taken; and though the record showed the grounds of demurrer, the court said: "The question upon which the disagreement took place is not certified. The difference of opinion is, indeed, stated to have been on the *point* whether the demurrer should be sustained. But such a question can hardly be called a point in the case within the meaning of the act of Congress, for it does not show whether the difficulty arose upon the construction of the act of Congress on which the indictment was founded—or upon the form of proceeding adopted to inflict the punishment —or upon any supposed defect in the counts in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer, and joinder, leaving this court to look into the record and determine for itself whether any sufficient objection can be made in bar of the prosecution, and without informing us what questions had been raised in the Circuit Court upon which they differed." Having said that the causes of the demurrer could not inform the court on that subject, the Chief Justice added: "But we are bound to look to the certificate alone for the question which occurred and for

the point on which they differed, and, as this does not appear, we have no jurisdiction in the case."

A case very analogous to the one before us is that of *White* v. *Turk*, 12 Pet. 238, in which the court says: "The intention of Congress, in passing the act under which this proceeding has taken place, was that a division of the judges of the Circuit Court, upon a single material point, in the progress of the cause, should be certified to the court for its opinion; and not the whole cause." "This certificate, therefore, brings the whole cause before this court, and if we were to decide the questions presented, it would in effect be the exercise of original, rather than appellate, jurisdiction."

To the same purport is the language of Chief-Justice Marshall in *United States* v. *Bailey*, 9 Pet. 267, 273.

In the case of *Havemeyer* v. *Iowa County*, 3 Wall. 294, the point is fully considered. See also *Dennistoun* v. *Stewart*, 18 How. 565; *Sadler* v. *Hoover*, 7 How. 646.

Applying these principles to the case before us, we think it must be dismissed.

The record shows a finding of facts upon the whole case, as it was submitted to the court without a jury.

This finding is stated to be made under the laws of Kansas in such cases, and not under the act of Congress, concerning a review when a jury is waived, nor under the act concerning differences of opinion between the judges to be certified to this court. The finding is, in fact, nothing but a recital of the evidence on which the presiding justice rendered judgment in favor of plaintiff. They number eleven separate findings of fact, and were excepted to by counsel, and exception was taken to the evidence received to support them.

This is accompanied by the following certificate:

"Be it remembered, that upon the trial of this action upon issue joined upon petition of plaintiff, answer of defendant, and reply of plaintiff, the cause having been duly heard and taken under advisement by the court, was considered by said two judges, and thereupon the said two judges were divided in opinion upon questions of interest and importance arising upon

the conclusions of fact found and stated by the court upon the said trial, viz.:

"1st. Had the defendant, as such city, power to issue such bonds for the said purpose in the original issue thereof, 1872, and did such want of power or such power appear upon the face thereof?

"2nd. Did defendant issue the said bonds sued on?

"3rd. If issued by defendant, had defendant power, as such city, to issue such bonds sued on for the said purpose therein expressed, and did such want of power, if not existing, appear upon the face of such bonds?

"4th. If such bonds sued on were issued by defendant and disposed of in open market for value, without other notice to purchasers than such as all persons were bound to take from the public character thereof, is the defendant estopped from denying its liability thereon to plaintiff?

"5th. Upon the conclusions of fact so found and stated upon the trial of this action is the plaintiff entitled to judgment for said amount stated, the said circuit judge being of opinion that such questions should be determined in favor of the plaintiff and judgment rendered in his favor for the said amount stated, and the said district judge differing therefrom?

"And judgment having been ordered in favor of plaintiff, and defendant having duly excepted thereto:

"It is now here ordered that the said questions as above stated, and upon which the said judges were divided in opinion, as aforesaid, that same shall be forthwith stated under the direction of said judges and certified and entered of record in said cause for writ of error to the Supreme Court of the United States, and which is now accordingly done in open court at said term thereof, and writ of error from such judgment is now allowed to said defendant, and bond fixed therefor to operate as supersedeas in the sum of $2000.

"Done and certified this 3rd day of March, A.D. 1885, in open court."

We do not see that any distinct question of law is stated on which the judges differed. In every instance it is what infer-

ence should be drawn from the facts found in the case, or rather from the evidence.

Take the first question. Does it refer to want of legislative action in regard to the power, or to want of constitutional power, in the legislature? Or does it refer to the want of proper action by the town authorities, or to want of the recital of their action in the face of the bond?

As to the second question, it appears to present a simple question of fact as to the actual issue of the bonds by the defendant. The third is very much like the first.

The fourth and fifth are still less presentations of any distinct propositions of law, but are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone.

And finally, it is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges, of the difficulties they have found in doing so.

It presents nothing like as clear a case as that of a demurrer to an indictment, which demurrer recited the grounds on which it was made, but which this court held presented no statement of the question of *law* on which the judges differed. *United States* v. *Briggs*, 5 How. 208.

We repeat that this procedure is not intended to enable the parties in the Circuit Court to bring up the entire case to be retried here. It is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the decision of the case, arises, on which, differing, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate, but where it is apparent that the whole case is presented to this court for decision, with all its propositions of fact and of law, the case will not be entertained. Such a case is this, and it is accordingly

Dismissed.

APPENDIX.

RICHARD T. MERRICK.

THE BAR OF THE SUPREME COURT OF THE UNITED STATES met in the court-room, in the Capitol, Washington, on Monday, December 14, 1885, at 11 o'clock, A.M., to pay respect to the memory of the late RICHARD T. MERRICK.

On motion, Mr. GEORGE F. EDMUNDS was called to the chair, and Mr. JAMES H. MCKENNEY was elected Secretary.

Mr. EDMUNDS, on taking the chair, addressed the meeting as follows:

GENTLEMEN OF THE BAR: We have met, as we often have done before, to go through the not perfunctory ceremony of paying our last sad tribute to the worth and memory of one of us whom we have so often heard with pleasure, and who has now gone to his reward. I have known Mr. MERRICK ever since the somewhat long time that I have been connected with public affairs in Washington. Although differing widely in our political associations and opinions, we were not the less firm friends, and I had for him a very high admiration. A man of learning, honor, industry, persistence, he was an ornament to the Bar and a great aid as a counsellor to the Court. All that we can do is to express our appreciation of his life and services, and our sorrow at his untimely departure.

On motion of Mr. J. RANDOLPH TUCKER the following gentlemen were appointed by the Chair to constitute a Committee on Resolutions: Mr. J. RANDOLPH TUCKER, Mr. A. R. LAWTON, Mr. ROBERT S. GREEN, Mr. JOHN W. DANIEL, Mr. WILLIAM A. MAURY, Mr. J. HUBLEY ASHTON, Mr. A. PORTER MORSE.

The committee thereupon retired, and, on returning, reported, through Mr. TUCKER, the following resolutions for adoption.

The Bar of the Supreme Court of the United States have met to express their profound sense of the loss they have sustained in the death of the Hon. RICHARD THOMAS MERRICK, and to bear their testimony to the public and private virtues which marked his distinguished career : Be it therefore

Resolved, That in the death of their departed brother they have been deprived of association with one who was a gifted and brilliant advocate, an able, laborious, and learned lawyer, and a conscientious and wise counsellor. His spotless character, his bold and fearless discharge of forensic duty, his devotion to his country and its free institutions, and his fidelity in all the other relations of life, have commanded public esteem and confidence, and deserve to be commemorated by the profession upon which he has shed the lustre of his pure and exalted name.

Resolved, That the sincere sympathies of this meeting are hereby tendered to the orphan children and family of our deceased brother.

Resolved, That the chairman of this meeting is hereby requested to send an engrossed copy of these resolutions to the family of the deceased, and that the Attorney-General be requested to lay the proceedings of this meeting before the Supreme Court of the United States for such action as may be appropriate.

Mr. TUCKER moved the adoption of the resolutions, and, after remarks by Mr. TUCKER, Mr. THOMAS F. BAYARD, Mr. GEORGE TICKNOR CURTIS, Mr. A. R. LAWTON, Mr. ATTORNEY-GENERAL, and Mr. Z. B. VANCE, they were unanimously adopted.

On Friday, the 18th of December, 1885, upon the opening of Court, Mr. ATTORNEY-GENERAL addressed the Court as follows :

MAY IT PLEASE THE COURT : At a meeting of the Bar of this Court held last Monday in this chamber, to give expression touching the death of our late distinguished brother, RICHARD T. MERRICK, suitable resolutions were adopted, and I, as Attorney-General, was requested to present them to this Court for such action as might be deemed proper for the Court to take. My own relations with the deceased, and his bright and honorable record in this Court, make the performance of this duty by me one of melancholy pleasure, and I now comply with that request.

Mr. CHIEF-JUSTICE WAITE thereupon directed that the resolutions be placed on the files of the Court.

INDEX.

ACQUITTAL.

See JUDGMENT, 2.

ACTION.

See APPEAL, 3; CONSTITUTIONAL LAW, 1; DECEIT; EQUITY, 3; PLEADING, 1; TRESPASS.

APPEAL.

1. An appeal will not be entertained by this court from a decree entered in a Circuit or other inferior court in exact accordance with the mandate of this court upon a previous appeal. *Mackall* v. *Richards*, 45.
2. In an appeal from the execution of a mandate of this court the appellant cannot object to an order in the original decree which was not objected to on the former appeal. *Ib.*
3. A defence, growing out of matter which happens after a mandate is sent down, can only be availed of by an original proceeding appropriate to the relief sought. *Ib.*
4. Except in cases of appeals allowed in open court during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error is necessary to perfect the jurisdiction of this court over the appeal or the writ, unless it sufficiently appears that citation has been waived. *Hewitt* v. *Filbert*, 142.
5. When a judgment of the Court of Claims is reversed and the case is remanded for new trial, the findings of fact on the first trial form no part of the record on appeal from the judgment in the second trial, unless embodied by that court in the second findings. *Union Pacific Railroad Co.* v. *United States*, 402.
6. When a claimant in the Court of Claims amends his petition by filing a new one in the place of it, and the case is heard on the amended petition only, and on appeal that court sends up only the amended

petition, this court will not issue a writ of certiorari to bring up the original petition. *Ib.*

See JURISDICTION A., 2; B, 1, 2; D., 1, 3, 4.

APPEARANCE.

See WRIT OF ERROR.

ARMS, THE RIGHT TO BEAR.

See CONSTITUTIONAL LAW, 7.

ARSENAL ISLAND.

Whether the island in the Mississippi River opposite St. Louis, known as Arsenal Island, shall be surveyed and brought into the market is a matter within executive discretion and judgment. *Carrick* v. *Lamar*, 423.

ATTORNEY-AT-LAW.

See CONSTITUTIONAL LAW, 23;
LICENSE TAX, 2, 4.

BANKRUPTCY.

1. Notice given to the holder and owner of an accommodation note, under § 17 of the act of June 22, 1874, of composition proceedings in bankruptcy by or against the payee and indorser for whose accommodation the note was given, is notice to the accommodation maker of the original bankruptcy proceedings, and that the payee may be discharged thereby. *Liebke* v. *Thomas*, 605.
2. A lawful composition with creditors under § 17 of the act of June 22, 1874, and its performance by the party has the effect of a discharge in bankruptcy. *Ib.*

BURDEN OF PROOF.

See EVIDENCE, 6, 7.

CADET ENGINEERS.

See NAVAL OFFICERS, 3, 4, 5.

CALIFORNIA SCHOOL LANDS.

See PUBLIC LAND, 3.

CASES AFFIRMED OR APPROVED.

1. *Moore* v. *Mississippi*, 21 Wall. 636, affirmed and applied. *Otis* v. *Oregon Steamship Co.*, 548.
2. *Pennsylvania Railroad Co.* v. *Locomotive Truck Co.*, 110 U. S. 490, affirmed. *Miller* v. *Foree*, 22.
3. *St. Louis, Iron Mountain and Southern Railway Co.* v. *McGee*, 115 U. S. 469, affirmed and applied. *Doe* v. *Larmore*, 198.
4. *Stewart* v. *Salamon*, 97 U. S. 361, affirmed. *Mackall* v. *Richards*, 45.
5. *Supervisors* v. *Kennicott*, 94 U. S. 498, again affirmed. *Chaffin* v. *Taylor*, 567.
6. *United States* v. *Jordan*, 113 U. S. 418, affirmed. *United States* v. *Price*, 43.

CASES DISTINGUISHED.

The case of *United States* v. *Carll*, 105 U. S. 611, distinguished. *Cannon* v. *United States*, 55.

CASES DOUBTED, DISAPPROVED, OR OVERRULED.

Thorogood v. *Bryan*, 8 C. B. 115, disapproved. *Little* v. *Hackett*, 366.

CERTIFICATE OF DIVISION.

See DIVISION OF OPINION.

CERTIORARI.

See APPEAL, 6.

CHALLENGE.

See JURY, 1, 2.

CIRCUIT COURTS OF THE UNITED STATES.

See JURISDICTION, B.

CITATION.

See APPEAL, 4;
JURISDICTION, A., 2;
WRIT OF ERROR.

CITIZENSHIP.

See EVIDENCE, 5.

CODES.

See STATUTES, A., 5.

COMMISSIONERS.

See FEES.

COMPENSATION.

See CONSTITUTIONAL LAW, 2;
FEES;
NAVAL OFFICERS.

COMPOSITION.

See BANKRUPTCY, 1, 2.

CONFLICT OF LAW.

See MUNICIPAL BOND, 1, 2.

CONSTITUTIONAL LAW.

1. Under art. 4, sec. 1, of the Constitution, and § 905 of the Revised Statutes, a judgment recovered in one State against two joint defendants, one of whom has been duly summoned and the other has not, and which is valid and enforceable by the law of that State against the former alone, will support an action against him in another State. *Hanley* v. *Donoghue*, 1; *Renaud* v. *Abbott*, 277.
2. Where a law attaches a fixed compensation to a public office during the whole term of service of a person legally filling the office and performing the duties thereof, a perfect implied obligation arises to pay for the services at the fixed rate, to be enforced by the remedies which the laws then give; and a change in the State Constitution which takes away then existing powers of taxation so as to deprive the officer of the means of collecting his compensation is within the prohibitory clause in the Constitution forbidding the passage of State laws impairing the obligation of contracts. *Fisk* v. *Jefferson Police Jury*, 131.
3. The prohibition of the Constitution against State laws impairing the obligation of contracts applies to implied as well as to express contracts. *Ib.*
4. A statute of the Territory of Colorado authorized a board of managers to receive a conveyance of a site in Denver for the Capitol of the Territory. A, by warranty deed, conveyed a tract for such site to the board "for the purpose of erecting a capitol and other buildings thereon only." The Territory made no use of the tract before the admission of Colorado as a State. After its admission, A executed and put on record a deed annulling the gift, and took possession of the tract, and was in possession when he brought this suit. The bill set forth these facts, alleged that the board was about to take possession of the tract for the purpose of erecting buildings thereon, and prayed an injunction.

All parties to the suit were citizens of Colorado. *Held*, That if the facts raised any Federal question, they did not show that A was about to be deprived of his property without just compensation. *Brown* v. *Grant*, 207.

5. The doctrine that statutes, constitutional in part only, will be upheld as to what is constitutional, if it can be separated from the unconstitutional provisions, reasserted. *Presser* v. *Illinois*, 252.
6. A State statute providing that all able-bodied male citizens of the State between eighteen and forty-five, except those exempted, shall be subject to military duty, and shall be enrolled and designated as the State militia, and prohibiting all bodies of men other than the regularly organized volunteer militia of the State and the troops of the United States from associating together as military organizations, or drilling or parading with arms in any city of the State without license from the governor, as to these provisions is constitutional and does not infringe the laws of the United States, and is maintained as to them, although the act contains other provisions, separable from the foregoing, which might be held to infringe upon powers vested in the United States by the Constitution, or upon laws enacted by Congress in pursuance thereof. *Ib.*
7. The provision in the Second Amendment to the Constitution, that "the right of the people to keep and bear arms shall not be infringed," is a limitation only on the power of Congress and the national government and not of the States. But in view of the fact that all citizens capable of bearing arms constitute the reserved military force of the national government as well as in view of its general powers, the States cannot prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security. *Ib.*
8. The provision in the Fourteenth Amendment to the Constitution that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not prevent a State from passing such laws to regulate the privileges and immunities of its own citizens as do not abridge their privileges and immunities as citizens of the United States. *Ib.*
9. Unless restrained by their own Constitutions, State legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations, except those which are authorized by the militia laws of the United States. *Ib.*
10. The right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction, cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law. *Stone* v. *Farmers' Loan & Trust Co.*, 307.
11. A statute which grants to a railroad company the right "from time to time to fix, regulate and receive, the tolls and charges by them to

be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. *Ib.*

12. An act of incorporation, which confers upon the directors of a railroad company the power to make by-laws, rules and regulations touching the disposition and management of the company's property and all matters appertaining to its concerns, confers no right which is violated by the creation of a State Railroad Commission, charged with the general duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State, and with the enforcement of reasonable police regulations for the comfort, convenience and safety of travellers and persons doing business with the company within the State. *Ib.*
13. An act of incorporation of a railway company which provides that the president and directors may "adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper," and the same "alter and change at pleasure," does not deprive the State of its power, within the limits of its general authority as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so adopted and established. *Stone* v. *Illinois Central Railroad Co.*, 347.
14. A State statute providing that a railroad company may receive for transporting, carrying and telegraphing, such tolls and charges as might from time to time be established, fixed and regulated by the directors, and that the act should be construed liberally so as to favor its purposes and objects, *provided*, that nothing in it should be construed as preventing the legislature from regulating the rates of transportation for passengers and freight over the road, and *provided further*, that there should be no discrimination in favor of any road, does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so established, fixed and regulated. Subsequent legislation by the State fixing a maximum rate for other railroads does not apply to this road by virtue of the proviso as to discrimination. *Stone* v. *New Orleans & Northeastern Railroad Co.*, 352.
15. It is within the constitutional power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates. *Gibbons* v. *District of Columbia*, 404.
16. A tax imposed by a statute of a State upon an occupation, which necessarily discriminates against the introduction and sale of the products of another State or against the citizens of another State, is repugnant to the Constitution of the United States. *Walling* v. *Michigan*, 446.

17. The police power of a State to regulate the sale of intoxicating liquors and preserve the public health and morals does not warrant the enactment of laws infringing positive provisions of the Constitution of the United States. *Ib.*

18. A State statute which imposes a tax upon persons who, not residing or having their principal place of business within the State, engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State, is a regulation in restraint of commerce repugnant to the Constitution of the United States : and the defect is not cured by a subsequent enactment, imposing a greater tax upon all persons within the State engaged in the business of manufacturing or selling such liquors therein. *Ib.*

19. Goods and chattels within a State are equally taxable whether owned by a citizen of the State, or a citizen of another State, even though the latter be taxed in his own State for the value of the same goods as part of his general personal estate. *Coe* v. *Errol*, 517.

20. Goods, the product of a State, intended for exportation to another State, are liable to taxation as part of the general mass of property of the State of their origin, until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose ; the carrying of them to, and depositing them at, a depot for the purpose of transportation is no part of that transportation. *Ib.*

21. When goods, the product of a State, have begun to be transported from that State to another State, and not till then, they have become the subjects of inter-state commerce, and, as such, are subject to national regulation, and cease to be taxable by the State of their origin. *Ib.*

22. Goods on their way through a State from a place outside thereof to another place outside thereof, are in course of inter-state or foreign transportation, and are subjects of inter-state or foreign commerce, and not taxable by the State through which they are passing, even though detained within that State by low water or other temporary cause. *Ib.*

23. After lawful tender to the proper State officer of the requisite amount of coupons (receivable by the terms of the act of the State of Virginia of March 30, 1871, in payment of taxes, debts, dues, and demands due the State) for a "separate revenue license" by a person otherwise duly authorized and licensed to practise as an attorney-at-law, and after refusal by that officer to receive the same or to issue the "separate revenue license," the person so making the tender may at once enter upon the practice of his profession ; and any law of the State subjecting him to criminal proceedings therefor is in conflict with the Contitution of the United States. *Royall* v. *Virginia*, 572.

24. The 5th section of the act of June 22, 1874, entitled "An Act to amend the customs revenue laws," &c., which section authorizes a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney to be taken as confessed : *Held*, To be unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the Fourth and Fifth Amendments of the Constitution. *Boyd* v. *United States*, 616.

25. Where proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the 12th section of said act : *Held*, That an order of the court made under said 5th section, requiring the claimants of the goods to produce a certain invoice in court for the inspection of the government attorney, and to be offered in evidence by him, was an unconstitutional exercise of authority, and that the inspection of the invoice by the attorney, and its admission in evidence, were erroneous and unconstitutional proceedings. *Ib.*

26. It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment ; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment. *Ib.*

27. It is equivalent to a compulsory production of papers, to make the non-production of them a confession of the allegations which it is pretended they will prove. *Ib.*

28. A proceeding to forfeit a person's goods for an offence against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case" within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself." *Ib.*

29. The seizure or compulsory production of a man's private papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the prohibition of the Fifth Amendment. *Ib.*

30. Both amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the Fifth Amendment, namely, compelling a man to be a witness against himself is the object of a search and seizure of his private papers, it is an "unreasonable search and seizure" within the Fourth Amendment. *Ib.*

31. Search and seizure of a man's private papers, to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property, are totally different from the search and

seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law. *Ib.*

32. Constitutional provisions for the security of person and property should be liberally construed. *Ib.*

See MUNICIPAL CORPORATION;
OFFICER.

CONTEMPT.

When a court, having acquired jurisdiction of a cause and the parties to it, issues an order upon one of the parties to show cause why he shuold not be punished for contempt in disobeying a temporary restraining order of injunction made in the cause, and he conceals himself to evade service of the process, the court may, on proper return of the facts, direct service of the order to show cause to be made on his attorney of record, and after due service thereof, may proceed to hear the order to show cause, and to adjudge the same. *Eureka Lake Co.* v. *Superior Court*, 410.

CONTRACT.

See CONSTITUTIONAL LAW, 1, 2, 3;
COURT AND JURY, 2;
PARTNERSHIP.

CORPORATION.

1. A railroad forming a continuous line in two or more States, and owned and managed by a corporation whose corporate powers are derived from the legislature of each State in which the road is situated, is, as to the domestic traffic in each State, a corporation of that State, subject to State laws not in conflict with the Constitution of the United States. *Stone* v. *Farmers' Loan and Trust Co.*, 307.
2. A corporation of one State leasing and operating a railroad in another State, is, as to the leased road, subject to local legislation to the extent to which the lessor would have been subject had there been no lease. *Stone* v. *Illinois Central Railroad Co.*, 347.

See CONSTITUTIONAL LAW, 12;
LOCAL LAW, 1;
MUNICIPAL CORPORATION.

COUNTER-CLAIM.

See PLEADING, 3.

COURT AND JURY.

1. It is not an error that the court below, after motion to set aside a verdict as excessive, ordered that the motion should be granted unless the plaintiff should at once remit the amount deemed by the court to be in excess, but in that case the motion should be denied and judgment entered for the remainder. *Northern Pacific Railroad Co.* v. *Herbert*, 642.
2. The rules of a Board of Trade were part of the contract sued on, and authorized plaintiff, who was a member of the board, and as a commission merchant, had bought produce for future delivery on account of defendant, to offset and settle such trade by other trades made by plaintiff, and to substitute some other person for the one from whom he purchased the property. Acting under this rule plaintiff released the seller from his contract, and, having many similar transactions in his business, proposed to himself to substitute in the place of the contract with the seller, the agreement of such other contractor as might be available for the purpose at the time of settlement, but designated no particular contractor or contract. *Held*, (1) That it was a question of law for the court whether this was a substitution within the meaning of the rule. (2) That an instruction to the jury upon these facts, that there had been no valid substitution of other contracts for those which were cancelled and plaintiff could not recover was correct. *Higgins* v. *McCrea*, 671.

See PRACTICE, 6.

COURT OF CLAIMS.

See APPEAL, 5, 6;
JURISDICTION, D.

COURTS-MARTIAL.

A naval court-martial, which has returned its proceedings to the Secretary of the Navy, and been adjourned by him until further order, may be reconvened by him to reconsider those proceedings. *Smith* v. *Whitney*, 167.

See WRIT OF PROHIBITION, 3, 4, 5, 6.

COURTS OF A STATE.

See JURISDICTION, A., 1, 4, 12;
MUNICIPAL BOND, 1, 2.

COURTS OF THE UNITED STATES.

See JURISDICTION;
MUNICIPAL BOND.

CUSTOMS DUTIES.

1. Iron ore is subject to the duty of twenty per centum *ad valorem* imposed by Rev. Stat. § 2504 upon "Mineral and bituminous substances in a crude state not otherwise provided for." *Marvell* v. *Merritt*, 11.
2. The proviso in § 7 of the act of March 3, 1865, 13 Stat. 491, 494, "That the duty shall not be assessed upon an amount less than the invoice or entered value," and the like proviso in § 9 of the act of July 28, 1866, 14 Stat. 328, 330, are applicable to the valuation of wools, for the purpose of determining the rate of duty chargeable upon them under the acts of March 2, 1867, 14 Stat. 559, and June 6, 1872, 17 Stat. 230. *Saxonville Mills* v. *Russell*, 13.
3. Under section 7 of the act of March 3, 1883, 22 Stat. 523, the cost or value of paper cartons or boxes, in which hosiery and gloves are packed, in Germany, and transported to the United States, and the cost or value of the packing of the goods in the cartons, and of the cartons in an outer case, are not dutiable items, either by themselves, or as a part of the market value abroad of the goods, unless the cartons are of a material or form designed to evade duties thereon, or are designed for use otherwise than in the bona fide transportation of the goods to the United States. *Oberteuffer* v. *Robertson*, 499.
4. Where the cartons are of the usual kind known to the trade before the act of 1883 was passed, as customarily used for covering and transporting such goods, and are intended to accompany them and remain with them, in the hands of a retail dealer, until the goods are sold to the consumer, they are designed for use in the bona fide transportation of the goods to the United States, within the meaning of the act, and their cost or value is not a dutiable item. *Ib.*
5. Where the importer is not dissatisfied with the appraisement of his goods *per se*, but only with the addition to the entry of items for cartons and packing, his proper remedy is not to apply for a re-appraisement, but to protest and appeal. *Ib.*
6. Under these provisions as to duties on imports, in Schedule E of section 2504 of the Revised Statutes (2d ed., p. 465): "All manufactures of steel, or of which steel shall be a component part, not otherwise provided for: forty-five per centum ad valorem. But all articles of steel partially manufactured, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured." "Locomotive tire, or parts thereof: three cents per pound." "Steel, in any form, not otherwise provided for: thirty per centum ad valorem," (p. 466). Articles known as "steel tire blooms," and which have passed through an important stage in the process of manufacture into steel tires, but are not shown to have been adapted or intended to be made into tires for the driving wheels of locomotives, are dutiable at forty-five per cent. ad valorem. *Tyre and Spring Works Co.* v. *Spalding*, 541.

See JURISDICTION, C;
STATUTES, A, 1.

DEATH OF A PARTY.

See JURISDICTION, A., 4.

DECEIT.

In order to maintain an action for deceit, it is not only necessary to establish the telling of an untruth, knowing it to be such, with intent to induce the person to whom it is told to alter his condition, but also that he did alter his condition in consequence, and suffered damage thereby: and if it appear affirmatively that although he altered his condition after hearing the untruth, he was not induced to do it in consequence thereof, but did it independently, the action fails. *Ming* v. *Woolfolk*, 599.

DEED.

1. The grantor in an absolute deed of an undivided interest in land, in fee simple, sought, by a suit in equity, against the grantee, to have it declared a mortgage. There was no defeasance, either in the deed or in a collateral paper, and the parol evidence that there was a debt, and that the intention was to secure it by a mortgage, was not clear, unequivocal, and convincing, and it was held, that the presumption that the instrument was what it purported to be must prevail. *Coyle* v. *Davis*, 108.
2. The weight of the testimony was, that the transaction was a sale, and that the property was sold for about its sale value, in view of the facts, that there was a poorly built and poorly arranged building on the premises, which was incapable of actual partition, and that the law did not permit a partition by a sale *in invitum*, and that the grantor's interest was a minority interest. *Ib.*

DEFEASANCE.

See DEED.

DEMURRER.

See PLEADING, 1.

DISTRICT COURTS OF THE UNITED STATES.

See JURISDICTION, B, 2; C.

DISTRICT OF COLUMBIA.

A, having done work on the streets of Washington under a contract with the board of public works, received certificates that his accounts were audited and allowed for specified amounts ; on pledge of which he borrowed money of B, giving his note therefor shortly before the abolition of the board by Congress, and the creation of the board of

audit. A requested the treasurer of the board of public works, in writing, not to pay these certificates, but assigned no reason for the request. Afterward C presented them to the board of audit, by whom they were allowed, and C received district bonds for them under the law. Neither B nor C has accounted to A for the certificates, nor returned his note. A sued the District for the amount due on the certificates. *Held*, That he has no cause of action. *Laughlin* v. *District of Columbia*, 485.

See CONSTITUTIONAL LAW, 15;
TAX AND TAXATION, 3;
WRIT OF PROHIBITION, 3.

DIVISION OF OPINION.

Each question certified in a certificate of division of opinion must present a clear and distinct proposition of law to which the court can respond, and not a proposition of mixed law and facts. While such a statement must accompany the certificate as to show that the question of law is applicable to the case, the point on which the judges differed must be a distinct question of law clearly stated. This procedure is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the decision of the case, arises, on which, differing in opinion, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate ; but where it is apparent that the whole case is presented to this court for decision, with all its propositions of fact and of law, the case will not be entertained. *Waterville* v. *Van Slyke*, 699.

EJECTMENT.

See LIMITATION, STATUTES OF, 1.
MINERAL LAND, 11.

EQUITY.

1. A married woman who, on being informed of a contract made by her husband for the sale of an equitable interest in real estate held by her in her own right, repudiates it, and who, for more than two years, refuses to perform it whenever thereto requested, during which time the property depreciates greatly in value, cannot, after the expiration of that time, enforce in equity the specific performance of the contract by the other party. *Holgate* v. *Eaton*, 33.
2. A loaned B a sum of money on a conveyance of a tract of land, the equitable interest in which belonged, as A knew at the time, to B's wife. He further agreed with B to acquire an outstanding tax title of the property, and subsequently complied with that agreement. Simultaneously by a separate instrument, they agreed that A, on pay-

ment of a further sum, might, at his election, acquire the whole title of B and wife, to be conveyed by warranty deed executed by both ; or, if A so elected, B should repay the sum loaned and the amount paid for the tax title, A holding the premises as security until such payments, and then reconveying. B's wife, though often requested, refused to comply with the agreement. After the lapse of more than two years, the property meanwhile having greatly depreciated, B's wife, by next friend, filed a bill in equity against A to compel specific performance. A filed a cross-bill against B and wife in that suit to recover the sum loaned and the sum paid for the tax title. The wife dying, the suit was revived and prosecuted by her administrator ; and her heirs also joined as complainants. *Held*, (1) That the delay in commencing proceedings was inexcusable, especially as a material change took place meanwhile in the subject-matter of the contract. (2) That the estate of the wife was not charged with the payment of the debt. (3) That without further facts not before it this court could not say what effect the outstanding tax title in the hands of A had upon the wife's estate. (4) That the title or interest of B in the land was charged with payment of the sum loaned and of the sum paid for the tax title. (5) That the offers in the cross-bill entitled the heirs to conveyances of B's interest and of the tax title on payment of both sums with interest, if they desired it. (6) That, they declining, A was entitled to a personal decree against B, and the cross-bill could be dismissed as to the heirs, without prejudice to A. *Ib.*

3. Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity. *Stebbins* v. *St. Anne*, 386.

See LIMITATION, STATUTES OF, 1;
PUBLIC LAND, 1;
TAX AND TAXATION, 2.

EVIDENCE.

1. This court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley* v. *Donoghue*, 1.

2. In an action by the vendee of personal property against an officer attaching it as property of the vendor, declarations of the vendor to a third party made after delivery of the property are inadmissible to show fraud or conspiracy to defraud in the sale, unless the alleged collusion is established by independent evidence, and the declarations fairly form part of the *res gestæ*. *Winchester & Partridge M'f'g Co.* v. *Creary*, 161.

3. A person whom a purchaser of personal property from a debtor in fail-

ing circumstances puts into possession of the property after the sale as his agent to manage it, cannot afterwards make declarations respecting the character of the sale, which can be received in evidence against the vendor in proceedings in which the sale is questioned as made in bad faith, with intent on the part of the vendor and vendee to hinder and delay the vendor's creditors. *Ib.*

4. This court, upon writ of error to the highest court of a State, takes judicial notice of the law of another State, where, by the local law that court takes judicial notice of it. *Renaud* v. *Abbott*, 277.
5. When the Jurisdiction of a Circuit Court of the United States over the parties by reason of citizenship appears on the face of the record, and no issue is joined respecting it, evidence not pertinent to the issues made by the pleadings cannot be introduced solely for the purpose of making out a case for dismissal by reason of the absence of the proper citizenship. *Hartog* v. *Memory*, 588.
6. In the trial of an action by the vendee of personal property against an officer seizing it on a writ of attachment issued at the suit of a creditor of the vendor to recover damages for the seizure, declarations of the vendor made after delivery of the property to the vendee, but on the same day and fairly forming part of the *res gestæ*, are admissible to show intent to defraud the vendor's creditors by the sale, if it is also shown by independent evidence that the vendee shared the intent to defraud with the vendor. *Jones* v. *Simpson*, 609.
7. When at the trial of such an action it is proved that the vendor made the sale with fraudulent intent to hinder and delay his creditors, the burden is thrown upon the vendee to prove payment of a sufficient consideration; but this being established, the burden is then upon the creditors attacking the sale to show bad faith in the vendee. *Ib.*

See SECRETARY OF THE INTERIOR.

EXCEPTIONS.

See JUDGMENT, 1.

EXECUTIVE.

See ARSENAL ISLAND;
MANDAMUS;
OFFICER;
SECRETARY OF THE INTERIOR.
STATUTE, A., 2.

FEES.

Under the provisions of Rev. Stat. §§ 847 and 828, a commissioner of a Circuit Court who, by direction of the court, keeps a docket with entries of each warrant issued and subsequent proceedings thereon made on the day of occurrence, is entitled to a fee like that allowed to the clerk of the court for dockets, indexes, &c., although his

docket entries may differ from those made by the clerk. *United States* v. *Wallace*, 398.

FINDINGS OF FACT.

See APPEAL, 5;
JURISDICTION, A., 11;
PRACTICE, 4.

FORFEITURES.

See JURISDICTION, C.

FRAUD.

See EVIDENCE, 2, 3, 6, 7;
SALE.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FUGITIVE FROM JUSTICE.

1. On the application of an alleged fugitive from justice (detained under authority of the executive of the State where he is found in order to be surrendered to the executive of the State in which the crime is alleged to have been committed), to be discharged on a writ of habeas corpus, it is a question of law, whether he is substantially charged with the commission of a crime against the laws of the latter State; but the question whether he is a fugitive from justice is one of fact, the decision of which by the governor of the State in which he is found is sufficient to justify the removal—at least until overthrown by contrary proof. *Roberts* v. *Reilly*, 80.
2. The question whether a corporation is capable in law of ownership of property, the subject of a larceny charged, is not a question which can be raised in proceedings in habeas corpus for the discharge of an alleged fugitive from justice held for surrender to the executive of the State in which the crime is alleged to have been committed. *Ib.*
3. If the governor of the State from which the delivery of a fugitive from justice is demanded does not require a certified copy of the law of the State against which the crime is charged to have been committed, the prisoner cannot take advantage of the omission in proceedings in habeas corpus for his discharge. *Ib.*
4. A person who, having committed, within a State, an act which by its laws constitutes a crime, is, when sought for to be subjected to criminal process to answer therefor, found without that State and within the territory of another State or Territory, is a fugitive from justice within the meaning of that term as used in the Constitution of the United States. *Ib.*

5. It is discretionary with the State upon which demand for surrender of a fugitive from justice is made, to comply with the demand, when the allegations charge acts done by the fugitive in the State surrendering, which amount to a crime there. *Ib.*

FUTURE DELIVERY.

See COURT AND JURY, 2.

HABEAS CORPUS.

See FUGITIVE FROM JUSTICE, 1, 2, 3;
JURISDICTION, B., 1, 2.

HUSBAND AND WIFE.

See EQUITY, 1, 2;
TRUST.

INDIAN RESERVATION.

The Fort Hill Indian reservation in the County of Oneida, in the Territory of Idaho, is not excluded from the limits of the Territory by the act of March 3, 1863, creating it; and the treaty of July 3, 1868, with the eastern band of Shoshonees and the Bannack tribe does not necessarily except it from the jurisdiction of the Territory. *Utah & Northern Railway* v. *Fisher*, 28.

See TAX AND TAXATION, 1.

INDICTMENT.

See POLYGAMY 1, 2.

INFORMATION.

An information *in rem* founded on Rev. Stat. § 3257, is sufficient if it follows the words of the section, and alleges that the person named was engaged in carrying on the business of a distiller and defrauded the United States of the tax on part of the spirits distilled by him; and it is not necessary it should set forth the particular means by which he defrauded the United States of the tax, or specify the particular spirits covered by the tax, or aver that the spirits seized were distilled by him, or were the product of his distillery, or that the distillery apparatus was wrongfully used. *Coffey* v. *United States*, 427.

See JURISDICTION, A., 8, 9, 10;
PLEADING, 2;
VERDICT.

INSURANCE.

1. A violation of any of the prohibitions in a policy of insurance against fire by a tenant, who occupies the insured premises with the permission of the assured, is a violation by the assured himself. *Liverpool and London Insurance Co.* v. *Gunther*, 113.
2. If a policy of insurance forbids the keeping of gasoline or benzine on the insured premises, but authorizes the use of gasoline gas there, the latter authority gives no warrant for keeping gasoline or benzine there for any purpose other than the manufacture of gas. *Ib.*

INTER-STATE COMMERCE.

See CONSTITUTIONAL LAW, 20, 21, 22.

INTERNAL REVENUE.

1. It is no offence against § 12 of the internal revenue act of March 1, 1879, to have in one's possession a cancelled stamp, or a stamp which has been used, or which purports to have been used, upon any cask or package of imported liquors, unless the same was removed from the cask or package by some person intentionally, without being defaced or destroyed at the time of the removal. *United States* v. *Spiegel*, 270.
2. The difference between § 12 of the act of March 1, 1879, 20 Stat. 342, and Rev. Stat. § 3324 shown. *Ib.*

See INFORMATION;
JURISDICTION, A., 8, 9, 10;
LIMITATION, STATUTES OF, 2;
PLEADING, 2;
VERDICT.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 17, 18.

ISSUE.

See JUDGMENT, 1.

JUDGMENT.

1. The answer of the claimant set up a prior judgment, and sentence to pay a fine, on a plea of guilty by him to a criminal information founded on the same violations of law alleged in the information in this suit: *Held*, That no reply to the answer was necessary to raise an issue of fact thereon, and such issue must be regarded as having been found against the claimant, by the general verdict; and that no question in regard to such defence could be raised on a writ of error, in the absence of a demurrer to the answer, and of a bill of exceptions raising specific questions. *Coffey* v. *United States*, 427.
2. The claimant set up, by answer, a prior judgment of acquittal on a

criminal information against him by the United States, in the same Circuit Court, founded on the same sections of the Revised Statutes sued on in this suit, and alleged that such criminal information contained charges of all of the violations of law alleged in the information in this suit. There was a general demurrer to the answer. After the general verdict for the United States, the claimant moved for judgment *non obstante veredicto*. The motion was denied. There was no bill of exceptions. On a writ of error : *Held*, That, although one section counted on in the information declared, as a consequence of the commission of the prohibited act (1) that certain specific property should be forfeited, and (2) that the offender should be fined and imprisoned, yet, as the issue raised as to the existence of the act or fact had been tried in a criminal proceeding against the claimant, instituted by the United States, and a judgment of acquittal rendered in his favor, that judgment was conclusive in his favor in this suit ; and that the judgment of the Circuit Court must be reversed, and the case be remanded, with a direction to enter a judgment for the claimant, dismissing the information, and to take proper proceedings in regard to restoring the property attached. *Coffey* v. *United States*, 436.

See Constitutional Law, 1;
Pleading, 1.

JUDICIAL NOTICE.

See Evidence, 1, 4.

JURISDICTION.

A. Jurisdiction of the Supreme Court.

1. This court is without jurisdiction over a case brought here on error from a State court, unless it appears in the record that the Federal question was raised in that court before the entry of a final judgment in the case. *Simmerman* v. *Nebraska*, 54.
2. This court has no jurisdiction to issue citation in an appeal docketed here after the term to which the appeal was returnable. *Hewitt* v. *Filbert*, 142.
3. This court has appellate jurisdiction, under the act of March 3, 1885, ch. 355, of a judgment of the Supreme Court for the District of Columbia, dismissing a petition for a writ of prohibition to a court-martial convened to try an officer for an offence punishable by dismissal from the service, and consequent deprivation of a salary which during the term of his office would exceed the sum of $5000. *Smith* v. *Whitney*, 167.
4. Upon a writ of error to a State court, the question whether on the death of a party after judgment another party was properly substi-

tuted in that court, before the suing out of a writ of error, is a question of practice which the State court has exclusive right to determine, and is not reviewable here. *Renaud* v. *Abbott*, 277.

5. The plaintiff in error having failed to show, either from the record, or by affidavits, that the matter in dispute exceeds five thousand dollars, the Court dismisses the writ for want of jurisdiction. *Johnson* v. *Wilkins*, 392.
6. The dismissal of a cause by the Supreme Court of a Territory, because errors had not been assigned according to the rules of practice applicable to the form of action, is a judgment which can only be reviewed by writ of error or appeal, as the case may be. *Ex parte Brown*, 401.
7. When the court may reasonably infer from the record in a case brought here by writ of error from a State court that the Federal question raised here was necessarily involved in the decision there, the court will not dismiss the writ on motion to dismiss for want of jurisdiction, although it may not appear affirmatively on the record that the question was raised there. *Eureka Lake & Canal Co.* v. *Superior Court*, 410.
8. On a writ of error to review a judgment of forfeiture, entered after a trial by a jury and a general verdict for the United States, on an information *in rem*, filed in a Circuit Court of the United States, after a seizure of the *res* on land, for a violation of the internal revenue laws, there was no bill of exceptions, and no exception to the overruling of a motion for judgment *non obstante veredicto*, and of a motion to set aside the verdict and in arrest of judgment: *Held*, That questions arising on demurrers to counts in the information, and as to the jurisdiction of the Circuit Court, could be reviewed. *Coffey* v. *United States*, 427.
9. A judgment of forfeiture, on an information *in rem*, for a violation of the internal revenue laws, filed by the United States, in a Circuit Court of the United States, after a seizure of the *res* on land, was rendered after a general verdict. On a writ of error by the claimant, there being no bill of exceptions: *Held*, That questions as to the sufficiency of the information, and the regularity of the proceedings, not having been formally raised in the Circuit Court, could not be raised in this court. *Coffey* v. *United States*, 436.
10. After a specific denial, by answer, of the allegations of the information, the claimant cannot, in a court of error, on such a record as that above mentioned, be heard to say that he did not know the charge made in the information, and could not defend against it. *Ib.*
11. Where a case is tried by a Circuit Court, without a jury, and that court makes a special finding of facts, but omits to find certain facts which a stipulation between the parties, made after the entry of judgment, states were shown by proof at the trial, this court, on a writ of error, can take notice only of the facts contained in the special finding. *Tyre & Spring Works Co.* v. *Spalding*, 541.

12. If a record shows on its face that a Federal question was not necessarily involved in the decision of a case in a State Court, and does not show affirmatively that one was raised, this court will not go out of the record to the opinion of that court, or elsewhere, to ascertain whether one was in fact decided. *Otis* v. *Oregon Steamship Co.*, 548.
13. Whatever has been decided on one writ of error cannot be re-examined on a subsequent writ of error brought in the same suit. *Chaffin* v. *Taylor*, 567.
14. When a case is brought here from a Circuit Court for review, in which the matter in controversy is less than $5000, it will be dismissed, although accompanied by a certificate of division of opinion by the judges holding the court, unless that certificate presents a case proper for the consideration of this court. *Waterville* v. *Van Slyke*, 699.

See APPEAL, 4; DIVISION OF OPINION; JUDGMENT, 1; PARTIES; PRACTICE, 5.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

1. Appeals in cases of habeas corpus from the final decision of a District Court, or of a judge thereof, may, within the discretion of the court or judge, be sent to the appellate tribunal, at a term of the Circuit Court current at the time when the appeal is taken, under regulations adapted to secure justice. *Roberts* v. *Reilly*, 80.
2. An appeal from the final decision of a District Court or of a judge thereof in a habeas corpus case may be heard by the Circuit Justice at chambers, when it appears that the order therefor is made without objection and for the convenience of parties, and that the parties appear and are heard and no objection is taken at the hearing, and that no hardship or injustice follows. An objection thereto under these circumstances is too late if taken for the first time in this court. *Ib.*
3. A suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Barry* v. *Edmunds*, 550.
4. Where exemplary damages beyond the sum necessary to give a Circuit Court of the United States jurisdiction are claimed in an action for a malicious trespass, the court should not dismiss the case for want of jurisdiction, simply because the record shows that the actual injury caused to the plaintiff by the trespass was less than the jurisdictional amount. *Ib.*
5. When a Circuit Court of the United States is led to suspect, from any cause, that its jurisdiction has been imposed upon, collusively or otherwise, it may protect itself against fraud or imposition by an

inquiry made of its own motion in such manner as it may direct; and by such further action thereafter as justice may require. *Hartog* v. *Memory*, 588.

6. The evidence on which a Circuit Court acts in dismissing a suit for want of jurisdiction must not only be pertinent either to the issue made by the parties, or to the inquiry instituted by the court, but it must also appear of record, if either party desires to invoke the appellate jurisdiction of this court for the review of the order of dismissal. *Ib.*

See EVIDENCE, 5;
REMOVAL OF CAUSES.

C. JURISDICTION OF DISTRICT COURTS OF THE UNITED STATES.

The exclusive jurisdiction conferred upon District Courts of the United States, before the enactment of the Judiciary Act of March 3, 1875, over suits for the recovery of penalties and forfeitures under the customs laws of the United States, is not taken away by the first section of that act. *United States* v. *Mooney*, 104.

D. JURISDICTION OF THE COURT OF CLAIMS.

1. An act of Congress specially referring to the Court of Claims a paymaster's claim for credits and differences in his accounts with the United States, and providing that the evidence of the claimant may be received, and that, if the court shall be satisfied that just and equitable grounds exist for credits claimed by him, it shall make a decree setting forth the amount for which he shall receive credit, confers no equity jurisdiction upon that court, but only the ordinary jurisdiction of the subject as a court of law, subject to be proceeded with as in ordinary suits, and subject to the rules regulating appeals in ordinary judgments. *McClure* v. *United States*, 145.
2. This court will not remand to the Court of Claims a case at law, with directions to return whether certain distinct propositions in requests for findings of facts, presented to that court at the trial of the case, are established and proved by the evidence, if it appears that the object of the request to have it so remanded is to ask this court to determine questions of fact on the evidence. *Ib.*
3. There is nothing in Rev. Stat. § 5261, authorizing certain railroad companies to bring suits against the United States in the Court of Claims to recover the price of freight or transportation, which takes those suits out of the operation of the general rules of this court regulating appeals from the Court of Claims, or which makes it proper for this court to require the Court of Claims to send up with its findings of facts the evidence in regard to them. *Union Pacific Railway Co.* v. *United States*, 154.
4. When the Court of Claims, on being requested by a party in a cause

there pending to find specifically upon several facts which are only incidental facts and amount only to evidence touching the main facts in issue, and the court disregards the requests and finds the facts at issue generally, and judgment is entered, and the party whose request was denied appeals, this court will not remand the case to the Court of Claims, with directions to specifically pass upon each of said requests, or to make a finding of facts on the subject embraced in each of said requests. *Ib.*

5. The jurisdiction of the Court of Claims over cases referred to it by one House of Congress is subject to provisions of general statutes of limitation regulating that jurisdiction. *Ford* v. *United States*, 213.

E. Jurisdiction of the Supreme Court of the District of Columbia.

See Writ of Prohibition, 3.

JURY.

1. When the allowance of a challenge to a juror for cause is assigned as error, it should appear that it was not peremptory if peremptory challenges are allowed. *Northern Pacific Railroad Co.* v. *Herbert*, 642.
2. An allowance of a challenge to a juror for cause and the selection of another competent and unbiased juror in his place, works no prejudice to the other party. *Ib.*

LACHES.

See Equity, 1, 2.

LAW AND FACT.

See Fugitive from Justice, 1.

LICENSE TAX.

1. An assessment made by a statute of Virginia a condition precedent to obtaining a license for pursuing a business or profession within the State, is a tax, debt or demand within the meaning of the act of that State of March 30, 1871, making coupons on the bonds of the State receivable for "taxes, debts, dues and demands due the State." *Royall* v. *Virginia*, 572.
2. The "separate revenue license," which persons authorized and licensed to practise as attorneys-at-law in the courts of Virginia are required by the statutes of that State to obtain before practising, is a tax laid for revenue, and not an exaction for purposes of regulation. *Ib.*
3. When a statute of a State imposes license taxes for purposes of revenue upon persons pursuing lawful occupations and professions within the State, and a State officer charged with the duty of issuing licenses

thereunder, acting in obedience to a statute of the State which is in conflict with the Constitution of the United States, refuses to issue such a license to a person who has duly tendered the amount required by law to be paid for it, the person tendering the payment, if otherwise qualified to pursue the occupation, is not required to proceed by mandamus to compel the issue of the license, and to await the result of those proceedings before entering upon the pursuit or occupation. *Ib.*

4. After lawful tender to the proper State officer of the requisite amount of coupons (receivable by the terms of the act of the State of Virginia of March 30, 1871, in payment of taxes, debts, dues and demands due the State), for a "separate revenue license" by a person otherwise duly authorized and licensed to practise as an attorney-at-law, and after refusal by that officer to receive the same, or to issue the "separate revenue license," the person so making the tender may, by mandamus, compel the officer to receive the coupons, and to deliver them to the proper official for identification and verification according to the terms of the act of that State of January 14, 1882. *Sands* v. *Edmunds*, 585.

See CONSTITUTIONAL LAW, 23.

LIMITATION, STATUTES OF.

1. The cause of action in a suit in equity by the holder of an equitable title to real estate, to restrain the owner of the legal title from enforcing a judgment in ejectment against him, and to compel the conveyance of the legal title to the owner of the equitable title, accrues on the entry of final judgment in the suit at law. *Webb* v. *Barnwall*, 193.
2. A suit cannot be maintained against a collector of internal revenue to recover back taxes alleged to have been illegally exacted, when the tax-payer has failed within two years next after the cause of action accrued, to present to the Commissioner of Internal Revenue his claim for the refunding in the manner pointed out by law. *Kings County Savings Ins.* v. *Blair*, 200.

See JURISDICTION, D., 5.

LOCAL LAW.

1. A transfer for valuable consideration of shares in a Massachusetts manufacturing corporation not recorded as required by the statute of Massachusetts of 1870, ch. 224, § 26, is valid against a subsequent attachment by a creditor having knowlege or notice of the transfer. *Bridgewater Iron Co.* v. *Lissberger*, 8.
2. The act of the legislature of Louisiana of 1872 prohibiting, with some exceptions, parish tax levies in excess of one hundred per centum of the State tax for the year was the measure of the taxing power of

parishes in that State in 1874, 1875, and 1876. *Stewart* v. *Jefferson Police Jury*, 135.

3. The authority given by the act of the legislature of Louisiana of 1869 to a judge rendering a judgment against a parish to order a levy of taxes sufficient for its payment, was taken away by the act of 1872, limiting parochial taxation to one hundred per centum of the State tax for the year, for all amounts in excess of the limit fixed by the latter act. *Ib.*
4. This court agrees with the Supreme Court of Mississippi, that a statute creating a commission, and charging it with the duty of supervising railroads, is not in conflict with the Constitution of that State. *Stone* v. *Farmers' Loan & Trust Co.*, 307.
5. The provisions of the statute of Mississippi of March 11, 1884, creating a railroad commission, are not so inconsistent and uncertain as to necessarily render the entire act void on its face. *Ib.*

See PARTIES.

VARIANCE.

MANDAMUS.

In matters which require an executive officer of the United States to exercise judgment or consideration, or which are dependent upon his discretion, no rule will issue for a mandamus to control his action. *Carrick* v. *Lamar*, 423.

MANDATE.

See APPEAL, 1, 2, 3.

MARRIED WOMAN.

See EQUITY 1, 2.
TRUST.

MASTER AND SERVANT.

1. An employer is not liable for injuries to his servant caused by the negligence of a fellow-servant in a common employment; but this exemption does not extend to injuries caused by the carelessness or neglect of another person in the master's service in an employment not common to that in which the person injured is engaged, and upon a subject in regard to which the person injured has a right to look for care and diligence on the part of the other person as the representative of the common master. *Northern Pacific Railroad Co.* v. *Herbert*, 642.
2. A statute which enacts that "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the

ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed in the same general business," does not apply to losses suffered by an employé in consequence of the negligence of another person employed by the same employer in another and not in the same general business. *Ib.*

See NEGLIGENCE ;
RAILROAD, 2.

MILITARY ORGANIZATIONS.

See CONSTITUTIONAL LAW, 9.

MILITIA.

See CONSTITUTIONAL LAW, 6, 9.

MINERAL LAND.

1. The act of Congress, § 2322 Revised Statutes, gives to the owner of a mineral vein or lode, not only all that is covered by the surface lines of his established claim as those lines are extended vertically, but it gives him the right to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally. *Iron Silver Mining Co.* v. *Cheesman*, 529.
2. But this right is dependent, outside of the lateral limits of the claim, upon its being the same vein as that within those limits. For the exercise of this right it must appear that the vein outside is identical with and a continuation of the one inside those lines. *Ib.*
3. The acts of Congress use the words vein, lode, or ledge as embracing a more or less continuous body of mineral, lying within a well-defined boundary of other rock, in the mass within which it is found, or, it may be said, to be a body of mineral, or a mineral body of rock within defined boundaries in this general mass. *Ib.*
4. A vein is by no means always a straight line, or of uniform dip or thickness, or richness of mineral matter, throughout its course. The cleft or fissure in which a vein is found may be narrowed or widened in its course, and even closed for a few feet and then found further on, and the mineral deposit may be diminished or totally suspended for a short distance, but, if found again in the same course with the same mineral within that distance, its identity may be presumed. *Ib.*
5. But if the mineral disappears, or the fissure with its walls of the same rock disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimants' survey is gone. *Ib.*
6. Whether any deposit of mineral matter, about which a contest arises before a court or jury, has been shown to belong to one of these veins

within a prior location, is a question to be decided by the application of these principles to all the evidence in the case. *Ib.*

7. In procuring a patent for a placer mine claim under § 2333 of the Revised Statutes, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known, and pays $5 per acre for twenty-five feet on each side of his vein, and $2.50 per acre for the remainder of his placer claim. *Reynolds* v. *Iron Silver Mining Co.*, 687.
8. Where no such vein or lode is known to exist the patent for a placer claim shall carry all such veins or lodes within its boundaries which may be afterwards found to exist under its surface. *Ib.*
9. But where a vein or lode is *known to exist* under the surface included in such patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode. *Ib.*
10. The title remaining in the United States in the veins thus known to exist and not claimed or referred to in the patent, the patentee and his grantee have no right to dispossess any one in the peaceable possession of such vein, whether the latter have any title or not. *Ib.*
11. In such case the rule which applies to actions of ejectment, and to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title. *Ib.*

MISSISSIPPI.

See LOCAL LAW, 4, 5.

MORTGAGE.

See DEED;
PARTIES.

MOTION TO ADVANCE.

Cases in which the execution of a State revenue law has been enjoined or stayed will be advanced only on motion of the State or of the party claiming under the law, and on proof that the operations of the State government will be embarrassed by the delay. *Central Railroad Co.* v. *Bourbon County*, 538.

MOTION TO DISMISS.

See JURISDICTION, A., 7;
PRACTICE, 1;
WRIT OF ERROR.

MOTION TO SET ASIDE VERDICT.

See COURT AND JURY, 1.

MUNICIPAL BOND.

1. When, at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a State, the highest court of a State has construed the law under which it purports to be issued, rights accruing under that construction will not be affected merely by subsequent decisions of the same court, varying or departing from it. *Anderson* v. *Santa Anna*, 356.
2. When negotiable evidences of indebtedness of a municipal corporation in a State are created and issued under laws which have not, at the time of issue, been construed by the highest court of the State, its subsequent construction of them is not conclusive on Federal courts, although they will lean to an agreement of view with the State court. *Ib.*

MUNICIPAL CORPORATION.

When a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new corporation as its legal successor; and powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation. *Mobile* v. *Watson*, 289.

NAVAL OFFICERS.

1. Under the provisions of the act of July 16, 1862, 12 Stat. 586, ch. 183, § 16, an officer of the navy of a class subject by law or regulation to examination before promotion to a higher grade, was not entitled to be examined until his term for promotion had arrived, or was near at hand. *Hunt* v. *United States*, 394.
2. If a naval officer was delayed in promotion for want of examination, and the examination was delayed by reason of absence on duty when entitled to promotion, the act of July 16, 1862, gave him the right to have the increased pay of the new grade begin when the examination should have taken place. *Ib.*
3. Cadet-engineers who had finished their four years' course at the Naval Academy, had passed their final academic examinations, and had received their diplomas before the passage of the act of August 5, 1882, 22 Stat. 284, became graduates, and were not made naval cadets by that act. *United States* v. *Redgrave*, 474.

4. The provision in the act of August 5, 1882, 22 Stat. 284, for the discharge of surplus naval cadet graduates was prospective only, and did not apply to the classes of 1881 and 1882. *Ib.*

5. A naval cadet-engineer, not found deficient at examination; not dismissed for misconduct under the provisions of Rev. Stat. § 1525 or upon and in pursuance of a sentence of a court-martial, but honorably discharged by the Secretary of the Navy against his will, remains in the service notwithstanding the discharge, and is entitled to recover in the Court of Claims the pay attached to the position. *United States* v. *Perkins*, 483.

NAVIGABLE RIVERS.

The bridge built by the Joliet and Chicago Railroad Company and maintained by the Chicago and Alton Railroad Company over Healey Slough, does not cross it at a point where it is a navigable highway for the public. *Healey* v. *Joliet & Chicago Railroad Co.*, 191.

NAVY.

See NAVAL OFFICERS.

NEGLIGENCE.

A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver. *Little* v. *Hackett*, 366.

NEGOTIABLE PAPER.

See DISTRICT OF COLUMBIA.

NOTICE.

See DISTRICT OF COLUMBIA.

OFFICER.

When Congress by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interests. *United States* v. *Perkins*, 483.

PARTIES.

In a suit in Connecticut for a strict foreclosure of a mortgage of real estate brought against a grantee of the mortgage, if the mortgagee seeks to

charge the mortgagor with any insufficiency in the appraised value of the land to pay the mortgaged debt, the latter is a necessary party to the suit so as to prevent a removal of it to a Federal Court by his grantee, if he and the mortgagee are citizens of the same State. *Coney* v. *Winchell*, 227.

See EQUITY, 3;
JURISDICTION, A., 4.

PARTITION.

See DEED, 2.

PARTNERSHIP.

An agreement by A with B that on the payment of a sum of money B shall participate in the profits of A's business, gives B no interest, as between themselves, in A's stock in trade when it appears that it was their intention that he should have no such interest. *London Assurance Co.* v. *Drennen*, 461.

PATENT FOR INVENTION.

1. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Miller* v. *Foree*, 22.
2. The patent issued to appellant, September 15, 1874, for an improved fastening in gloves is not infringed by the appellees' mode of applying springs to an apparatus for the same purpose. *Field* v. *De Comeau*, 187.
3. Claim 2 of reissued letters patent No. 8589, granted to Charles F. Davis and William Allen, February 18, 1879, for an "improvement in grain drills" (the original patent, No. 74,515, having been granted to said Davis as inventor February 18, 1868), namely: "The shoes or hoes of a seed planter, attached to the main frame, substantially as described, in combination with a lever, or its equivalent, whereby they can be shifted at the pleasure of the operator, from a straight to a zigzag line, or *vice versa*," makes the lever, or its equivalent, an essential element of the combination; and the claim is not infringed, where the lever is dispensed with and the human hand is substituted, although in the patent the hand is applied to work the lever. *Brown* v. *Davis*, 237.
4. In view of a prior invention, claims 1 and 3 of the reissue, which were not made in the original patent, were held to be limited to the special

shifting apparatus of the patent, because, if extended to cover shifting arrangements not substantially using a rotating crank-shaft, they became claims which could not lawfully have been granted in the original patent, and, as claims in a reissue, were invalid, because the application for the reissue was made nearly eleven years after the original patent was granted, and after machines effecting the shifting by other means than a rotating crank-shaft had gone into use subsequently to the date of the original, and no sufficient excuse was given for the laches and delay. *Ib.*

5. It appeared as a fact, that new matter was introduced into the specification of the reissue for the purpose of reaching machines which the claims of the original patent would not reach, and of laying a foundation for claims 1 and 3 of the reissue. *Ib.*
6. Claims 4, 5 and 6 of the reissue were held not to be infringed, because the shifting mechanism of the patent, with its rotating crank-shaft, was an element in each claim, in view of a prior invention, and was not used by the defendant. *Ib.*
7. When an applicant for a patent is compelled by the rejection of his application at the patent office, to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping the element which he was compelled to include in order to secure the patent. *Shepard* v. *Carrigan*, 593.
8. The patent granted to Helen M. MacDonald, September 29, 1874, for an improvement in dress protectors, must be construed to include a fluted or plaited band or border as one of the essential elements of the invention, and is not infringed by the manufacture or sale of skirt protectors which have neither plaited nor fluted bands or borders. *Ib.*
9. A hose-reel, mounted upon a wheeled carriage, supporting a fountain standard, and provided with a foot or brace to sustain it in an upright position, and with a nozzle-holder, being in common use; a patent for a combination of these elements with "a reel of large diameter to allow the water to flow through the hose when partially wound thereon" is void for want of invention. *Preston* v. *Manard*, 661.

PENALTY.

See JURISDICTION, C.

PENSION.

The pension which widows are entitled to receive under the provision of Rev. Stat. § 4702, is the pension for total disability which is granted to those entitled to receive it by Rev. Stat. § 4695. *Burnett* v. *United States*, 158.

PLEADING.

1. In an action brought in one State upon a judgment recovered against the defendant jointly with another person in another State, an averment that the judgment, by the law of the State in which it was rendered, is valid and enforceable against this defendent and void against the other person is an allegation of fact, which is admitted by demurrer. *Hanley* v. *Donoghue*, 1.

2. Rule 22 of the Rules in Admiralty prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States, on land or water; and the general rules of pleading in regard to Admiralty suits *in rem* apply to a suit *in rem* for a forfeiture, founded on a violation of the internal revenue laws brought by the United States, after a seizure of the *res* on land. *Coffey* v. *United States*, 427.

3. In Ohio the validity in law of a counter-claim by defendant depends upon the allegations respecting it, without regard to allegations and admissions of the pleadings on the other side in regard to plaintiff's cause of action; and if defendant avers that the counter-claim is founded upon a transaction which the law forbids and makes a crime, it cannot be maintained, even if plaintiff, in setting forth his cause of action founded on the same thing, avers the transaction to be legal. *Higgins* v. *McCrea*, 671.

See INFORMATION; VARIANCE;
JUDGMENT, 1; VERDICT.

POLICE POWER.

See CONSTITUTIONAL LAW, 9, 10, 11, 12, 13, 14, 17, 18.

POLYGAMY.

1. The offence of cohabiting with more than one woman, created by § 3 of the act of Congress of March 22, 1882, ch. 47, 22 Stat. 31, in regard to polygamy in the Territory of Utah, is committed by a man who lives in the same house with two women, and eats at their respective tables one-third of his time, or thereabouts, and holds them out to the world, by his language or conduct, or both, as his wives, and it is not necessary to the commission of the offence that he and the two women, or either of them, should occupy the same bed or sleep in the same room, or that he should have sexual intercourse with either of them. *Cannon* v. *United States*, 55.

2. An indictment under that section charged a male person with having unlawfully cohabited with more than one woman, continuously, for a specified time, naming two women, but did not allege that he was a male person, nor that he cohabited with the women as wives, or as persons held out as wives. The statute provides that "if any male person . . . hereafter cohabits with more than one woman, he

shall be deemed guilty of a misdemeanor." The defendant pleaded not guilty: *Held*, (1) Under the Criminal Procedure Act of Utah, of February 22, 1878, Laws of 1878, p. 91, objections taken to the indictment after a jury was sworn, that it did not contain the allegations before mentioned, were properly overruled. (2) The word "cohabit," in the statute, means, "to live together as husband and wife," and its use in the indictment includes every element of the offence created, as above defined; and the allegation of cohabiting with the two women as wives, is not an extrinsic fact, but is covered by the allegation of cohabiting with them. *Ib.*

PRACTICE.

1. The court hears a motion by counsel for plaintiff in error, specially appointed for the purpose, to dismiss the writ of error, which motion is opposed by counsel of record for plaintiff in error. The court dismisses the writ on the ground that there is no longer an existing cause of action. *San Mateo* v. *Southern Pacific Railroad Co.*, 138.
2. The court receives affidavits from plaintiffs in error, and counter affidavits from defendants in error, to determine the value of tracts of land sued for in ejectment (neither pleadings nor evidence in the record showing it), and dismisses the case. *Wells* v. *Wilkins*, 393.
3. Cases advanced under Section 3 of Rule 32 are to be submitted on printed briefs and arguments after service of notice and brief or argument. *Fletcher* v. *Hamlet*, 408.
4. The Appellate Court of a Territory, having before it findings of the court below, and new matter submitted by stipulation, makes no findings and sends up the case without the new matter: *Held*, That it must be determined here on those findings. *O'Reilly* v. *Campbell*, 418.
5. After argument of the cause is heard, the court of its own motion gives counsel an opportunity to file printed arguments on a plea to the jurisdiction which was overruled in the Circuit Court, and was not argued here. *Pennsylvania Railroad Co.* v. *St. Louis, Alton and Terre Haute Railroad Co.*, 472.
6. When the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked for by counsel on the same subject, whether they are correct or not. *Iron Silver Mining Co.* v. *Cheesman*, 529.

See APPEAL;
EQUITY;
JUDGMENT;
JURISDICTION, A., 4, 5, 6, 11, 12; D., 2, 4;
MOTION TO ADVANCE;
POLYGAMY, 2;
PUBLIC POLICY.

PRINCIPAL AND AGENT.

See USURY, 1.

PROHIBITION, WRIT OF.

See WRIT OF PROHIBITION.

PROMISSORY NOTE.

See BANKRUPTCY, 1.

PUBLIC HACK.

See NEGLIGENCE.

PUBLIC LAND.

1. One seeking in equity to have the holder of a patent of public land declared a trustee for his benefit on the ground that the patent was improperly issued, must clearly establish that there was a mistake or fraud in the issue of the patent, which affected the decision of the Land Office, and but for which he would be entitled to the patent. *Lee* v. *Johnson*, 48.
2. The act of April 10, 1869, 16 Stat. 45, "to renew certain grants of land to the State of Alabama," which were granted by the act of June 3, 1856, 11 Stat. 17, is not to be construed as a new and original grant, but as an extension of the time named in the original act for the completion of the railroads referred to in it. *Doe* v. *Larmore*, 198.
3. If the proper officers of the United States approve a selection of school lands in disputed territory in California, outside the limits of an unsettled survey by the United States of a private claim, and issue proper certificate lists, and a purchaser under the title thus acquired by the State enters into possession, improves, and holds the land, no one, by forcibly or surreptitiously getting into possession can make a preëmption settlement which will defeat his title. *Mower* v. *Fletcher*, 380.

See ARSENAL ISLAND;
MINERAL LAND;
SECRETARY OF THE INTERIOR.

PUBLIC OFFICE.

See CONSTITUTIONAL LAW, 2.

PUBLIC POLICY.

When it clearly appears in a proceeding that a claim set up is against public policy, and that in no event could it be sustained, the tribunal should dismiss it, whether the allegations of the parties have or have not raised the question. *Lee* v. *Johnson*, 48.

RAILROAD.

1. The Southwestern Railroad Company of Georgia as to those parts of its

road which extend from Americus to Albany from Albany to Arlington and from Cuthbert to Eufaula, is subject to the general laws of the State for the taxation of railroads, without regard to the exemption in its original charter. *Southwestern Railroad Co.* v. *Wright*, 231.

2. If no one is appointed by a railway company to look after the condition of its cars, and see that the machinery and appliances used to move and to stop them are kept in repair and in good working order, it is liable for the injuries caused thereby. If one is appointed by it charged with that duty, and injuries result from his negligence in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company. *Northern Pacific Railway Co.* v. *Herbert*, 642.

See CONSTITUTIONAL LAW, 10, 11, 12, 13, 14; MASTER AND SERVANT;
CORPORATION, 1, 2; NEGLIGENCE;
LOCAL LAW, 4, 5; TAX AND TAXATION, 5.

REMOVAL FROM OFFICE.

See OFFICER.

REMOVAL OF CAUSES.

When one of several defendants in a suit on a joint cause of action in a State Court loses his right to remove the action into a Circuit Court of the United States by failing to make the application in time, the right is lost as to all. *Fletcher* v. *Hamlet*, 408.

See PARTIES.

RULES.

See PLEADING, 2;
PRACTICE, 3.

SALE.

A sale of personal property made by the vendor with intent to defraud his creditors, but for valuable consideration paid to him by the vendee, followed by actual and continued change of possession, is valid against the vendor's creditors, unless it also appears that the vendee acted in bad faith. This rule prevails in Kansas. *Jones* v. *Simpson*, 609.

See EVIDENCE, 2, 3, 6, 7.

SEARCH.

See CONSTITUTIONAL LAW, 24 to 32.

SECRETARY OF THE INTERIOR.

In the absence of fraud, the findings of the Secretary of the Interior are conclusive upon questions of fact as to land claims submitted to him for his decision. *Lee* v. *Johnson*, 48.

SECRETARY OF THE NAVY.

See COURTS-MARTIAL;
WRIT OF PROHIBITION.

SECRETARY OF THE TREASURY.

See STATUTES, A., 2.

SEIZURE.

See CONSTITUTIONAL LAW, 24 to 32.

SERVICE.

See CONTEMPT;
WRIT OF ERROR.

SPECIFIC PERFORMANCE.

See EQUITY, 1, 2.

SPIRITUOUS LIQUORS.

See CONSTITUTIONAL LAW, 17, 18.

STATE COURTS.

See JURISDICTION, A., 1, 4, 12;
MUNICIPAL BOND, 1, 2.

STATUTE.

A. CONSTRUCTION OF STATUTES.

1. In construing a tariff revenue system, consisting of numerous acts enacted at different times, each alteration is to be regarded in connection with the system, and existing legislative rules of general application are not to be disturbed beyond the clear intention of Congress. *Saxonville Mills* v. *Russell*, 13.
2. When an act of Congress directs the Secretary of the Treasury to pay a specified sum to a person named, for a specific purpose, no discretion is vested in the Secretary, or in any court to inquire whether the person named is entitled to receive that sum for that object. *United States* v. *Price*, 43.
3. It is again decided that the surrender of the power to tax, when claimed, must be shown by clear and unambiguous language, admitting of no reasonable construction consistent with the reservation of the power. *Southwestern Railroad Co.* v. *Wright*, 231.

4. A State statute must be interpreted, if possible, so as to make it consistent with paramount law. *Presser* v. *Illinois*, 252.

5. A statute which provides that "there is no common law in any case where the law is declared by the codes" does not take from the court the duty of referring to the common law in order to determine the meaning of a term used in the codes, when they fail to define it. *Herbert* v. *Northern Pacific Railroad Co.*, 642.

See CONSTITUTIONAL LAW, 5, 10, 11, 12, 13, 14, 15, 32;
JURISDICTION A., 3; D., 1, 3, 5; PUBLIC LAND, 2;
MUNICIPAL BOND, 1, 2; TAX AND TAXATION, 5, 6.

B. STATUTES OF THE UNITED STATES.

See BANKRUPTCY, 1, 2;
CONSTITUTIONAL LAW, 1, 24, 25;
CUSTOMS DUTIES;
FEES;
INDIAN RESERVATION;
INFORMATION;
INTERNAL REVENUE, 1, 2;
JURISDICTION A., 3; C.; D., 1, 3;
MINERAL LAND, 1;
NAVAL OFFICERS;
PENSION;
POLYGAMY, 1, 2;
PUBLIC LAND, 2;
TAX AND TAXATION, 3.

C. STATUTES OF STATES AND TERRITORIES.

Colorado: *See* CONSTITUTIONAL LAW, 4;
Illinois: *See* CONSTITUTIONAL LAW, 6, 7, 8;
Louisiana: *See* LOCAL LAW, 2, 3;
Massachusetts: *See* LOCAL LAW, 1;
Michigan: *See* CONSTITUTIONAL LAW, 16, 17, 18;
Mississippi: *See* CONSTITUTIONAL LAW, 10, 11, 12, 13, 14; LOCAL LAW; 4, 5;
New Hampshire: *See* CONSTITUTIONAL LAW, 19, 20, 21, 22;
Utah: *See* POLYGAMY, 2;
Virginia: *See* CONSTITUTIONAL LAW, 23; LICENSE TAX.

STATUTE OF FRAUDS.

An agreement, on the part of A to acquire title in his own name to a tract of land upon the best terms possible, and when acquired to convey to B an undivided part thereof, and on the part of B to pay to A his proportionate part of the purchase money and expenses incurred in obtaining title, is a contract for the sale of lands within the Statute of Frauds; and the contract being verbal and not in writing as required by the Statute, A, after performing his part of the agreement, cannot recover from B his share of the price and expenses in an action at law founded upon and seeking to enforce the contract; nor in equity, under a statute which prescribes the same forms at law and in equity, when the pleadings show no allegation to lay a foundation for equitable relief. *Dunphy* v. *Ryan*, 491.

STATUTES OF LIMITATION.

See LIMITATION, STATUTES OF.

SUBSTITUTION.

See JURISDICTION, A., 4.

TARIFF.

See STATUTES, A., 1.

TAX AND TAXATION.

1. The lands and railroad of the Utah and Northern Railway Company situated within the limits of the Fort Hill Indian Reservation are subject to Territorial taxation, which may be enforced within the exterior boundaries of the reservation by process of the proper courts. *Utah & Northern Railway* v. *Fisher*, 28.
2. A bill in equity to set aside and restrain the collection of a personal tax, or a tax levied upon personal property by a municipal corporation, cannot be maintained on the sole ground of the illegality of the tax by reason of the non-residence within the limits of the municipality of the person against whom the tax is levied. *Milwaukee* v. *Koeffler*, 219.
3. If a church building is taken down, and a new church, with a sufficient space around it for air and light, is built on other land within the same enclosure, in order to enable a revenue to be derived from the sale or lease of the land on which the old church stood, and it is unnecessary for the enjoyment of the new church that this land should remain vacant, this land is not exempt from taxation for the support of the government of the District of Columbia under § 8 of the acts of March 3, 1875, ch. 162 ; July 12, 1876, ch. 180 ; and March 3, 1877, ch. 117. *Gibbons* v. *District of Columbia*, 404.
4. Logs cut at a place in New Hampshire were hauled down to the town of Errol, on the Androscoggin River, in that State, to be transported from thence upon the river to Lewiston, Maine ; and waited at Errol for a convenient opportunity for such transportation : *Held*, That they were still part of the general mass of property of the State, liable to taxation, if taxed in the usual way in which such property is taxed in the State. *Coe* v. *Errol*, 517.
5. A provision in a charter granted by a State to a railroad company, by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation for ten years after the completion of said road, within the limits of this State," does not exempt the road, fixtures, and appurtenances

from taxation before such completion of the road. *Vicksburg, Shreveport & Pacific Railroad* v. *Dennis*, 665.

6. The omission of taxing officers to assess certain property cannot control the duty imposed by law upon their successors, or the power of the legislature to tax the property, or the legal construction of a statute under which its exemption from taxation is claimed. *Ib.*

See CONSTITUTIONAL LAW, 6, 18, 19, 20, 21, 22, 23;
LICENSE TAX; RAILROAD;
MUNICIPAL CORPORATION; STATUTES, A., 3.

TRANSIT, GOODS IN.

See CONSTITUTIONAL LAW, 21, 22, 23.

TRESPASS.

It is settled in this court that in an action for a trespass accompanied with malice, the plaintiff may recover exemplary damages in excess of the amount of his injuries, if the *ad damnum* is properly laid. *Barry* v. *Edmunds*, 550.

TRUST.

When the husband of a married woman obtains a decree of foreclosure of a mortgage held by him as her trustee, and at the sale purchases the property and takes a deed in his own name, she retains an equitable interest therein, as against a purchaser from the husband with actual notice. *Holgate* v. *Eaton*, 33.

USURY.

1. When an agent, who is authorized by his principal to lend money for lawful interest, exacts for his own benefit more than the lawful rate, without authority from or knowledge of his principal, the loan is not thereby rendered usurious. *Call* v. *Palmer*, 98.
2. Where the promissor in a usurious contract makes it the consideration of a new contract with a third person, not a party to the original contract, or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious. *Ib.*

VARIANCE.

As the practice in New York allows a variance between proof and pleadings to be cured by amending the latter, where the opposite party is not misled, if, in the trial of an action in that State on a policy of insurance, evidence is offered, without objection, establishing or tending to establish a defence under the policy which has not been properly

pleaded, and, on defendant's request for instructions, founded on that evidence, no objection is made that the defence is not within the issues, it is competent for the defendant to rely upon the defence after the opportunity for amending the pleadings has passed. *Liverpool & London Insurance Co.* v. *Gunther*, 113.

VENDOR AND VENDEE.

See EVIDENCE, 2, 3, 6, 7;
SALE.

VERDICT.

A general verdict on several counts in an information *in rem* for violation of the internal revenue laws, which proceeds only for the forfeiture of specific property, will be upheld if one count is good. *Coffey* v. *United States*, 427; *Same* v. *Same*, 436.

VIRGINIA COUPONS.

See CONSTITUTIONAL LAW, 24;
LICENSE TAX.

WRIT OF ERROR.

A service of citation of a writ of error to a court of a State, made upon the defendant in error in another State by the marshal of the latter State, is an irregularity which can only be taken advantage of by motion to dismiss made promptly, on an appearance limited to that special purpose. *Rendud* v. *Abbott*, 277.

See JUDGMENT, 1;
JURISDICTION, A., 13.

WRIT OF PROHIBITION.

1. Where an inferior court has clearly no jurisdiction of a suit, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled as matter of right to a writ of prohibition from a court having authority to grant it; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. *Smith* v. *Whitney*, 167.
2. *It seems*, that a writ of prohibition should issue from the law side of a court having both common law and equity powers. *Ib.*
3. Whether the Supreme Court of the District of Columbia has power to issue a writ of prohibition to a court-martial—*quære*. *Ib.*
4. A writ of prohibition does not lie to the Secretary of the Navy convening a naval court-martial. *Ib.*

5. A writ of prohibition does not lie to a court-martial to correct mistakes in the decision of questions of law or fact within its jurisdiction. *Ib.*

6. A writ of prohibition will not be issued to prohibit a naval court-martial from trying a naval officer, being paymaster general and chief of a bureau in the Department of the Navy, upon a charge of "scandalous conduct tending to the destruction of good morals," with specifications alleging that as such chief of bureau he made contracts and payments in disregard of the interests of the government, and to promote the interests of contractors, in violation of law, and to the great scandal and disgrace of the service and injury of the United States; and upon an additional charge of "culpable inefficiency in the performance of duty," with specifications setting forth acts similar to those specified under the first charge. *Ib.*

See JURISDICTION, A., 3.